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CASES

DECIDED IN

THE COURT OF SESSION,
COURT OF JUSTICIARY,

AND

HOUSE OF LORDS,

FROM JULY 20, 1900, TO JULY 29, 1901.

REPORTED BY

H. J. E. FRASER, G. L. MACFARLANE, J. C. DOVE WILSON, AND WILLIAM HARVEY, ESQUIRES, ADVOCATES.

EDITED BY

MIDDLETON RETTIE, ESQUIRE, ADVOCATE.

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OF THE

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ERRATA.

Page 230, 24th line from foot, *for* "James Brownlie" *read* "John Brownlie."

Page 406, 5th line from foot, *for* "pursuers" *read* "defenders."

Page 1027, 28th line from top, *for* "Brazilian" *read* "Provincial."

Page 1029, 3d line from top, do. do.

CASES

DECIDED IN

THE HOUSE OF LORDS.

1900-1901.

No. 1.

Mar. 20, 1901.

Osborne or M'Kinnon v. Barclay, Curle, & Co.

JANET OSBORNE OR M'KINNON, Appellant.—*Thomas Shaw, K.C.* BARCLAY, CURLE, & COMPANY, Respondents.—*William Campbell, K.C.*

Appeal to House of Lords—Review of judgments pronounced under special jurisdiction—Master and Servant—Workmen's Compensation Act, 1897 (60 *and* 61 *Vict. c.* 37), *Sched. II., sec.* 14 (*c*).—By sec. 14 (*c*) of the second schedule to the Workmen's Compensation Act, 1897, which applies to Scotland, "any application to the Sheriff as arbitrator shall be heard, tried, and determined summarily in the manner provided by the 52d section of the Sheriff Courts (Scotland) Act, 1876, save only that parties may be represented by any person authorised in writing to appear for them, and subject to the declaration that it shall be competent to either party, within the time and in accordance with the conditions prescribed by Act of Sederunt, to require the Sheriff to state a case on any question of law determined by him, and his decision thereon in such case may be submitted to either Division of the Court of Session, who may hear and determine the same finally, and remit to the Sheriff with instruction as to the judgment to be pronounced."

Held that in an arbitration under the Act the judgment of a Division of the Court of Session upon a case stated by the Sheriff cannot be appealed to the House of Lords.

(IN the Court of Session, *infra*, p. 436.)

APPEAL COMMITTEE. Ld. Chancellor (Halsbury.) Lord Davey. Lord Morris. Lord Shand. Lord Lindley.

This was an arbitration under the Workmen's Compensation Act, 1897, between Barclay, Curle, & Company, Limited, engineers, Whiteinch, Partick, and Janet Osborne or M'Kinnon, in which the Sheriff-substitute of Lanarkshire (Boyd) awarded Mrs M'Kinnon compensation in respect of the death of her husband, and at the request of Barclay, Curle, & Company stated a case.

On 1st February 1901 the Second Division recalled the award of the arbitrator, and remited to him to dismiss the claim.

Mrs M'Kinnon appealed to the House of Lords.

Barclay, Curle, & Company presented a petition to the House of Lords to dismiss the appeal as incompetent.

The petition was ordered to be argued before the Appeal Committee by one counsel on each side.

After hearing counsel,—

LORD CHANCELLOR.—We are all of opinion that this appeal is incompetent. Whatever may have been the reason for it, we think the Legislature has conferred the jurisdiction upon the Court of Session under circum-

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stances and in language which render it impossible to say that any appeal to this House is competent. That may, and I think it does, render the observation which was made at the bar a just and true one, namely, that it does seem a somewhat anomalous condition of things that there should be an appeal in similar cases to this House from the English Court of Appeal, and yet none in Scotland; but that, after all, is only one of the anomalies which may be created by different legislation. We must construe the language as it stands here: and, looking at the language as it stands with reference to the subject-matter dealt with, we are all, as I have said, of opinion that the appeal is incompetent.

APPEAL dismissed, with costs.

WILLIAM ROBERTSON & CO.—J. & J. GALLETLY, S.S.C.—LESLIE FIELD—MORTON, SMART, & MACDONALD, W.S.

No. 2.

Mar.20,1901.* Duke of Fife v. Great North of Scotland Railway Co.

THE GREAT NORTH OF SCOTLAND RAILWAY COMPANY (Defenders), Appellants.—*Lord-Advocate Murray—Haldane, Q.C.—Ferguson.* THE DUKE OF FIFE (Pursuer), Respondent.—*Guthrie, Q.C.—Clyde.*

Railway—Construction—Conveyance in implement of decreet-arbitral—Railway Clauses (Scotland) Act, 1845 (8 *and* 9 *Vict. c.* 19), *secs.* 60, 65.—The Railway Clauses Act, 1845, sec. 65, enacts,—"The company shall not be compelled to make any further or additional accommodation works for the use of owners and occupiers of land adjoining the railway after the expiration of the prescribed period, or if no period be prescribed, after five years from the opening of the railway for public use."

A decree-arbitral, dated 5th November 1856, determining the compensation payable by a railway company to a proprietor for lands taken by the company and for damage through the railway works, after findings in favour of the proprietor, proceeded,—"Fifth, we hereby repel all other claims made by" the proprietor "in the said reference, and find that the foresaid sums are in full satisfaction of all claims competent to him against the said railway company under the said reference, excepting always the obligation upon the said company to preserve the effective drainage of the lands in so far as the same may be interfered with by the construction of the works, and to keep up the works, fences, water-courses, and others, falling upon the said company under the Railway Clauses Consolidation (Scotland) Act, 1845."

On 11th August 1859, a disposition was executed by the proprietor, which, after narrating the decreet-arbitral, conveyed the land to the railway company under the conditions contained in the decreet-arbitral, and with the following declaration:—"Declaring that the said railway company shall be bound and obliged to preserve the effective drainage of the lands in so far as the same may be interfered with by the railway works, and to keep up the works, fences, water-courses, and others, falling upon them under the Railway Clauses Consolidation (Scotland) Act, 1845."

In an action raised in 1896 by the proprietor against the railway company the First Division of the Court of Session held that the disposition contained an unambiguous conventional obligation on the railway company to maintain the effective drainage of the pursuer's lands in all time coming, and that it was incompetent to refer to the decreet-arbitral as qualifying its construction.

In an appeal *held*, reversing the judgment, that the disposition fell to be construed in conformity with the decreet-arbitral on which it proceeded, and the Railway Clauses Act, and that after the lapse of the prescribed statutory

* Decided March 12, 1900.

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Ld. Chancellor (Halsbury).
Lord Macnaghten.
Lord Morris.
Lord Shand.
Ld. Brampton.

period the railway company could not be called on to execute any additional accommodation works.

THE following narrative is taken from the judgment of Lord Macnaghten:—"More than forty years ago, in 1855, the Great North of Scotland Railway Company required to purchase and take for the purpose of their undertaking certain lands forming part of the Fife estate. The estate at the time was held under strict entail, and vested in one Thomas Robertson Chaplin, as trustee for the fourth Earl of Fife, who was then heir of entail. The usual notices were given, and the parties went to arbitration under the Lands Clauses Consolidation (Scotland) Act, 1845, for the purpose of determining the sums to be paid by the company as purchase-money for the lands permanently taken, and as compensation for all damages sustained or to be sustained by the said trustee or by the estate of the said Earl by and through the works and operations of the railway company.

"The decreet-arbitral was dated the 5th of November 1856. The arbiters found the sums payable by way of purchase-money and compensation, and enumerated certain conditions to be observed by the parties, some in favour of the company and others in favour of the trustee, and then they proceeded as follows:—'We hereby repel all other claims made by the said Thomas Robertson Chaplin as trustee foresaid in the said reference, and find that the foresaid sums are in full satisfaction of all claims competent to him against the said railway company under the said reference, excepting always the obligation upon the said company to preserve the effective drainage of the lands in so far as the same may be interfered with by the construction of the works, and to keep up the works, fences, water-courses, and others, falling upon the said company under the Railway Clauses Consolidation (Scotland) Act, 1845, and keep in repair the bottoms and sides of the streams deepened below the natural level by the railway company, and also to keep the same clear in so far as affected by the railway works.' The arbiters then directed that 'in respect the said lands were held under the fetters of strict entail,' the trustee should execute a conveyance in favour of the railway company on payment of the sums payable for purchase-money and compensation in accordance with the provision of the Lands Clauses Act.

"The conveyance was not executed until after the death of the fourth Earl and his trustee. It bears date the 11th of August 1859. It recites the decreet-arbitral and the provision for the execution of 'a valid and formal conveyance' which was to be made (as expressed in that recital) 'under the conditions and declarations contained in the said decreet-arbitral and hereinafter mentioned.' And then after recitals from which it appeared among other things that the purchase-money and compensation had been paid 'in terms of the said decreet-arbitral and Lands Clauses Act,' the lands permanently taken were duly conveyed to the railway company under the conditions contained in the decreet-arbitral, and with the following declaration:—'Declaring that the said railway company shall be bound and obliged to preserve the effective drainage of the lands in so far as the same may be interfered with by the railway works, and to keep up the works, fences, water-courses, and others, falling upon them under the Railway Clauses Consolidation (Scotland) Act, 1845, and protect and keep in repair the bottoms and sides of the streams deepened below the

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natural level by the railway company, and also to keep the same clear in so far as affected by the railway works.'

"It was common ground in the argument before your Lordships that the latter part of the declaration which I have just read referring to 'the bottoms and sides of streams deepened below their natural level,' and the corresponding passage in the decreet-arbitral, have no application to the circumstances of the present case. It is therefore unnecessary to determine the scope and effect of the provision embodied therein. If it be anything more than the recognition of an existing statutory obligation under the Railway Clauses Act, it is at anyrate not inconsistent with anything which that Act contains."

The present action was raised in 1896 by the Duke of Fife against the Great North of Scotland Railway Company, to have it declared that the company were bound to implement the terms and conditions of the disposition of 1859, and in particular the clause or condition quoted above, and that the company had failed to implement the said clause. There was also a conclusion to have the defenders ordained to execute such works as might be necessary to satisfy their obligation, and there was a conclusion for damages.

The Lord Ordinary (Low) after a proof, on 6th March 1897, dismissed the action.*

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* "OPINION.—The object of this action is to compel the defenders to implement an obligation imposed upon them by the disposition granted in their favour in 1859 by the pursuer's predecessors, of the land acquired from them by the defenders for the construction of their railway.

"The first question is as to the construction of the obligation. The first part of it runs as follows:—'Declaring that the said railway company shall be bound and obliged to preserve the effective drainage of the lands in so far as the same may be interfered with by the railway works, and to keep up the works, fences, water-courses, and others, falling upon them under the Railway Clauses Consolidation (Scotland) Act, 1845.'

"That is a very badly-expressed sentence, because there is no proper antecedent to the words 'falling upon them.' It is plain enough that these words were intended to refer to statutory obligations upon the railway company in regard to keeping up works, fences, water-courses, and others. It is not so clear, however, whether the obligation to preserve the effective drainage is also a statutory obligation, or whether it is a contractual obligation imposed by the disposition.

"There is no difficulty in seeing what is the nature of the obligation in regard to drainage if it is competent to look at the decree-arbitral.

"In the decree-arbitral the arbiters, after fixing the price to be paid by the defenders for the lands and for severance damage, and dealing with accommodation works, abatement of rents, public burdens, and the expenses of the proceedings, repelled all other claims made by the then proprietor of the lands, and found 'that the aforesaid sums are in full satisfaction of all claims competent to him against the said railway company under the said reference, excepting always the obligation upon the company to preserve the effective drainage of the lands,' and then the clause proceeds as in the disposition.

"In the decree-arbitral, therefore, there is no ambiguity. What is excepted is 'the obligation' to preserve drainage, and keep up the fences, &c., in terms of the Railways Clauses Act, and it is plain that it was that obligation and no other which was intended to be incorporated in the disposition.

"But the pursuer says that it is incompetent to look at the decree-arbitral to aid in the construction of the clause in the disposition, and that

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The pursuer reclaimed.

The First Division, on 23d November 1897, recalled the interlocu-

the natural interpretation of that clause is to impose upon the defenders the obligation to do whatever is necessary in all time coming to preserve the effective drainage of the lands.

"Now, I do not think that it is incompetent to look at the decree-arbitral.

"The decree-arbitral and the disposition are two successive steps in the process by which the railway company exercised their statutory powers and acquired the lands, and the decree is not like negotiations or a previous agreement which the disposition superseded. I therefore do not think that it is incompetent to read the decree-arbitral in order to see what were the circumstances under which the disposition was granted, and what was the subject-matter with which it dealt. Again, it is not a question of controlling the words of the disposition. If the obligation in the disposition had been, upon a natural construction of the language used, different from the obligation in the decree-arbitral, I think that it would have been necessary to give effect to the former, either as superseding or being in addition to the obligation imposed by the decree-arbitral. But the only question here appears to me to be, to what does an ungrammatical and, if read literally, unintelligible sentence in the disposition refer? A reference to the decree-arbitral makes that clear, and shews that it refers to the obligation which had been already imposed by the decree-arbitral, and to nothing else.

"The next question is, What are the obligations laid upon a railway company by the Railways Clauses Act in regard to drainage of lands interfered with by their works? I think that the only obligations are those contained in the 60th section of the Act under the heading of 'Drainage Works.'

"The provision is that the company shall make, and at all times thereafter maintain, all necessary culverts and drains 'either over or under or by the sides of the railway, of such dimensions as will be sufficient at all times to convey the water as clearly from the lands lying near or affected by the railway as before the making of the railway or as nearly so as may be, and such works shall be made from time to time as the railway works proceed.'

"Now, it is not disputed that the defenders carried out these directions when they were constructing the railway, and it is not said that at the time the culverts and drains were not sufficient. Nor do the defenders dispute their liability to maintain the works which they made.

"The pursuer's case is that the works originally made to provide for drainage are no longer sufficient, and that the defenders are bound now to do whatever is necessary to put the drainage of the lands in as good a state as it was in prior to the formation of the railway.

"The question has arisen in this way. At the place in question the River Isla followed a winding course, and to save the expense of building bridges, the defenders exercised the powers conferred by the 16th section of the Railways Clauses Act and diverted the river, making it run in a new channel for a considerable distance along the railway line. Chiefly by reason of debris brought down by two streams which flow into the Isla, banks of sand and gravel have been formed across its course, and the effect has been to cause an accumulation of silt in the new channel, which has raised the surface level of the water considerably higher than it originally was. The result is that culverts and drains which when they were made had a sufficient outfall are now under water and of little use for drainage purposes. The pursuer does not say what he wants the defenders to do, but it is plain that what is required to make the drainage effective is to remove the banks which have formed across the river and clear out the new channel. Apart from the difficulty that the main bank is in the bed of the river

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tor of the Lord Ordinary, and found "that the railway works of the defenders have interfered with the drainage of the pursuer's lands so that it has become ineffective, and that the defenders have failed to below the new channel, and on lands to which the defenders have no right, they contend that they are under no obligation to keep the new channel or any part of the river free of natural obstructions.

"The defenders argued that the new channel was not a railway work in the sense of being one of the works authorised by their Act. As I have said, the new channel was made under the powers given by the 16th section of the Railways Clauses Act. But that Act was incorporated into the special Act, and it was by virtue of that incorporation that the defenders were able to exercise the powers contained in the general Act. Upon this point I need only refer to the judgment of Lord Cairns in regard to the analogous case of the diversion of a road in *Rangeley* v. *Midland Railway Company*, 1868, L. R., 3 Ch. App. 306. I therefore do not think the defenders can escape liability on the ground that the diversion of the Isla was not a work which they made under the authority of their Act.

"But that does not greatly advance matters, because the question remains, When a railway company have altered the course of a river, what obligation are they under, if any, to maintain the new course of the river and keep it from being silted up? I do not find in the statute any obligation of any kind laid upon a railway company in regard to the diverted part of a river. I shall consider presently whether the new channel of the river is to be regarded as part of 'the railway,' to which the obligation in regard to drainage works in the 60th section of the Railways Clauses Act applies, but apart from that provision the statute seems to contemplate that where the course of a river is altered the new course shall simply become part of the river, and that the railway company shall have no obligations in regard to it any more than they have in regard to other parts of the river. Of course that is on the assumption that the diversion is properly executed. If the work was unskilfully or negligently done, and injury followed to adjoining lands, I apprehend that the railway company might be liable in damages at common law.

"Upon the question whether the drainage provisions of the 60th section apply to the new channel of a river, there is more difficulty. The drains which the company are by that section directed to make are to be 'sufficient at all times to convey the water as clearly from the lands lying near or affected by the railway as before the making of the railway.' The expression 'the railway' is defined in the Act as meaning 'the railway and works by special Act authorised to be constructed.' That may mean only the works which are specified in the special Act, and not works which are only authorised by the incorporation into the special Act of the Railways Clauses Act. Further, it rather appears that the works referred to in the definition do not include all works which a railway company may make, because the expression 'the undertaking' is defined as meaning 'the railway and works of *whatever description* by the special Act authorised to be executed.' On the other hand, in the case of *Rangeley* to which I have referred, Lord Cairns said that the 16th section of the Railways Clauses Act appeared to him 'to shew conclusively that the diversion of the footway was part of the works authorised by the company's Act.' Further, if a company diverts a river for the purpose of making their line, there is the same reason for compelling them to restore drainage intersected by the new channel as there is for compelling them to restore drainage intersected by their line.

"I do not think, however, that that is a question which it is necessary to determine in this case, because it appears that the drainage works which the defenders made when they constructed their line and the new channel were designed in view of the fact that the river, instead of following its old

fulfil the obligation incumbent on them under and in terms of the disposition of 11th August 1859 to preserve the said drainage effective, and decern." *

course ran alongside the line, and were intended to preserve drainage which had been affected both by the new channel and by the line.

"Further, I think that it is plain that the defenders cannot now be called upon to execute new works, because by the 65th section of the Act it is provided that the company 'shall not be compelled to make any further or additional accommodation works . . . after five years from the opening of the railway for public use.'

"The question, therefore, comes back to this, whether the defenders are bound to clear away banks which have formed, and silt which has been deposited in the bed of the river, so as to reduce the level of the water in the new channel to what it originally was. For the reason which I have given, I do not think they are under obligation to do so. . . ."

* LORD PRESIDENT.—In constructing their railway, the Great North of Scotland Railway Company diverted the River Isla at a part of its course where it formed a bend. The new course cut the arc, so to speak, and thus saved the company from having to form two bridges. The new channel was formed alongside of the railway—the land both for it and for the railway being acquired from the Earl of Fife.

From the configuration of the ground, the land at this part of the Isla was not easily drained; and the disposition, which formed the title of the railway company to the land so taken from Lord Fife, contains this clause:—"Declaring that the said railway company shall be bound and obliged to preserve the effective drainage of the lands in so far as the same may be interfered with by the railway works." The present action is rested on the allegation that the works of the railway company have so interfered with the drainage of the lands that it has ceased to be effective, and the company, who are defenders, are called on to restore the drainage to a state of efficiency.

Now, the Lord Ordinary's opinion contains a great deal of discussion about the statutes and about a decree-arbitral which is narrated in the disposition. In my view the first question is, what is the meaning of the obligation which is founded on? and is there any ambiguity in its terms? Unless there is such an ambiguity, I do not think that we have got anything to do with the decree-arbitral or with the statutes.

Now, the obligation which I have read seems to me to be perfectly intelligible, and to contain no ambiguity at all. The company undertake to keep the drainage of the lands effective so far as their works interfere with it. There is no question which are "the lands"; they are the lands portions of which are disponed to the company (as is made clear by a reference to the immediately preceding clause). Now, the diversion of the Isla was a work which manifestly interfered with the drainage of the land which formerly drained into the old course of the Isla, and now must necessarily drain into the new course. Accordingly it is quite intelligible that the company should undertake to keep the drainage of the lands effective.

In this view I cannot affect to find any difficulty in construing the clause primarily in question, and I have therefore no need to inquire whether the decree-arbitral or whether the railway statutes contain any such obligation. Whether they do or do not, there is the obligation written plain in the disposition.

It is attempted, however, to perplex the clause upon which I have commented by saying that it is qualified by the words "falling upon them under the Railways Clauses Consolidation (Scotland) Act, 1845," which occur a little further on. I do not think that these words are attached to

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The defenders appealed.

At delivering judgment,—

LORD CHANCELLOR.—In this case the pursuer raised an action with the object of compelling the railway company to keep up the works, fences, water-courses, and others, which the company were under an obligation to maintain, and to keep in repair the bottoms and sides of the streams which were deepened below the natural level by the railway company, and keep them clear in so far as they have been affected by the railway works.

The main contention of the pursuer was based upon the language of a somewhat ungrammatically drawn instrument, which in the pursuer's view of its construction imposed upon the railway company the perpetual obligation not only to keep and maintain the existing water-courses and the like, but apparently to execute whatever works were necessary to drain the pursuer's lands in the neighbourhood of the railway works.

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or apply to the clause in question. They seem to me, in the structure of the sentence, to apply solely to the words which they immediately follow, viz.: "and to keep up the works, fences, water-courses, and others." Limited to those words, they are intelligible, although the expression is slightly inaccurate or elliptical, for it is not accurate to describe works as falling upon the company—what falls on the company being not the works but the keeping up the works. With this limited application, the reference to the Acts is good enough sense, although the expression is faulty, and the words of qualification are satisfied. With the more extended application, the construction becomes painfully difficult, for the substantive which is to be described as "falling upon the company" is the very complex one "the effective drainage of the lands in so far as the same may be interfered with by the railway works." Once this connection is assumed, the defenders proceed to make the adjective eat up the substantive, for they say that the words which I have so often quoted mean nothing more than "drains," the reason being that the maintenance of drains is all that falls upon the company under the Railways Clauses Act.

I regard this as an illegitimate process of construction. The question whether the words about the statute apply to the words about effective drainage is at least an open question; the words do not necessarily apply to them—they do not primarily apply to them—they are satisfied without applying to them. Whether they do or do not apply to them must be determined, in part, by considering, first, what is the natural meaning of the words to which it is proposed to apply them, and then whether the epithet to be applied harmonises with or is repugnant to that meaning. If the result of that consideration be to shew that the proposed application creates a repugnancy, then it is also proved that the epithet does not apply. To make up your mind that the epithet applies, and then construe the substantive by the necessities of the adjective, is the course of reasoning adopted by the defenders, and in my judgment it is fallacious.

I may add one remark on the construction of the passage in the disposition. The reference to the statutory obligations of the company seems to be introduced for the purpose of making it clear that the obligation about the effective drainage was not to come in place of the class of statutory obligations germane to that subject. This being done, the deed proceeds to lay on another obligation, which is admittedly conventional and not statutory.

In the view which I take of the disposition, I have no occasion, and I do not think I have any right, to examine the decree-arbitral. I may say, however, that if the decree-arbitral be examined, the true inference seems

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It appears to me that before dealing with the case as appearing on this record, it is desirable to point out the state of the law as applicable to such questions.

There is no doubt that in this Act under which the railway was made, as in most Acts of a similar character, obligations are placed upon the undertakers to make, keep, and maintain proper accommodation works for (among other purposes) the drainage of adjoining lands, but the obligation to keep and maintain is under the Acts limited to the keeping and maintaining of these works *tales quales*, and the Legislature has made proper provision for the sufficiency of such accommodation works by remitting that question to some tribunal whose determination shall be final, and has further provided in this, as in other Acts, that after a particular time no further works can be demanded by the adjoining proprietors. There does not appear in this case to be any question that the culverts and drains originally made are kept in proper repair, and it is not denied on the part of the railway company that if they were out of repair, there is a continuing obligation to keep and maintain them in proper condition.

The limitation in this case is five years. The Acts were passed in the years 1846 and 1855, and, of course, unless some other obligation exists beyond that involved in the statute, and assuming that the accommodation

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to be that Lord Fife's trustee, Mr Chaplin, had made a claim (*plus* his other claims for compensation) either for money or (if the company chose to give it) for an undertaking to keep his drainage right; that the company had offered an obligation; and that the arbiters accordingly repelled his claim "excepting always the obligation," that is to say, on the footing that an obligation was granted. If the decree-arbitral meant that Mr Chaplin was to be remitted, as regards drainage, to his rights under the Railways Clauses Act, then his claim would have been repelled *simpliciter*, and no exception have been made of an obligation. Indeed here, as well as in the construction of the disposition, the defenders' argument is that the obligation founded on was mere superfluous words.

The observation which I have made on the decree-arbitral suggests that its effect depends on the record on which it adjudges. We were told that, in fact, the claims submitted to the arbiters have been lost; and all this rather confirms one's belief in the soundness of letting the disposition tell its own story.

The view which I have now presented of the case gives rise to this issue of fact—have the works of the defenders so interfered with the drainage of the pursuer's lands as to render it ineffective?

It seems to me that the pursuer has succeeded in establishing his case. I shall briefly state the propositions of fact which lead to this conclusion. [His Lordship then adverted to the evidence upon which he held that the pursuer had succeeded in establishing his case.]

I would propose that we should recall the Lord Ordinary's interlocutor, and find that the railway works of the defenders have interfered with the drainage of the pursuer's lands so that it has become ineffective, and that the defenders have failed to fulfil the obligation incumbent on them under and in terms of the disposition of 11th August 1859 to preserve the said drainage effective. By adopting a declaration of this kind we shall protect the defenders against the suggestion that we are enforcing against them any obligation arising out of the statutes, or from anything other than the specific conventional obligation undertaken in this particular deed.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

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works were sufficient and proper at the time they were made, which in my view cannot now be disputed, there is no ground for the pursuer's contention that the railway company are bound to execute new works.

Assuming as I do, on this part of the case, that the accommodation works originally executed must be held to be sufficient and proper for the purpose, it is not competent to raise again the question, which ought to have been determined within five years from the passing of the Acts. The whole purport and object of such a limitation would be defeated if it were possible to raise such questions after the limited period.

The policy of the Railway Acts is to limit the period within which railway companies may exercise certain powers, *e.g.*, the power of taking land within a limited time, and it would be very unreasonable to suppose that the Legislature had intended to cast upon them a perpetual obligation, which at the same time it deprived them of the power of fulfilling.

The learned counsel who have argued on the part of the pursuer have hardly contested that this is the state of the law if the obligations on which they insist are simply to be found within the language of the Act of Parliament, but they insist that the instrument to which I have referred involves a much wider obligation, and apparently it is contended that the obligation is to keep the drainage of the lands effective so far as their works interfere with it.

Now, it becomes necessary to consider what is the history of the claim on which reliance is placed. It is a deed of disposition executed in pursuance of a decreet-arbitral, and I cannot entertain a doubt that that decreet-arbitral which is recited in the disposition, and which the disposition itself refers to as "dealing with a matter now in debate" is quite properly referred to by the Lord Ordinary as expounding what is the extent and meaning of the language of the disposition.

This is not a question of attempting to alter or qualify a deed by matter external of the deed itself, but it is in truth an exposition by the very deed itself of what was its bearing and intention.

Now, the decreet-arbitral, in pursuance of one direction of which this deed was executed, was a proceeding under 8 and 9 Vict. c. 19. The matter remitted in pursuance of the statute was, what sum should be paid in respect of the land which the railway company were taking under the powers of the Act.

Of course where portions of land adjoining the railway or intended railway were being taken, the question of what accommodation works were to be executed by the company would naturally and justly affect the amount which the company were called upon to pay, and in the decreet-arbitral now in question certain accommodation works (not, however, including drainage works) are recited as being part of the obligations undertaken by the company. Those who drew the decreet-arbitral when they were in ordinary form releasing the railway company from anything further than the payment of the purchase-money and the execution of the works, appear to have been struck by the generality of the language whereby the railway company were to be released, and by way of caution they inserted a parenthetic exception pointing out that this general release was not to operate to relieve the company from such statutory obligations as by law they were already under.

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Notwithstanding the generality of the language, I cannot think that such an exception was necessary. The arbiters would have no authority to override the Act of Parliament, and as I have said, drainage was not a matter dealt with by the arbiters themselves, and indeed under the circumstances I doubt if they would have had authority to do so.

The framers of the disposition in endeavouring to give effect to the decreet-arbitral inverted the mode in which the rights of the railway company were to be preserved as well as the rights of the adjoining proprietors, and put into the disposition as a positive obligation what had only been preserved in the decreet-arbitral itself by way of exception. But it seems to me that this can make no difference in the operation of the deed. It is manifest that what was intended was to draw a deed in pursuance of the directions of the decreet-arbitral, and I entirely agree with the Lord Ordinary that, reading the two instruments together, it is impossible to doubt what is the meaning and intention of the deed itself.

In my view, this disposes of the case, because, though questions of fact have been entered into, if the obligation founded on them is limited in the way which I have suggested, there is no fact in proof which establishes that the railway company have not fulfilled their obligations, and to my mind it would be a very serious thing indeed if, many years after the railway had been constructed, it could be contended that entirely new obligations could be created so that questions which ought to have been determined at the formation of the railway should be raised many years afterwards when circumstances, and indeed the natural conditions of the soil or the flow of the river, might have entirely changed.

I do not think it necessary to enter into the question of whether or not the complete diversion of a stream, or a portion of a stream, would carry with it, apart from any specific directions of the statute, any obligation in respect of the drainage of adjoining lands. *Prima facie*, one would suppose that a section authorising a diversion should itself provide for the conditions under which such a diversion was authorised, and if not provided for the rights and incidents of the diverted portion of the stream would carry with it the same rights and incidents as existed in the original portion of the stream diverted. But I say that in this case that question does not appear to me to arise, because in either event it either was or was not a condition of things which required the execution of drainage works. If it did, they should have been executed within the five years; if they did not, no subsequent action by anyone but the railway company themselves could cast upon them a new obligation.

As to the matters of fact with which the Lord Ordinary has dealt, both in respect of the nature of the action now raised, and in respect of the proper parties to be called if some action other than the present one were in debate, I am in entire agreement with his Lordship, and I have nothing to add to what he has said.

For these reasons I move your Lordships that the interlocutor appealed against be reversed, that the judgment of the Lord Ordinary be restored, and that the respondent do pay to the appellants the costs both here and below.

LORD MACNAGHTEN.—(After the narrative above quoted)—The interlocu-

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tors under appeal are founded entirely on the opening words of the declaration, to the effect that "the said railway company shall be bound and obliged to preserve the effective drainage of the lands so far as the same may be interfered with by the railway works." Taking those words by themselves without attending to the context, and excluding altogether from their consideration both the terms of the decreet-arbitral and the provisions of the Railway Clauses (Scotland) Act, 1845, the learned Judges of the First Division hold that the obligation upon the railway company is "perfectly intelligible." They construe it as unlimited in extent. "There is the obligation," they say, "written plain in the disposition"; there is no need to inquire whether the decreet-arbitral or the Railway Clauses Act contains any such obligation; the Court has nothing to do with the Act or the award. Such being the view of the Court, the finding in the interlocutor of 23d November 1897 was that the railway works had interfered with the drainage of the pursuer's land, and that the defenders had failed to fulfil the obligation incumbent on them under and in terms of the disposition of the 11th of August 1859 to preserve the drainage effective. On the 21st of June 1898 the Court made a remit to a civil engineer to report what works were necessary to render the drainage effective. A report has been made recommending works outside the property of the railway company, the cost of which is said to be estimated by the company's engineers at £4000.

Now, the first observation which occurs to one in reference to the interlocutors under appeal is that if the railway company have indeed undertaken the obligation which the learned Judges of the First Division fasten upon them, they have taken upon themselves a burden from which the Railway Clauses Act expressly and in terms protects railway companies. Section 65 of that Act provides that the promoters shall not be compelled to make any further or additional accommodation works for the use of adjoining owners after the expiration of the prescribed period, or if no period be prescribed, after five years from the opening of the railway for public use. In the present case, many years after the statutory period has expired, the Court orders the appellants to make further and additional accommodation works, involving a present outlay of large amount and an indefinite liability in the future, while there is nothing in the conveyance or in the decreet-arbitral or in the evidence to suggest that the railway company ever dreamed of waiving the benefit of section 65, or were ever asked to make so foolish a sacrifice.

Then comes the question, has the Court of Session rightly construed the obligation on the part of the railway company, and are they right in shutting their eyes to the Railway Clauses Act and the decreet-arbitral? I think not. The decreet-arbitral and the conveyance are both parts of one and the same transaction. The governing instrument is the decreet-arbitral. The conveyance was executed in obedience to the directions contained in it. The conveyance was necessary for the purpose of constituting a valid feudal title to the lands taken permanently, but for no other purpose. The obligations imposed upon the company by the decreet-arbitral, or rather I should say recognised therein as being incumbent upon the company, do not derive their validity or gain any additional force from being "mentioned" in the

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conveyance. They were just as binding on the railway company before the conveyance as after it. Whatever force they have is derived solely from the railway statutes and the decreet-arbitral. The conveyance merely purports to repeat what is contained in the award. If there be any error or slip in the repetition, or if the words seem to have some different meaning when found in the conveyance, the error or slip must be corrected, or the matter put right, by referring to the decreet-arbitral.

Now, the decreet-arbitral is, I think, perfectly clear. It finds that the sums assessed as purchase-money and compensation are in full satisfaction of all claims competent to the landowner against the railway company, but at the same time, by way of precaution, it notices that there are certain obligations still incumbent upon the company, and that those obligations, so far at anyrate as they have to be considered for the purposes of the present case, are obligations falling upon the company under the Railway Clauses Consolidation Act. The first of those obligations is the obligation to preserve the effective drainage of the pursuer's land "so far as the same may be interfered with by the construction of the works." Instead of importing an obligation of indefinite duration involving an indefinite liability, the declaration in question is, in my opinion, merely a recognition of an existing liability cast upon the company by section 60 of the Railway Clauses Act, but limited and controlled by section 65. By section 60 the company became bound to make, for the accommodation of adjoining owners, all such culverts, drains, and other passages as would be "sufficient at all times to convey the water as clearly from the lands lying near or affected by the railway as before the making of the railway, or as nearly so as may be," and such works, it is to be observed, are to be made "from time to time as the works proceed." What is that but an obligation to "preserve the effective drainage of the land so far as the same may be interfered with by the construction of the works"? Perhaps it would have been better to have kept to the language of the Act. But for my part I cannot see the slightest difference in meaning and effect between the two expressions. And in each case the provision must be read in connection with the limitation of liability prescribed by the statute which the Court below has unfortunately ignored.

The next part of the declaration provides for the maintenance of the accommodation works when made; and then there is a reference to the Railway Clauses Consolidation (Scotland) Act, 1845, which in the decreet-arbitral plainly applies to the obligation to preserve effective drainage as well as to the obligation to maintain the accommodation works. The parallel clause in the conveyance is somewhat elliptical, and taken by itself perhaps somewhat obscure, but it must, I think, be read by the light of the decreet-arbitral, and it must, I think, have the same meaning as the original provision from which it purports to be copied.

I am therefore of opinion that the conveyance does not impose upon the railway company any such obligation as that to which the First Division of the Court of Session have found them liable, and I am of opinion that the interlocutors appealed from ought to be reversed, and the action dismissed, with costs both here and below.

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LORD MORRIS.—I am of the same opinion, and I can add nothing to the reasons which have been given by my noble and learned friend on the woolsack, and my noble and learned friend opposite, Lord Macnaghten.

LORD SHAND.—I am also of opinion that the interlocutors appealed from should be reversed, and the judgment of the Lord Ordinary restored, and I concur in the opinions of my noble and learned friends the Lord Chancellor and Lord Macnaghten.

It is, in my opinion, taking much too narrow a view of the case to take the disposition of 1859, and what, indeed, I regard as a part only of a clause in that deed, as decisive of the questions between the parties. The decreet-arbitral, which is the basis of the disposition, and which is therein fully referred to, and the Railway Clauses Act, must also be looked at and be regarded as settling the rights of the parties. It was, indeed, in giving effect to the decreet-arbitral that the disposition itself was, as that deed bears, granted; and it is clear that section 65 of the Railway Clauses Act of 1845 applies, and is by the decreet-arbitral expressly made to apply, to the case. The result is that the company is not bound, after the prescribed period, which elapsed many years ago, to execute the drainage works which have been demanded. The reference to the decreet-arbitral in the disposition itself in my opinion makes it clear that the whole clause as to the drainage of the lands "in so far as the same may be interfered with by the railway works," and the keeping up of the accommodation works there enumerated which the disposition itself contains, is one and the same continuous clause, and gives effect only to sections 60 and 65 of the Railway Clauses Act of 1845 with the limitation as to time which the statute prescribes in imposing the obligation of maintenance on the railway company. That limitation as to time is sufficient to exclude the present action, which therefore entirely fails.

LORD BRAMPTON.—Having heard the judgment delivered by the Lord Chancellor, and having availed myself of the opportunity afforded me to read and carefully consider the judgment which my noble and learned friend Lord Macnaghten has just read, I desire only to express my entire concurrence in the views they have announced. I have nothing to add, feeling that those noble and learned Lords have in far better language than I have at my command embodied the opinion I had also formed for myself.

ORDERED that the judgment appealed from be reversed, and that of the Lord Ordinary be restored.

DYSON & CO.—GORDON, FALCONER, & FAIRWEATHER, W.S.—MARTIN & LESLIE—J. K. & W. P. LINDSAY, W.S.

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May 7, 1901. Smith v. Patrick.

ALEXANDER DAWSON SMITH (Defender), Appellant.—*Sol.-Gen. Dickson—Levett, K.C.*

JOSEPH PATRICK AND ANOTHER (Smith's Trustees) (Pursuers), Respondents.—*Haldane, K.C.—Ure, K.C.*

Trust—Power to lend to firm.—Held that a power given by a testator to lend part of his funds to a firm of which he was a partner applied only to the firm as existing at the date of his death, and did not authorise the trustees to continue the loan to the firm after a partner had retired.

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Trustee—Breach of Trust—Partnership—Transfer of assets and liabilities to new firm—Novation.—In December 1893 a partner in a large engineering business died, leaving a settlement in which he authorised his trustees to allow his share of the capital in the business "to remain as a loan" to the firm, so long as his trustees considered it reasonably safe to do so. His trustees were A and B, two of the three surviving partners, and his widow. The testator's widow died in April 1894. The deceased's capital, ascertained to amount to £19,000, was allowed to remain in the business, which was carried on by the surviving partners, A, B, and C.

On 23d December 1895 C retired from the firm, in terms of an agreement by which he received £9000, the other two partners A and B taking over the whole assets of the firm, and binding themselves to "pay and so relieve C of all the obligations due by the firm," and to exhibit to him discharges thereof. The trustees were not parties to this agreement, and no payment was made to the trust.

On 3d November 1896 A and B, as the surviving trustees of the testator, executed a deed, which, after narrating the agreement, set forth that the granters as trustees foresaid had accepted the new firm and its partners in lieu of the dissolved firm, and discharged the dissolved firm, and C as a partner thereof and as an individual, of all sums due to the trust.

On 3d December 1896 the new firm and the individual partners granted a trust-deed for behoof of their creditors. A and B thereafter assumed D and E as trustees of the testator, and subsequently resigned office.

D and E as trustees acceded to the trust for creditors and drew a dividend.

D and E as trustees then raised an action against C concluding for payment of the balance of the loan, the summons containing also a conclusion for reduction of the discharge.

Held (*aff.* judgment of the First Division) that the discharge granted by A and B as trustees in favour of the defender was entirely gratuitous and *sine causa*, and was invalid and ineffectual to discharge the defender of his liability for the loan.

Held further that the pursuers, by acceding to the trust for the creditors of the new firm, were not barred from claiming payment of the debt from the defender as a partner of the old firm.

Ld. Chancellor (Halsbury). Lord Shand. Lord Davey. Ld. Brampton. Ld. Robertson.

THIS action was raised in April 1898 by Joseph Patrick and Robert Howie, the trustees of the deceased Alexander Smith junior, engineer, Glasgow, against Alexander Dawson Smith, concluding for reduction of a deed of discharge, dated 3d November 1896, granted by the pursuers' predecessors in office, William Smith and Hugh Osborne Smith, whereby they, as trustees of Alexander Smith, discharged the dissolved firm of A. & W. Smith & Company, and the defender, Alexander Dawson Smith, as a partner and as an individual, of a debt due by them to Alexander Smith junior, or to his trustees. The discharge was challenged on the grounds—(1) That it was granted by Alexander Smith's trustees without any consideration to the estate; and (2) because, being gratuitous, it was obtained by fraud and collusion on the part of the defender and the granters, William Smith and Hugh Osborne Smith. The sum concluded for was £10,702, 2s. 6d., which was a balance of a debt to the trust-estate, which amounted to £19,857, 17s. 9d.

The discharge proceeded on the narrative that before 23d December 1895 the granters, William Smith and Hugh Osborne Smith, were partners in business with the defender, Alexander Dawson Smith, under the firm of A. & W. Smith & Company; that the firm and partners were indebted to Alexander Smith's trustees (being William Smith and Hugh Osborne Smith); that at that date the firm was

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dissolved by the retiral of the defender; and that William Smith and Hugh Osborne Smith, as the continuing partners, undertook to relieve the defender, the retiring partner, of all the obligations due by the dissolved firm. The deed then proceeded, "and that we, as trustees foresaid, have accepted, as we do hereby accept, the present firm of A. & W. Smith & Company, engineers, Glasgow, of which we, the said William Smith and Hugh Osborne Smith, are the sole partners, as debtors in lieu of the said dissolved firm and partners."

The following circumstances were disclosed in a proof:—The firm of A. & W. Smith & Company carried on business as engineers at the Eglinton Engine Works, Glasgow. On 7th December 1893 Alexander Smith junior died, after which the business was carried on by the remaining partners, William Smith, Hugh Osborne Smith, and the defender Alexander Dawson Smith, until 23d December 1895, when the defender retired.

By the trust-deed of Alexander Smith junior he nominated his wife and William Smith and Hugh Osborne Smith as his trustees. He was survived by his widow, who died in April 1894, and by one child, Herbert, the sole beneficiary. With regard to the testator's interest in the firm, he specially authorised his trustees to allow his share of the capital to remain as a loan to the firm, should the partners be willing to retain it as a loan, so long as his trustees should think it safe to allow it to remain; and he further declared that his trustees should not be liable "for allowing my share of the capital in the firm of A. & W. Smith & Company to remain as a loan so long as they think proper, nor for any loss that may arise therefrom, seeing it is my desire that my share should remain in the firm."

The amount of the interest of Alexander Smith junior was allowed to remain in the firm. It was ascertained to be £19,857, 17s. 9d.

In January 1894 the defender visited Australia, and did not return until May 1895. During the defender's absence some pieces of business had been done which ultimately turned out badly; and, in particular, there was one relating to the supply of machinery to a sugar plantation, called the Bronte Estate, in Trinidad. Before the defender retired it had resulted in a debt to the firm of above £8000 insufficiently secured. The defender's partners entertained the idea that the firm should take over the whole sugar plantation and work it. The defender was strongly opposed to this project, considering it foreign to the legitimate business of the company. On 30th September 1895 William Smith and Hugh Osborne Smith gave notice to the defender that the partnership would be dissolved as on 31st March 1896. This they had power to do under the contract. But there was a question whether, under the contract, they were entitled to buy out the defender and keep the business, or whether, as the defender believed, he was entitled to keep the business and pay out his partners. He endeavoured to raise capital for this purpose, but found himself unable to carry it out, partly because the other partners were, in a trust capacity, proprietors of the business premises.

The result was that the defender retired on terms expressed in a minute of agreement, dated 23d December 1895, between the other partners and him. It narrated that it had been arranged to dissolve the firm, and it provided (1) that the dissolution should be at the date of the deed, and that the defender should be as free to carry on the business of an engineer as if he had not been a partner, but should not be entitled to represent himself as successor in business of A. &

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W. Smith & Company; (2) that the defender should be paid £9000; (3) that the parties should sign a notice of dissolution, which should be advertised and circulated among all the parties from whom the firm had received credit; (4) that William Smith and Hugh Osborne Smith should "pay and so free and relieve the said Alexander Dawson Smith of all the obligations due by the said firm of A. & W. Smith & Company," and exhibit discharges thereof, and that William Smith and Hugh Osborne Smith should be entitled to the whole assets.

The notice referred to in the agreement, which was advertised and sent to, *inter alia*, the trustees, was to the effect that the firm was dissolved of mutual consent, and that William Smith and Hugh Osborne Smith would continue the business for their own behoof, and would collect all debts and discharge all liabilities.

The agreement was between the partners only. The trustees were not parties to it.

The defender did not think it necessary to get a formal discharge, and the matter was delayed. His agent, Mr Cook, however, thought it necessary, and pressed for it. It was not, however, obtained till 3d November 1896, when William Smith and Hugh Osborne Smith signed the discharge against the strong remonstrance of their agent.

A month after this it was found that the firm was in financial difficulties which it could not overcome, and the firm and partners granted a trust-deed for behoof of their creditors in favour of Mr M'Clintock, C.A., whose examination disclosed an apparent deficit of above £13,000. In December 1896 the pursuers, Joseph Patrick and Robert Howie, were assumed as trustees of the deceased Alexander Smith, and the former trustees, William Smith and Hugh Osborne Smith, resigned office. The trustees acceded to the trust for creditors, and they claimed, and received, a dividend. The sum sued for was the amount of the original debt, deducting the dividend.

The pursuers pleaded;—(2) The said discharge being entirely gratuitous and *sine causa*, and having been granted by the said William Smith and Hugh Osborne Smith as trustees foresaid, and obtained by the said defender, without any consideration having been received or given therefor, is invalid and ineffectual to discharge the defender of his liability for said loan. (3) The said discharge being entirely gratuitous and *sine causa, et separatim*, having been obtained by fraud and collusion on the part of the defender and the said William Smith and Hugh Osborne Smith, it ought to be reduced as concluded for.

The defender pleaded;—(4) The said discharge being valid and effectual, and not liable to challenge on any of the grounds libelled, the defender should be assoilzied. (5) The pursuers are barred by their actings since said discharge was granted from maintaining the conclusions of the summons. (6) It being impossible to effect *restitutio in integrum*, the conclusions for reduction should be refused.

The Lord Ordinary (Kincairney), on 5th January 1899, pronounced this interlocutor:—"Finds that it is not proved that the discharge sought to be reduced was granted without consideration, or was obtained by fraud and collusion on the part of the defender, and of William Smith and Hugh Osborne Smith, the trustees at the date of said discharge of Alexander Smith junior: Therefore assoilzies the defender from the whole conclusions of the summons, and decerns," &c.*

* The ground of the Lord Ordinary's judgment appears from the follow-

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The pursuers reclaimed. The First Division, on 20th March 1900, pronounced this interlocutor:—"Recall the said interlocutor [5th January 1899]: Find that the discharge granted by William Smith and Hugh Osborne Smith in favour of the defender dated 3d November 1896 was entirely gratuitous and *sine causa*, and was granted by the said William Smith and Hugh Osborne Smith, and obtained by the said defender, without any consideration having been received or given therefor, and is invalid and ineffectual to discharge the defender of his liability for the loan: Find that the said discharge was granted by the said William Smith and Hugh Osborne Smith fraudulently:

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ing extracts from his Lordship's opinion:—"If the trustees were under no antecedent obligation to grant this discharge, they were not, in the circumstances, entitled to grant it, and the defender could not avail himself of it. If so, the case would be a very hard one, because the decision would be against the clear understanding of all the parties who had transacted. But I think that in law it could not have been resisted.

"It seems to me, then, that the question comes to be whether, at the date of the discharge, the defender had right to insist on it on account of what had occurred before; or whether—which expresses the same thing in different terms—the trustees could at that time have successfully raised an action against the defender for payment of the debt. This really raises the defence of novation or delegation at some date before the date of the discharge. . . .

"In support of this defence various authorities were referred to; in particular, *Bilborough* v. *Holmes*, 1876, 5 Ch. Div., 255; *Scarf* v. *Jardine*, 1882, 7 App. Cas. 345; and *Rolfe and Bank of Australasia* v. *Flower, Sutting & Co.*, L. R., 1 P. C. 27; and I would particularly refer to the exposition of the law of novation in cases of partnership by Lord Selborne in *Scarf, supra*. But I do not think it necessary to make further reference to these cases, because I find the law on the point expressed in subsection 3 of section 17 of the Partnership Act, 1890, 53 and 54 Vict. cap. 39, which is as follows:—'A retiring partner may be discharged from any existing liabilities, by an agreement to that effect between himself and the members of the firm, as newly constituted, and the creditors, and this agreement may be either express or inferred as a fact from the course of dealing between the creditors and the firm as newly constituted.'

"There was in this case no express agreement to the effect here specified; but it may be inferred from the course of dealing, and it is worthy of notice that the inference is to be drawn, not from anything which takes place between the creditors and the retiring partner, but from the course of dealing between the creditors and the new firm. The only question here is, whether an agreement by the trustees to discharge the defender can be inferred from their dealings with the new firm. No doubt there was not much time for a course of dealing between December 1895 and November 1896, and transactions were necessarily few when the creditors and debtors were identical. Still, I think it clear that the trustees intended to relieve the defender, and that their dealings must be held to have been in fulfilment of that intention. There are one or two points which may be here noticed. In the first place, there was the preparation of a bond in favour of the trustees. The draft was framed before the defender retired, and the name of the defender was inserted with those of the other two partners as obligants. But after his retiral this draft was revised by the agent of the remaining partners, and the defender's name was struck out. There is a minute of trustees, dated 10th February 1896, which bears that the agent of the trust reported that the bond to be granted by Messrs A. & W. Smith & Company to the trustees had been sent for revisal, and I think that at that date A. &

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Therefore sustain the second and third pleas in law stated for the pursuers: Reduce, decern, and declare in terms of the reductive conclusions of the summons: Further, decern and ordain the defender to make payment to the pursuers, as trustees foresaid, of the sum of £9682, 17s. 6d. sterling, with interest at 5 per cent on the sum of £10,702, 2s. 6d., from 15th April 1898 to 7th July 1898, with interest at 5 per cent on the sum of £10,192, 10s. from 7th July 1898 to 22d September 1899, and with interest at 5 per cent on the said sum of £9682, 17s. 6d., from 22d September 1899 to the date of payment: Find the pursuer entitled to expenses," &c.*

W. Smith & Company could only signify the new firm. The defender was represented by a different agent, and this draft bond was never submitted to him. Again, on 2d June, the new firm paid the interest of the debt to the trustees. That might not of itself be conclusive, but it becomes so when it is considered that the creditors and debtors were the same, and that the trustees understood that the defender was to be discharged. Further, the money itself remained with the new firm. I am of opinion on the whole that the defence of novation is instructed, and that for a considerable time before the date of the discharge the change of the one debtor for the other had been effected.

"It remains for consideration whether this change of the one debtor for the other by novation was not to be regarded as a breach of trust from which the defender cannot benefit. Discharge by novation could not, it may be said, be better than express discharge, and the validity of an express discharge might be objected to as injurious to the trust. Now, I am of opinion that had a discharge been granted at that date, on the footing that the trustees should obtain the new firm as a debtor, it would have been effectual, for it would not have been without consideration to the trust. As to the adequacy of the trust security, it was for the trustees to judge, and I think that such a discharge could not have been accounted a breach of trust or a fraud against the trust, if it really and in substance amounted to a shorthand method of reinvesting the funds after they had been in form repaid to the trustees.

"It seems to me that this case falls to be decided in respect of what took place when the defender retired, and in respect of the subsequent dealings of the trustees with the new firm. If there was then novation, then the discharge was the mere formal implement of the preceding contract, and if it was so, it was granted with full consideration.

"While the case has appeared to me very difficult and complicated, the conclusion which I have reached seems to me certainly in accordance with equity.

"I do not require to consider the defences founded on the pursuers having acceded to the trust-deed granted by the new firm and its partners, and having claimed and obtained a dividend. I may only say that I do not see that this case can on that point be distinguished from the case of *Morton's Trustees*, 25 R. 72, or that this defence could be supported consistently with that decision.

"The defender complained that he had not been consulted enough in regard to the carrying out of the trust for creditors; but whether his complaint be well founded or no, I do not see how it could be directed against the pursuers, or could in itself form any ground of defence."

* LORD ADAM.—The Lord Ordinary has repelled the reasons of reduction and assoilzied the defender.

It appears that at the first meeting of the trustees, held on 10th January 1894, with reference to the power given to the trustees by the truster to allow his share in the firm of A. W. Smith & Company to remain as a loan to that firm, Mr William Smith stated that his firm was willing to take on loan the residue of the estate, and that the trustees having considered the

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LORD CHANCELLOR.—It appears to me that this is a particularly plain case, and I confess I should feel great regret if there could be any doubt as to what the decision of it should be.

In the first place, I disagree with the learned counsel for the appellant as to the true construction of the will, and I believe that is enough to decide this case. It appears to me that, not only in form but in substance, when a testator is disposing of his effects and leaving a large sum of money for the benefit of his son, it is not a mere technicality to say that a new firm is a different person. On the contrary, he has been familiar with the firm and the mode in which it is conducting its business and so on all his life, and when he says, "Well, there is a certain sum of money, £19,000, and that may continue in the firm as a loan," that means the firm with which he is familiar. It is not denied by the learned counsel here that the change which took place in the firm did make it a new and a different firm. In point of law,

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matter agreed to the loan, and instructed their agent, when the amount was ascertained, to have the loan put upon a proper footing by taking a personal bond for the amount from the firm and several partners thereof.

It further appears that at the next meeting of the trustees, held on 30th August 1895, the law-agent laid before the meeting a statement made up by A. W. Smith & Company as at 11th November 1894 shewing the sum of £19,857, 17s. 9d. as the balance of the deceased's interest in the firm, and that the trustees instructed their agent to prepare a personal bond for the signature of the partners of the firm for £19,500, and to obtain their cheque for the balance. The draft of such a bond was prepared and sent to the agents of the firm for revisal, but it was never executed.

The defender was abroad when these transactions took place, and he alleges that he was ignorant of these resolutions of the trustees, which, he says, were never communicated to him. But even if so, that does not appear to me to be material, for if the matter is to be considered as a loan to the firm, the other parties were entitled to bind him, in respect that it was a loan to be applied to the use of the firm, or if, as it appears to me, it is to be considered as a debt for which the firm was liable, as being the value of the interest of the deceased partner in the dissolved firm, in either case the three partners were conjunctly and severally liable for the amount.

In consequence of disputes between William Smith and Hugh Osborne Smith on the one hand and the defender on the other (which it does not appear to be necessary to consider in detail) as to the manner in which the business of the firm was being conducted, the defender retired from the firm on 23d December 1895, in terms of a minute of agreement between the partners of that date.

By the second article of this agreement it was stipulated that William Smith and Hugh Osborne Smith should pay to the defender the sum of £9000 sterling, which sum he had agreed to accept in full payment of all sums standing at his credit in the books of the company, whether in name of capital, interest, salary, or otherwise.

By the fourth article it was stipulated that William Smith and Hugh Osborne Smith should pay, and so free and relieve the defender of all obligations due by the firm, and exhibit to him discharges thereof, and that the said William Smith and Hugh Osborne Smith should have right to the whole debts due to the firm.

The defender of the same date received payment of this sum of £9000, but William Smith and Hugh Osborne Smith did not pay all the obligations

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therefore, their contention is that if instead of there being all the persons that there were originally in it, not one of them remained, but it was a firm, to use the loose phrase which the learned counsel indulged in, "substantially carrying on the same business," that would be equally within the power given by the will. I entirely differ from that view. It appears to me that the acquaintanceship with the modes of business of the firm and the individuals composing it may have formed a factor, and probably did form a factor, in the mind of the testator for giving the permission that the money should continue as a loan. Having arrived at that conclusion, there can be no doubt as to what follows. The lending it to a new firm was not within any power given by the will, and inasmuch as it was not a proper trust investment, it was undoubtedly a breach of trust by the trustees.

Then as to the granting of the discharge, I do not think it requires much observation to shew that that discharge, whether granted or not, was not worth the paper on which it was written. There was no antecedent obliga-

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of the firm—at least they did not pay the debt due to the trustees of Alexander Smith junior and so relieve him thereof.

Notice was sent to the trustees of the dissolution of the firm, and that William Smith and Hugh Osborne Smith were to carry on the business for their own behoof under the same firm name, and that they would collect all debts due to and discharge all the liabilities of the late firm.

It appears to me that there is nothing objectionable in this agreement as an agreement between the partners. The defender may or may not have made a good bargain, but that does not affect the present question. The trustees were no parties to the agreement, and I think that it is hopeless to contend that it had the effect of discharging the defender of his liability for the debt due to them—and the Lord Ordinary is of the same opinion.

The Lord Ordinary, however, is of opinion that circumstances occurred subsequent to the retirement of the defender from the firm, and before the date of the discharge sought to be reduced, which altered the complexion of the case and operated the discharge of the defender, and this, in his view, is the cardinal part of the case.

Subsection 3, section 17, of the Partnership Act, 1890, enacts that a retiring partner may be discharged from any existing liabilities by an agreement to that effect between himself and the members of the firm as newly constituted and the creditors, and that this agreement may be either express or inferred as a fact from the course of dealing between the creditors and the firm as newly constituted.

The Lord Ordinary thinks that there was such a course of dealing between the trustees and the newly constituted firm from which it can be inferred as a fact that the trustees agreed to discharge the defender.

The first circumstance on which he founds is that a draft bond was prepared in favour of the trustees for the amount of the debt due to them, and that in this draft the defender appeared as a conjunct and several debtor with William Smith and Hugh Osborne Smith, but that after the defender's retiral from the firm the draft was revised by the agent for William Smith and Hugh Osborne Smith, when the defender's name was struck out of it, leaving William Smith and Hugh Osborne Smith as the only debtors on the face of the bond. If the name of the defender had been struck out of the draft bond by the agent of the creditors, or if the bond as so altered had been accepted by them, I could have seen the force of the observation, but as neither of these things happened I fail to see the relevancy of the circumstance.

The only other circumstance founded on is that on 2d June 1896 the trustees accepted from the new firm a sum of £452, 12s. 11d., being a half

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tion on the trustees to grant the discharge at all. What they did was to grant the discharge to a person, because in their individual capacity they had agreed with him to do it; and in regard to their doing that I confess I take the view taken in the Inner-House. It appears to me that, if we are to form a judgment upon the facts, the circumstances shew most distinctly that the reason why they granted the discharge was in order to escape from the embarrassment of having to pay a large sum of money; that in so doing they did not regard the interests of the persons whose interests as trustees they were bound to regard; and in that respect I agree with the unanimous judgment of the Inner-House, that they were guilty of a fraudulent breach of trust. It may be very hard upon the appellant, to whom, so far as I can see, no blame is attributable at all, that he is made to suffer for their fraud; but the question is whether or not the beneficiary is to suffer by the fraud of his trustees. It appears to me that there is no doubt that there was not the least pretence of justification for the acting of this new firm in its character as a firm, and then its members alternating with themselves

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year's interest on the debt. This sum was paid to the agent of the trust and a receipt for it granted by him. He certainly never imagined that by so doing he was discharging the defender of his liability for the capital of the debt.

I do not think that it can possibly be inferred from the trustees' acceptance of this sum from the new firm, who had intimated to them that they had undertaken to pay the debts of the old firm, that they thereby agreed to discharge the defender of his existing liabilities, or, as the Lord Ordinary puts it, agreed to accept the new firm as their sole debtor in lieu of the old firm and its partners. The mere acceptance of the money would not have that effect in law, and if that be so, there is nothing in the case that I see to give it that effect.

The Lord Ordinary says that the taking of the money might not of itself be conclusive, but that it becomes so when it is considered that the creditors and the debtors were the same, and that the trustees understood that the defender was to be discharged. I think it is a fallacy to say that the creditors and debtors were the same. The trustees were, no doubt, nominally the creditors, but the true creditor was the beneficiary under the trust, nor were the debtors the same, because the defender was a debtor and he was not a trustee, nor do I know of any evidence that the trustees understood that the defender was to be discharged by this payment, or otherwise than by payment by William Smith and Hugh Osborne Smith of the obligations of the old firm, as they had undertaken to him to do.

The truth is, that William Smith and Hugh Osborne Smith, in their capacity as trustees, had never had the matter of the defender's discharge under their consideration at all. The minutes of meeting of the trustees have been produced, and there is only one minute during the period in question, and it has no reference to the matter.

I cannot concur in the conclusion at which the Lord Ordinary has arrived, that prior to the date of the discharge which we have now to consider there had been novation of the debt.

This discharge is dated 3d November 1896, and is granted by William Smith and Hugh Osborne Smith in favour of the defender.

It proceeds on the narrative that they prior to 23d December 1895 had carried on business with the defender under the firm of A. W. Smith & Company, that the firm and partners were indebted to them at the said date as trustees of Alexander Smith junior, that the firm was dissolved at the said date by the retiral therefrom of the defender, and that they as the continuing partners undertook to pay, free, and relieve the defender of all

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in their character as trustees. It is said, forsooth, that a wide discretion was given to the trustees. Yes, but acting as trustees, and not when they are deciding for themselves and in their own interests whether they will preserve the property of their *cestui que* trust or not, or whether they will do that which in effect is supplying out of the beneficiary's own money a sort of composition which they pay to their creditors, or at least in great measure.

I should be very sorry indeed if any doubt were entertained about the principles upon which this case should be decided. It appears to me that it is *luce clarius* that the judgment of the Inner-House is right, and therefore I move your Lordships that this appeal be dismissed, with costs.

LORD SHAND.—I shall make only a few observations in this case, after what has fallen from his Lordship on the woolsack, for I concur entirely in all that has been said.

It has been submitted in argument that the terms of this trust-deed are

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the obligations due by the dissolved firm, and that they, as trustees foresaid, had accepted, as they thereby accepted, the present firm of A. W. Smith & Company, of which they were the sole partners, as their debtors in lieu of the dissolved firm and partners, and therefore they thereby discharged the said dissolved firm and the defender as a partner thereof and as an individual, of all sums due and addebted by them or him to the deceased Alexander Smith junior, or to them as trustees foresaid.

It is desirable to see under what circumstances this discharge was considered and signed. It appears, accordingly, from the minutes of meeting at which this was done, that Mr Parker, the agent of the trustees, very properly stated to them that as they themselves were the only partners of the firm it would be difficult for them as trustees in the trust to consider the matter impartially, and that they ought to assume several other trustees, who would consider the application for the discharge of the defender apart from the interest of A. W. Smith & Company in the matter, and that after assuming new trustees they should resign the trusteeship.

The agent further pointed out to them that the effect of their signing the discharge was to discharge a security held for the trust investments, and that they ought not to do so, and further, that if they were not also partners of A. W. Smith & Company they would not do so without an independent inquiry as to the security that would remain.

It further appears from the minute of meeting, that the trustees, after full consideration, took the matter into their own hands and resolved to grant the discharge, and the instrument being laid on the table they signed the same.

It was in these circumstances that the discharge was signed.

William Smith and Hugh Osborne Smith were at the time being pressed by the defender to pay the debt and so operate his discharge, as they were bound to do. The Lord Ordinary thinks—and I agree with him—that they knew they could not pay the debt. It was pointed out to them what the effect would be as regards the trust-estate of their granting the discharge, and having regard to their conflicting interests as creditors and debtors they were not in a position to consider the matter impartially; nevertheless they took the matter into their own hands and signed the discharge. By so doing it appears to me that as trustees they knowingly and deliberately sacrificed the interests of the estate under their charge in their own personal interest as debtors to the trust. By so doing it appears to me that they not only committed a breach of trust, but a fraudulent breach of trust.

The next question for consideration is the position of the defender in

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very wide indeed—that they authorise practically a loan, not only to the firm as it existed at the time of the testator's death, but to that firm, if continued, whatever change may occur in the partners. I agree with your Lordship in thinking that it was an important change in the firm that one of the partners, the partner who seems to have taken the entire charge of the engineering department, had withdrawn from the firm, and I think, therefore, as your Lordship does, that on that ground it was *ultra vires* on the part of the trustees to continue or to give the loan to the new firm.

In the next place, there is undoubtedly this peculiarity in the case, and it is a very important one, that when the trust-deed was executed there were three trustees named in existence—William Smith, Hugh Osborne Smith, and the testator's widow. On the other hand, there were three partners—William Smith, Hugh Osborne Smith, both of whom were trustees, and Alexander Dawson Smith, who was not. When Alexander Dawson Smith retired from the business and William Smith and Hugh Osborne Smith became the sole partners, they were also the sole trustees,

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the matter of this discharge, and I do not see that he was in any way to blame in taking it. It is true that the discharge was not in such terms as his ex-partners were bound to have procured and exhibited to him. They were bound to pay the debt, and so free and relieve him of it. It appears, however, on the face of the discharge, that they had not paid the debt, and that he was discharged only because the trustees alleged that they had agreed to accept the new firm and its partners as their debtors in lieu of the old firm and its partners. If the defender chose to be content with such a discharge, *valeat quantum*, I think he was entitled to take it.

I agree with the Lord Ordinary that no fraud attaches to the defender as regards this discharge. He was not bound to know anything, and apparently knew nothing, of the proceedings of William Smith and Hugh Osborne Smith, either as trustees or as partners of the firm after he had quitted it in December 1895.

I further agree with the Lord Ordinary that the fact that the defender was not participant in the fraud of William and Hugh Osborne Smith is not necessarily sufficient to support the discharge as far as he is concerned.

I agree with the Lord Ordinary in his statement of the law on the matter as applicable to this case to the effect that if the defender was the debtor of the trust at the date of the discharge, and if the trustees were under no antecedent obligation to grant it, if it was gratuitous, and if in granting it they acted fraudulently and in breach of their trust, then the discharge cannot be maintained.

I think that all these conditions are complied with in this case.

I have already stated the grounds on which I think, differing from the Lord Ordinary, that the trustees were under no antecedent obligation to grant the deed, in respect that there was no novation of the debt, and that therefore the defender remained a debtor to the trust.

It appears to me that the discharge was entirely gratuitous. Its effect was simply to discharge the defender. So far as I can see, the trust-estate received no benefit or consideration, valuable or otherwise, in consequence of its having been granted, and I have already said that I think the trustees acted fraudulently in granting it. If that be so, however hard it may be on the defender, I do not think the discharge can be supported in law.

The only other matter to which I think it necessary to refer is, that in December 1896 the new firm granted a trust-deed for behoof of their creditors, that the pursuers acceded to the trust, and claimed and received several dividends from the estate.

It was strongly contended to us, on the authority of the case of *Scarf* v.

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the widow having died in the meantime. The positions of creditors and debtors were united in them alone. It appears to me that in those circumstances they, as the sole creditors, not only could not lawfully lend to themselves as the sole debtors, but had no power to grant the discharge in favour of the firm of which they were themselves the sole partners. It is, I think, clear that the discharge was entirely without consideration, for it is idle to say that in accepting the firm of which the trustees themselves were alone partners as debtors the trust-estate was getting any security which it had not already. The result of the deed was practically to discharge the appellant of his indebtedness to the trust-estate without con-

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Jardine[1] referred to by the Lord Ordinary, that the pursuers had thereby elected to accept the new firm as their debtor, with the necessary result of discharging the previous firm and its partners of their liabilities.

I think it only necessary to say that that case appears to me to differ in essential particulars from the present, which I agree with the Lord Ordinary in thinking cannot be distinguished from the case of *Morton's Trustees*,[2] and which we are bound to follow.

On the whole matter, I think the interlocutor of the Lord Ordinary should be recalled, and decree pronounced in favour of the pursuers.

LORD M'LAREN.—I concur entirely in Lord Adam's opinion, and shall only state the results as they present themselves to my mind in two propositions. On the first and main question, it is certain that the trustees as such received no consideration whatever for the discharge which they granted, and as the discharge was gratuitous it follows that the defender, as a person taking benefit under a gratuitous deed, can have no right other than what the granter was entitled to give. The granting of this discharge was a manifest breach of trust on the part of the trustees, and so the right of the defender, who gave nothing for the discharge, is subject to the infirmity of the trustees' title.

On the second point, I observe that in the case of *Scarf* v. *Jardine*[1] the defender was not liable by contract for the debt on which he was sued. He was a retired partner, and he was sought to be made liable, not for a debt incurred by him as a member of the firm, but for a debt incurred after he had retired, on the ground that he remained liable as a partner because he had not given notice of his retirement. In these circumstances the House of Lords was of opinion that the act of claiming from the representatives of the new firm was inconsistent with the only hypothesis on which the case against the defender could be sustained, viz., that the creditor held the old firm liable. In the present case Mr Smith was an original debtor in the obligation, because the trust money was lent to the three partners collectively, and the fact that his partners and successors in the business have been made liable through their trustee is not in any way inconsistent with the theory of this action, which is, that the three partners of the old firm were and are, conjunctly and severally, responsible for the loan. While at first sight the case of *Scarf* v. *Jardine*[1] may appear to be analogous to the present case, when it is further examined it is seen that there is a clear distinction in principle—I mean that the principle of election there given effect to has no application to a case where all the parties were originally liable as co-obligants in the obligation resulting from the loan.

LORD KINNEAR concurred.

The LORD PRESIDENT was absent.

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[1] 7 App. Cas. 345. [2] 25 R. 72.

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sideration, and the discharge was granted really in the interest or for the pecuniary benefit of the trustees themselves, who took the matter into their own hands and disregarded the judicious and sound advice of their law-agent. In my opinion this was a clear breach of trust, and the deed was invalid.

Upon the last point I shall only say that I do not think the following of this trust-estate, so as to recover the moneys which go to the credit of the appellant and reduce his liability for the debt now sued for, to a large extent, can be founded on as a proceeding that releases him in any way. It appears to me that it was a proceeding that was for his advantage. He gets the benefit of it, and I fail to find any circumstances which enable him to plead that he was thereby released from liability.

I have only to add that I concur in the observations made by Lord Adam and Lord M'Laren in their judgments on the reclaiming note.

LORD DAVEY.—I agree with my noble and learned friend on the woolsack that this is a particularly plain case. It appears to me that you have only to read the document which is impeached, namely, the so-called discharge signed by William Smith and his brother Hugh Osborne Smith, to see on the face of it what the transaction was. It recites that the firm is "dissolved" "by the retiral therefrom of the said Alexander Dawson Smith," and then it states,—"We, the said William Smith and Hugh Osborne Smith, as the continuing partners, undertook to free and relieve the said Alexander Dawson Smith of all the obligations due by the dissolved firm, and that we, as trustees foresaid, have accepted, as we hereby accept, the present firm of A. & W. Smith & Co." (that is, themselves), "engineers, Glasgow, of which we, the said William Smith and Hugh Osborne Smith, are the sole partners, as our debtors, in lieu of the said dissolved firm and partners; therefore we, as trustees foresaid, have discharged and hereby discharge the said dissolved firm of A. & W. Smith & Co. and the said Alexander Dawson Smith as a partner thereof." In other words, we, as trustees, having as our debtors ourselves and Alexander Dawson Smith, elect to discharge Alexander Dawson Smith and to retain ourselves. Now, my Lords, can anybody acquainted, I do not say with the refined doctrines of equity, but with the commonest principles of law, treat that document as entitled to the slightest value in any respect? It is undoubted that Alexander Dawson Smith was a debtor to this trust-estate, and he relies upon this document as his discharge. My Lords, I agree with what Lord Adam said, that "By so doing" (that is, by signing the discharge) "it appears to me that, as trustees, they knowingly or deliberately sacrificed the interests of the estate under their charge in their own personal interest as debtors to the trust. By so doing, it appears to me that they not only committed a breach of trust, but a fraudulent breach of trust."

I will not say anything about the construction of the will, because I entirely agree with what has fallen from my noble and learned friend. There can be no doubt in my mind that a power to lend to a firm consisting of certain individuals does not authorise a loan to a firm differently constituted whether including more individuals or less. Still less does it

authorise it when the suggestion is that the trustees having by the death of one of their number been reduced to two persons and the partnership by the retirement of one of the partners having been reduced to the same two persons, those gentlemen in their position of trustees and their position of partners take the trust-estate into their own hands and use it for their own business under the pretence that they have lent it to themselves.

I think it is perhaps due to Mr Levett that I should say one word as to his argument that by proving against the partnership estate the present trustees have debarred themselves from suing Mr Alexander Dawson Smith, the appellant. My Lords, it appears to me, as I have already said, that Mr Alexander Dawson Smith, having obtained his discharge by means of a breach of trust, cannot set up that discharge, and being a debtor to the trust-estate has not discharged himself, and remains liable. But, my lords, that is quite consistent with the power of the beneficiary to follow the trust-estate into the place where it has improperly got, namely, into the partnership funds, and claim the amount of the trust-estate against the partnership estate. It is well established that you may sue a person who is liable to replace trust-estate, and you may also pursue your other remedies against the trustees who have improperly dealt with it. My Lords, I need say no more about it, but merely add that I entirely agree that the appeal ought to be dismissed.

LORD BRAMPTON.—I entirely concur, and have nothing to add.

LORD ROBERTSON. — It would be strange if the law allowed a transaction so plainly unfair as that which is now in question. This trust-estate was made to release one of three debtors without his giving or providing to the estate anything whatever that it did not have before, this release being the act of the two remaining debtors who were the sole trustees, and were at the time insolvent.

The demerits of the proceedings, so far as the trustees are concerned, are too flagrant to require comment. They had no right gratuitously to release a debtor of the trust-estate, and they had no right, as I hold, under this trust-deed, to lend to any other firm than that existing at the testator's death; still less had they a right to do this, for the furtherance of their own convenience, by ridding themselves of a partner whom they found censorious of their own irregularities, and by carrying out their obligations to him at the expense of the trust-estate. The act was clearly a breach of trust, and I think the First Division had adequate grounds for holding it to be fraudulent.

I may in passing say that I am not deterred from this conclusion by the circumstance that those two trustees were not parties to the action, and were not witnesses. In the practice of Scotland it frequently happens (as in the case of wills and of forged instruments) that the fraud of a third party is the *medium concludendi*, and the mere fact of his fraud gives him no proper place as a party to the cause, and imposes no obligation on the party asserting his iniquity to offer his testimony.

This being the nature of the discharge, the appellant cannot hold his discharge, however innocent he may be, unless he gave valuable considera-

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tion—and of consideration he gave none. Everything which the new firm gave, their estate and the liabilities of its partners, the trust-estate had already—not, of course, to each item the identic and specific assets of the new firm, but the corresponding, and, so far as appears, equivalent assets of the old firm. The attempt of the appellant to found on this point only derives plausibility from splitting up what is really one transaction—the dissolving the old firm, and the making the new firm the sole debtors.

The appellant has endeavoured to found an argument on the change of circumstances which has occurred as disentitling the respondents to the remedy they seek. This seems to me to be a fallacy arising from the merely formal circumstance that the respondents' summons includes a reduction. This is not an action of rescission of a contract obtained by fraud, although, like such actions, it takes the form of a reduction—it is a demand for payment of a debt, backed with appropriate formal procedure for parrying a defence founded on a valueless discharge. It was within the rights of the creditors to take as much payment as they could get from the estates of the remaining debtors without impairing their rights to enforce the several liability of the third. Even if the appellant were right in saying that the respondents were not entitled to rank on the estate of the new firm, their doing so has in no way prejudiced the appellant, and cannot be pleaded by him as an answer to the present demand.

I am entirely satisfied with the judgment of the First Division, and consider the reasoning of Lord Adam and Lord M'Laren to be unimpeachable.

INTERLOCUTOR appealed from affirmed, and appeal dismissed, with costs.

WILLIAM ROBERTSON & Co.—J. W. & J. MACKENZIE, W.S.—FLUX, THOMPSON, & FLUX—SIMPSON & MARWICK, W.S.

No. 4.

May 9, 1901. Smith v. Callander.

DAVID W. E. SMITH, Appellant.—*Haldane, K.C.—E. H. Coles—A. J. Joseph.*

HENRY CALLANDER (Complainer), Respondent.—*Asquith, K.C.—A. Orr Deas.*

Lease—Compensation for Improvements—Statute—Construction—Retrospective effect—Market Gardeners Compensation (Scotland) Act, 1897 (60 *and* 61 *Vict. c.* 22), *sec.* 4.—*Held* (*aff.* judgment of Second Division) that sec. 4 of the Market Gardeners (Scotland) Act, 1897, is not retrospective, and does not entitle tenants under leases current at the date of the Act to compensation in respect of market garden improvements executed prior to the commencement of the Act.

Ld. Chancellor (Halsbury). Lord Ashbourne. Lord Shand. Lord Davey. Ld. Brampton. Ld. Robertson.

(IN the Court of Session, July 7, 1900, 2 F. 1140.)

This was a petition for interdict by Henry Callander of Prestonhall against his tenant David W. E. Smith, to prevent the latter from prosecuting a claim for compensation for improvements under the Market Gardeners Compensation Act, 1897.

On 15th March 1900, the Lord Ordinary (Kyllachy) granted interdict in so far as related to alleged improvements executed prior to 1st January 1898, when the Act came into operation. On 9th July 1900, the Second Division adhered to the Lord Ordinary's interlocutor.

David W. E. Smith appealed.

The question turned on the construction of sections 3 and 4 of the Market Gardeners Compensation Act of 1897.*

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LORD CHANCELLOR.—I cannot say that much doubt has been infused into my mind upon the subject of this case, which appears to me to be capable of very easy solution.

It appears to me that the effect of the Act of 1897 is very plain. In the first place, I think no rights were intended to be conferred upon anybody retrospectively. The language of the 3d section seems to me to have a very plain meaning:—"Where after the commencment of this Act it is agreed in writing that a holding shall be let or treated as a market garden," then certain "provisions shall have effect," and one of them is the 3d subsection, which enlarges Part III. of the schedule of the former Act. The effect of clause 4 also appears to me to be very plain. The Legislature is providing anew for the condition of things as applicable to market gardens, and it says after the commencement of this Act, where you have a written agreement, then certain conditions shall apply—this is all after the commencement of the Act; and then, apart from a written agreement, the case is provided for where, although there is no written agreement, "a holding is at that date" (that is to say, "at the commencement of this Act"; the word "then" follows immediately after, but I make no distinction between "the commencement of this Act" and the time referred to by "then") "in use or cultivation as a market garden," then without the intervention of a written agreement, which is the first case provided for, a tenant under a lease, unless he has received notice of dissent from his landlord, shall have the same right of compensation in respect of improvements as if there had been a written agreement: "the provisions of this Act shall apply in respect of such holding as if it had been agreed in writing after the commencement of this Act that the holding should be let or treated as a market garden." What is the effect of that? It does not say that he shall

* The Market Gardeners Compensation Act, 1897 (60 and 61 Vict. cap. 22), enacts,—

Sec. 1.—"This Act . . . shall be read and construed as part of the Agricultural Holdings (Scotland) Act, 1883, hereinafter called the principal Act."

Sec. 3.—"Where after the commencement of this Act it is agreed in writing that a holding shall be let or treated as a market garden, the following provisions shall have effect:—

"(3) The following improvements shall, as far as regards such holding, be deemed to be comprised in Part III. of the said Schedule [of the principal Act]:—

. . . . . .

"(iii.) Planting of strawberry plants."

Sec. 4.—"Where, under a lease current at the commencement of this Act, a holding is at that date in use or cultivation as a market garden with the knowledge of the landlord, and the tenant thereof has then executed thereon, without having received previously to the execution thereof any written notice of dissent by the landlord, any of the improvements in respect of which a right of compensation or removal is given to a tenant by this Act, then the provisions of this Act shall apply in respect of such holding as if it had been agreed in writing after the commencement of this Act that the holding should be let or treated as a market garden."

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have compensation for everything that has been done upon the land since the commencement of the lease. What it says is that the provisions of the Act which have been specified shall apply as if it had been agreed in writing after the commencement of the Act that the holding should be let or treated as a market garden. Then what is the tenant to get? I turn back, and I find what is to happen in the event thus contemplated. Sec. 3 says, "the following provisions shall have effect." Those "following provisions" apply only (the contrary is hardly susceptible of argument) to improvements made since the date of the commencement of the Act. And that is the whole of the controversy.

I entirely agree with the Lord Ordinary in his construction of the statute. It seems to me to be simply hopeless to attempt to read the language otherwise than as I have read it. One case contemplated by the framers of the statute is the case of a written agreement. The other case is that, at the time of the passing of the statute, the thing has already been done, and the condition of things is such that the tenant has already with the knowledge of the landlord cultivated the land as a market garden; the Act says that then "the same provisions shall apply," that is to say, that for all future improvements, although the landlord has not given his consent in writing, there shall be compensation at the end of the lease. That seems to me to be intelligible reading the mere words as they stand, and I confess that, having listened to the long and ingenious argument submitted to us by Mr Haldane, I have been unable to find anything that requires exposition or that is difficult of interpretation in the language of the statute so read. It appears to me that there is great difficulty in the construction which Mr Haldane has suggested, and I think, as a mere matter of language and the construction of the words in the Act, it would be impossible to maintain it.

For these reasons, I move your Lordships that the interlocutors appealed from be affirmed, and the appeal dismissed with costs.

Lord Ashbourne.—I entirely concur.

Of course, it is obviously competent for the Legislature, if it pleases, in its wisdom to make the provisions of an Act of Parliament retrospective; but before giving such a construction to an Act of Parliament one would require that it should either appear very clearly in the terms of the Act, or arise by necessary and distinct implication. Now, such reading as I have given to this short statute to my mind conveys very clearly that the provision on which the controversy arises is not retrospective. Clause 3 comes into operation where holdings are let as market gardens after the commencement of the Act, and the 4th section deals with the cases which are not covered by the 3d section—that is, leases current at the date of the commencement of the Act. But to prevent all misconception and to shew that it was not intended to go further in that direction, it says at the end of it that although the provisions of the Act are to attach to current leases under certain conditions, they are to do so as if there had been an agreement in writing made after the commencement of the Act, shewing that the governing words all through are, "after the commencement of the Act."

It is not necessary to go into any discussion of the meaning of the word "then," or any of the other topics that have been introduced. I agree with

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the construction given by the Lord Ordinary, and I assent to the motion which has been made by my noble and learned friend.

LORD SHAND.—I am of the same opinion. It is not necessary in my view of this case to invoke the rule or principle under which a right to claim payment on the part of a tenant for improvements made prior to the passing of an Act of Parliament, and so to give an improbable retrospective effect to the Act, must be given expressly or by necessary implication by the provisions of the statute. It seems to me there is here no ground to support the tenant's claim even by ingenious and strained interpretation of the sections of the statute.

For the reasons stated by the noble and learned Lord on the woolsack and by the Lord Ordinary in the note to his judgment, I agree that the meaning of the word "then" in sec. 4 of the statute of 1897 is "thereupon," or "thereafter," and that the clause includes and refers only to improvements made by the tenant after the date of the Act. But if this were not so, I think the result would be the same as found by the learned Judges of the Second Division.

LORD DAVEY.—I am of the same opinion. I think it is important to observe that market gardens, as was pointed out by Mr Haldane, are within the Act of 1883, and this Act of 1897 makes further and more beneficial provisions for market gardens by way of amendment of Parts I. and III. of the schedule to the previous Act. But those amendments are only made under certain conditions and in certain cases, and the question is, In what cases are those amendments to be made? Now, under sec. 3 of the Act it is very clearly pointed out that the provisions of that section apply only "where after the commencement of this Act" there is an agreement "in writing that a holding shall be let or treated as a market garden"; that is to say, that, so far as the landlord is concerned, he does for the first time treat or let the land as market garden after the commencement of the Act. There, necessarily, the amendment can only come into operation as regards improvements which are made after the commencement of the Act.

Then, my Lords, under sec. 4 the case is contemplated where there is "a lease current at the date of the commencement of the Act," under which land has in fact, with the knowledge of the landlord, but without his written consent or any written agreement, been treated as a market garden, and the tenant "has then executed thereon, without having received previously to the execution thereof any written notice of dissent by the landlord, any of the improvements in respect of which a right of compensation . . . is given to a tenant by this Act, then the provisions of the Act shall apply" as if there had been a written agreement. My Lords, I should have thought that the meaning of that clause was sufficiently obvious. It puts a market garden which has been allowed by the landlord to be treated as a market garden in the same position as regards this Act as if a written agreement had been made after the commencement of the Act to treat it as a market garden, but only on the condition that the tenant has "then executed thereon" improvements without having received from the landlord written notice of dissent. I am disposed to agree with the Lord Ordi-

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nary in construing the word "then" in that clause as meaning "thereafter." It may be that the other meaning which Mr Haldane attached to it, and which the Inner-House have favoured, is more like the *prima facie* meaning, but it is clearly capable of meaning "has thereupon," and I think the structure of the section requires it to mean that.

I see no reason or sense whatever in making the previous execution of the improvements a condition of the Act coming into operation. If it had any meaning at all, it would rather, I think, have the effect of making old improvements within the Act, and not new improvements. However that may be, a stronger objection to reading it as Mr Haldane read it is that it would put the landlord in the position of being liable to compensate for improvements by not having given a written notice of dissent at a time when he was not called upon to do so, as he could not, unless he gave his consent in writing to the improvement, be made liable.

For these reasons, I think that those words mean "has thereupon executed"; and the scheme of the Act is shortly this—to amend the schedules as regards market gardens in the Act of 1883, first, as to what I may call new market gardens, in cases in which there is an agreement in writing made after the commencement of the Act to treat them as market gardens, and, secondly, as to all market gardens in respect of subsequent improvements, provided the landlord has not, after the passing of the Act, given a written notice that he will not be liable for those improvements. That seems to me to render consistent the construction of the Act, and it is the construction which I advise your Lordships to place upon it.

LORD BRAMPTON.—I entirely agree.

LORD ROBERTSON.—I also agree, for the reasons which have been stated by the learned Judges of the Second Division.

INTERLOCUTORS appealed from affirmed, and appeal dismissed, with costs.

H. C. HALDANE—BUIK & HENDERSON, W.S.—GRAHAMES, CURREY & SPENS—JOHN C. BRODIE & SONS, W.S.

No. 5.

May 9, 1901. International Fibre Syndicate, Limited, v. Dawson.

INTERNATIONAL FIBRE SYNDICATE, LIMITED (Pursuers), Appellants.—*Lawson Walton, K.C.—Crabb Watt—J. G. Joseph.*

PETER DAWSON (Defender), Respondent.—*Bousfield, K.C.—Younger.*

Contract—Assignation of debt accrued on assignable contract—Delectus personæ.— Dear, the owner of a patent for a fibre decorticating machine, entered into a contract with Dawson, the owner of an estate in Borneo, by which it was agreed as follows:—Dear was to supply and erect one of the machines on Dawson's estate; and, on this machine working satisfactorily, Dawson was to pay the price of it to Dear, and terms were to be arranged for the further supply of machines by Dear to Dawson, who undertook to bring a specified area of his estate into fibre cultivation. After the machine first mentioned had been supplied and erected by Dear in implement of the contract, Dear assigned his patent, "licence, concessions and the like," to a limited company. In a schedule part of the price was allocated to "contracts and concessions." The company thereafter, with consent of Dear, brought an action against Dawson for payment of the price of the machine supplied, averring that the contract with him had been assigned by Dear to them. The defender pleaded, *inter alia*, No title to sue.

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Held (in *aff.* judgment of Second Division) (1) That in so far as the pursuers' claim was for implement of the contract, they had no title to sue, as the contract implied *delectus personæ* and was not assignable; and (2) that in so far as the claim was for a debt which had accrued to the cedent before the assignation, the pursuers had no title to sue, as the debt was not assigned.

(IN the Court of Session, Feb. 20, 1900, 2 F. 636.)

The pursuers appealed.

At delivering judgment,—

Ld. Chancellor (Halsbury).
Lord Ashbourne.
Lord Shand.
Lord Davey.
Ld. Brampton.
Ld. Robertson.

LORD CHANCELLOR.—I think this case is quite clear. I entirely assent to the reasoning of Lord Kincairney, and it appears to me that the whole is summed up in the dilemma which I put to the learned counsel who last addressed your Lordships. Either this was or it was not an entire contract. If it was, it has not been doubted or questioned at the bar that there is a personal element in it which makes the entire contract as referred to in these papers not assignable at all; or if it is treated as something which had become a complete debt before the assignment so that it was practically assigned for £500, then it is clear upon the face of this contract, coupling it with the schedule which is referred to, that there is no assignment at all. Therefore the dilemma is complete—either it was a contract in its entirety, which was not assignable, or if it is treated as a chose-in-action separate from the contract, and separated from it in such a sense that there was a sum then payable, it is not assigned. I think that dilemma is absolutely complete, and it appears to me that that disposes of the case.

I move that the appeal be dismissed with costs.

LORD ASHBOURNE, LORD SHAND, LORD DAVEY, and LORD BRAMPTON concurred.

LORD ROBERTSON.—It is conceded by the appellant that the contract out of which this claim arises was not assignable. The principle that contracts involving *delectus personæ* are not assignable is well rooted in Scots law as well as in the law of other countries. It may, however, be conceded to the appellant that it does not necessarily follow from this that a right may not arise out of an unassignable contract which is itself assignable. I prefer in a Scotch case to call such a right *jus crediti* rather than chose-in-action. The simplest case would be that of a money claim pure and simple which has accrued. Even in the case of such a claim, the assignee, while of course entitled to sue in his own name, is liable to all the answers which could have been made to his cedent. But the questions arising in the present case are, first, whether this claim for £500 of damages is such a money claim pure and simple, and second, whether it has been assigned. Now, the second of these questions seems to me so clear that I do not dwell on the first further than to observe that after what has been said the appellant must not consider it as clear. But on the second of these questions I do not find any assignation of debt or damages. It is quite true that the law does not require technical words in an assignation. But here the only thing assigned in the body of the assignation is "concessions," and even if this word be amplified by the schedule, then "contracts and concessions" are assigned. Now, at the date of this assignation the claim now

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sued on had already accrued, and on the theory of the appeal it was a claim separable from the contract. I find it impossible to read this as an assignation of a pecuniary claim. It is at best an assignation of the contract as a whole, and it is in my opinion impossible to apply it to the present claim.

APPEAL dismissed, and interlocutors appealed from affirmed.

GOODCHILD & HAMMOND—WILLIAM GEDDES, Solicitor—SWEETLAND & GREENHILL—CAMPBELL & SMITH, S.S.C.

No. 6.

July 29, 1901. Paterson & Son, Limited, v. Corporation of Glasgow.

CORPORATION OF THE CITY OF GLASGOW (Defenders), Appellants.—*Shaw, K.C.—Lees.*

JOHN PATERSON & SON, LIMITED (Pursuers), Respondents.—*Salvesen, K.C.—Guy.*

Arbiter—Informal reference to person of skill—Refusal by Arbiter to allow law-agents to appear—Award of lump sum where separate claims referred.—A firm of contractors and the corporation of a burgh agreed by informal missives to refer to an engineer, as arbiter, the question of "the amount to be paid" by the corporation to the contractors "in respect of the extra cost incurred by the necessary adoption of" the system of air pressure in the tunnelling for certain portions of a sewer, which the contractors had undertaken to construct for the corporation. The contract for the construction of the sewer contained no provision for the use of air pressure. While the reference was pending the contractors and the corporation agreed to refer to the same arbiter certain other disputed items—not relating to the use of air pressure—in the contractors' account. The arbiter issued an order for proof. In a note to this order he intimated that as the parties had agreed not to be represented by law-agents he would not allow them to be so represented at the proof, unless of mutual consent. The contractors refused to accept a proof on these conditions, denying that there was any such agreement. The arbiter then cancelled the order for proof, and thereafter issued a decree-arbitral by which he awarded a lump sum "as the total amount due in respect of work done by the claimants in connection with this contract." No details were given.

In an action by the contractors against the corporation for reduction of the decree-arbitral the arbiter deponed that his view of the reference, in so far as it related to the air-pressure work, was that he had to determine the sum that "ought to be paid" to the contractors for the extra work caused by the use of the air-pressure system, and that he made no inquiry as to the actual extra cost incurred by them through the adoption of that system.

Held (*rev.* judgment of Second Division) (1) that the parties had agreed to refer to the arbiter as a person of skill and experience to adjust, without the legal formalities of an arbitration, *inter alia*, the amount to be paid "in respect of the extra cost incurred" by the use of the air-pressure system, and that the arbiter was entitled to prevent the appearance of law-agents as being against the original understanding of the parties, and that, in any view, as arbiter he was entitled to do so; (2) that the arbiter was entitled to determine the amount that should be paid to the contractors in respect of the extra cost without taking evidence as to the amount which was actually expended by them; (3) that the decree-arbitral was not invalid because it did not distinguish the sum awarded on account of the use of the air-pressure system from the sum (if any) awarded under the second branch of the reference.

(IN the Court of Session, July 17, 1900, 2 F. 1201.)
The Corporation of Glasgow appealed.
At delivering judgment,—

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Ld. Chancellor (Halsbury).
Lord Macnaghten.
Lord James of Hereford.
Ld. Brampton.
Ld. Robertson.
Lord Lindley.

LORD CHANCELLOR.—With all respect for the Inner-House, I think they have not given sufficient effect to the evidence that was before them as to what the actual contract between these parties was. The story is in itself a simple one. The Corporation of Glasgow entered into a contract for the making of certain sewers in their streets. The date of that contract is not immaterial; it was in 1893. During the progress of the work, between January 1893 and January 1894, it was found that some difficulties arose in the execution of the contract according to the mode which it was assumed on both sides when the original contract was made should be pursued. The contractors stated that in their view it was impossible to continue by reason of the nature of the soil the execution of the works in the manner originally contemplated. As a consequence there was a correspondence between the contractors and the Corporation, and as a matter of fact it was arranged, subject to certain words which I will consider in a moment, that what was called the air-pressure system should be adopted, which undoubtedly would involve an extra cost upon the contractors if that system was pursued.

Originally the contention appears to have been that the contractors were bound by the contract to execute the work as well as they could under the terms of the contract, that the Corporation had got them fixed by a contract which they were bound to fulfil, and therefore there was no original obligation upon the Corporation to make any allowance for the extra cost which had become necessary, but after correspondence between the parties an agreement appears to have been come to. The date should be observed, because the dates of the original contract and the intervention of Mr Copland are separated by a whole year, which becomes important upon further consideration of what happened thereupon. In a minute of the 3d August 1894, we find:—"After careful consideration of the whole circumstances the subcommittee agreed to recommend that the request made by Messrs Paterson & Son be, without prejudice to the rights and claims of the Commissioners, complied with, and that, as this payment is in respect of, and applicable to, the extra cost incurred by Messrs Paterson & Son in executing their contract by means of the system of air pressure found by them to be necessary, Mr W. R. Copland be appointed arbitrator in the matter of the amount to be paid to Messrs Paterson & Son in respect of the extra cost incurred by the necessary adoption of the said system of air pressure—the cost of such arbitration to be borne equally by Messrs Paterson & Son and the Commissioners."

I may say in passing, with reference to another argument put forward on the part of the respondents, that that document is "approved" on the "17th of August 1894" by the Corporation; so that in respect of the authority to enter into this contract being brought home to the Corporation, it really is not necessary to proceed further. There is the deliberate adoption by the Corporation of this bargain.

The work proceeds and is apparently executed, and then comes the question which has given rise to this appeal. After a considerable delay,

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the arbitrator so selected hears the parties and is occupied in going into the accounts and ascertaining the amount due between the parties in the manner which was arranged by the parties themselves at the time, in order that he should have before him the materials upon which he should make his award. That appears to have been in the contemplation of both parties on the three days during which they were occupied—that was in November 1898.

It is said now by the respondents that the award which was then made or proposed to be made is to be set aside because the arbitrator refused to allow further proof to be given. In the view that I take of the matter the answer to that is a very simple one—that it is not true. He never refused to hear them. He offered to hear them; but they declined on two occasions to attend a meeting which he had arranged, because he insisted upon preserving an arrangement which he had entered into by the consent of both parties to refuse to hear professional advisers instead of the parties themselves.

I confess I had very great difficulty in following the reasoning of the learned Judges who reversed the judgment of Lord Kyllachy. They say in more than one passage in their judgments—two of them at least—that there was no evidence of any such agreement. To my mind the agreement is proved beyond doubt or question, and I cannot but think that there must have been some omission to bring before their Lordships the evidence upon which that agreement rests. It is abundantly proved, I think, both in the correspondence and by verbal statement. At page 89 Messrs Paterson & Son, Limited, in answer to a suggestion by Mr Whyte, that professional assistance should be called in because a new point had arisen and a point of law was involved, write thus:—"We have yours of yesterday's date with pressed copy of letter from Mr Whyte, and in reply beg to say that the other matters in dispute, besides the compressed air, were excluded at the time by the Corporation themselves from the reference as then existing." On that matter I may say in passing that that was perfectly true, but at a subsequent date there is clear evidence of remitting all matters in dispute between the parties. The letter goes on,—"A considerable time ago, on the suggestion of Mr Whyte, we agreed that the matter of the compressed air should be referred to you to adjust between us"—that is between Mr Whyte and themselves—"without the formalities of a legal arbitration, and with a view to an amicable settlement, so as to save legal and other expenses. We would like to know now if Mr Whyte departs from this position, because if so, we must reconsider the whole matter and the terms of its submission."

I am wholly unable to imagine a more complete answer to the suggestion that there was no such agreement. So far from there being no such agreement, the person who now insists upon it at that time in answer to a request by Mr Whyte that legal assistance might be permitted, says—one can read between the lines of such a letter, and what it means is this—If you depart from the arrangement we have made—that is to say, the arrangement to treat this as an amicable settlement and a reference without trusting to the legal forms of arbitration—we shall reconsider our position. It actually means this, that we shall decline to go on with the arbitration at all, and cancel our submission to arbitration. That is the meaning of it. How in the face of that letter it can be suggested—apart from the verbal

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evidence which states it beyond all dispute and question on the one side, and is hardly denied on the other—that there is no evidence of such an agreement, I am wholly unable to understand. I can only say that to my mind the agreement is positively proved without the smallest doubt. Under these circumstances it is untrue to say that the arbitrator has refused to hear any evidence. What he has refused to do is to depart from an arrangement which all the parties had agreed to. Under the circumstances I think he was perfectly right in saying,—"I am not going to depart from that: the agreement by which I was made arbitrator was on the express understanding that there was to be no legal assistance. I, as being a person familiar with this sort of thing, was to deal with and settle the whole matter without either the expense or the practical delay which sometimes occur in arbitrations conducted in legal form."

That seems to me to determine the question whether or not upon the mere refusal, which was the ground mainly put forward, there was any reason why this award should be set aside. It appears to me, on the contrary, that the arbitrator has done that which the parties agreed that he should do. If he had not done it he would have departed from that which the parties had agreed upon in the first instance; indeed, on that ground his award might very readily have been set aside, because then he would have been acting without the consent of the parties and taking a course which they had agreed should not be pursued.

But then comes another question—it is said on the face of this award upon the admitted facts that the arbitrator has not pursued the course which was agreed upon between the parties—that he has departed from the arrangement in this respect, that he has not either inspected or had proof of, or in any way entered into, the question of the amount to be paid by the one to the other in respect of the measure of value, the cost of labour and material, which has been expended in the extra cost of this compressed air system. Upon that point, to my mind the question is a very simple one. The whole object and purpose of referring the dispute to a person like Mr Copland was, that with his technical knowledge of those elements which make up the amount which is to be paid by the one to the other for this extra work, which in truth is the measure of value, he was to have the materials before him which the parties thought proper to produce. The answer to my mind is this, that he has taken—I do not care whether you call it the basis or whether you call it the mode of ascertaining the amount—I do not care what you call it—what he did was this, for three days he heard the parties upon all the matters relevant to that question which he had to consider, together with his technical knowledge and his own local knowledge of what the proper sums to be charged were, and it is not suggested that at the end of the third day anybody ever said that he was to have another meeting to consider his award, or another meeting to hear the parties. On the contrary, the hypothesis on both sides was that they had both been heard out, and when he makes his intended award known to the parties, then, and not till then, is this question raised, that he was bound to have another meeting and to have legal assistance provided upon both sides.

It seems to me, therefore, that every part of the case which has been put

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forward on the part of the respondents is answered. There was such an agreement as the appellants insist upon; the arbitrator proceeded, I think, substantially in the way that it was intended he should proceed, applying his technical knowledge to technical matters which were within his knowledge, and applying his local knowledge of the particular place where this work was to be done. He having done that, it appears to me it is far too late for the parties now to complain, the award having been made—or rather it having been published what the award would be—and to claim that they should have a new arbitration and commence these proceedings afresh. It seems to me that it would entirely destroy the value of any arbitration if that could be allowed; it would be a very bad precedent, and certainly would prevent people from entering into any such arbitrations, which are often carried on with great advantage to the parties, and without the expense attending a regular litigation. At anyrate, so far as your Lordships are concerned, I think we are all agreed that it is impossible to say that there is any misconduct here. I confess that I rather protest against the Scottish term "misconduct," which at first sight seems to imply corruption: it seems to me a very inappropriate word, but by judicial decision the Scottish Courts have included under it any mistake committed by an arbitrator in the mode of carrying on an arbitration. It appears to me that there has been no misconduct in any sense in this case. The arbitrator has arrived at the conclusion which he has arrived at upon the materials on which the parties themselves contemplated he would arrive at it, and the whole object of having an arbitration conducted in this fashion by a man of skill without the formal procedure of a legal arbitration was to induce him to do the very thing he has done—apply his own technical knowledge in the consideration of the books and accounts placed before him, knowing, as he must have known if he was the person both parties assumed him to be, what was the appropriate price of labour in such work as this, and the nature of the work. I know it has been said he never had this sort of work to do before. I do not know that there is any magic in this particular work. He knew work of this nature if he had never been engaged in it. It appears to me that that is one of the sort of things that people say after they have lost their cause—that the person who adjudicated upon it was not sufficiently acquainted with the subject-matter. The answer is, you have chosen him, and you must take his decision whether it is good or bad. That is indeed a complete answer to all the arguments which have been addressed to us on the part of the respondents. We are not ascertaining now whether this award was right or wrong—with that question we have nothing to do. I should think it is probably right; but what we are deciding here is, whether there has been anything in the course of this arbitration, and in the award made under it, which justifies any Court in sending it back or setting it aside. My view is that all the evidence is satisfactory to prove that the arbitrator has regularly and properly proceeded in the way it was expected he should proceed, and he has arrived at the conclusion in the way which both parties contemplated, and by the means by which both parties contemplated, he would arrive at the conclusion.

Under these circumstances there is no reason why this arbitration and the award should not proceed to its proper consummation, and I move your

Lordships that the interlocutor of the Inner-House be recalled and the original judgment of Lord Kyllachy restored, and that the respondents should pay to the appellants the costs both here and below.

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Lord Macnaghten, Lord James of Hereford, and Lord Brampton concurred.

Lord Robertson.—I cannot help thinking that the objections to this award are all more or less directly traceable to a misconstruction of the minute of reference. It has been assumed that what the arbiter had got to do under the first reference was to ascertain what had been the extra cost, or as the Lord Justice-Clerk puts it, the reasonable extra cost of the air pressure. This is in my judgment a misreading of the reference. The extra cost incurred was merely the consideration in respect of which a sum to be fixed by the arbiter was to be paid to the respondents. In this view the question of the actual expenditure by the respondents sinks into a position of very subordinate importance. What the arbiter said in effect was this—"I will assume, as you say it, that you expended all that money, but it was extravagant expenditure, and I decline to take it as affording any reliable criterion of what ought to be given." In so proceeding I think the arbiter was within his duties.

Now, if this be correct, the question upon which evidence was ultimately proposed was not the main issue, but had only a very indirect bearing on the result. It follows from this, first, that there was no duty on the part of the arbiter under the reference to find what had actually been spent, and second, that the question about agents in any evidence about actual expenditure becomes one of the most incidental procedure. But then it is said that the parties have by their pleadings committed themselves to a different view. I do not think that the terms of the rather inartificial pleadings support this contention. I read the admitted part of the respondents' pleadings as a statement of historical fact that the appellants agreed to the work being proceeded with on a time and material basis. But then this applies to a period anterior to the minute of reference, and it cannot alter the subject-matter agreed to be referred. And if it does not avail for this it has no further effect in the controversy.

The next objection to the terms of the award seems to me wholly untenable. The arbiter had by the reference of 1894 to deal with the question of air pressure, and by the reference of 1898 he had to deal with what are called the remaining items of difference. Now, the identification of the remaining items of difference took place in a way proposed by the respondents themselves, viz., by the appellants lodging the account, and along with it a statement of the items in that account which they disputed. There is not the slightest ground in fact for supposing that the arbiter dealt with any but the disputed items, and there is most certainly no legal presumption that he did so.

Then as regards the complaint that the arbiter has not separated the amount which he has allowed for the compressed air from the amount which he has allowed for the remaining items of difference, I think that, even on the strictest view of his duties, he was not bound to do so

No. 6.

July 29, 1901. Paterson & Son, Limited, v. Corporation of Glasgow.

unless he was asked, the reference of 1898 and the proceedings of parties having merged or consolidated the two references. And the respondents' leading witness says in so many words that "neither by representation nor request, direct or indirect, was Mr Copland asked to distinguish the amounts in his decree which were applicable to the compressed air contract and to the general contract." On the other hand Mr Copland himself tells us that he had the materials at hand enabling him to satisfy such request had it ever been made. These facts become the more striking when we know that, according to a frequent practice in Scotland, the arbiter issued a memorandum of his proposed findings and the respondents made no request to know how much applied to either reference.

The other and more important objection as to law-agents is, I think, very judiciously handled by Lord Kyllachy. *Prima facie* it is for the arbiter to decide questions of procedure. Lord Rutherfurd Clark, whose precise and guarded statements of law have a special authority, says (in *Holmes*[1]),—"All the incidental questions which arise in the course of procedure are as much referred to his sole judgment as the final decision." Now, there is no stereotyped rule as to who are to practise before arbiters generally, or before any arbiter in particular. While for permanent Courts of justice this matter is settled by permanent rules, each arbiter must settle it according to the subject-matter which he has in hand, and the resulting considerations of convenience and justice. In some references to exclude lawyers would be unjust, in others to admit them would be absurd. Their presence at one stage of an arbitration might be useful, and at another stage of the same arbitration might be confusing. But in the present instance Mr Copland considered that he found the rule for this arbitration settled by the concurrent action of the parties themselves, and governed himself accordingly. I think he was right in so holding, but even if I thought that the parties were not bound to this course, I do not see any ground for the interference of the law Courts with an order as to the conduct of an inquiry into what I hold to have been merely one head of information as to the main question, and not the main question. In no view have we here a contravention of any of these general conditions which are necessary for doing justice, which form the only limitations on the procedure of voluntary tribunals not imposed by the express agreement of those who set them up. There are innumerable arbitrations in Scotland about matters agricultural and commercial in which things are gone about in a rough and ready way, and it would be subversive of good faith and of social convenience if Courts of law were to exact of such tribunals a kind of procedure which in many cases would be unnecessary and inappropriate.

Lord Lindley concurred.

Appeal allowed, judgment appealed from reversed, and judgment of Lord Kyllachy, Ordinary, restored, with costs both in the House of Lords and in the Court below.

Martin & Leslie—Campbell & Smith, S.S.C.—Lloyd George, Roberts, & Co.—Alex. Morison & Co., W.S.

[1] 17 R. 656.

CASES

DECIDED IN

THE COURT OF JUSTICIARY.

1900–1901.

SOLOMON WESTWOOD, Complainer.—*Cullen.*
ALEXANDER WATSON TAYLOR, Respondent.—*Clyde.*

No. 1.

Dec. 6, 1900.*
Westwood v. Taylor.

Vaccination—Refusal to allow child to be vaccinated—Complaint—Relevancy—Vaccination (Scotland) Act, 1863 (26 *and* 27 *Vict. cap.* 108), *sec.* 18.—In a complaint charging a refusal to allow a child to be vaccinated, in contravention of section 18 of the Vaccination (Scotland) Act, 1863, it is essential to set forth that the vaccinator tendered his services to the accused between ten and twenty days after the date on which written notice of the order to vaccinate, issued by the Parish Council, was given to the accused.

Sentence—Form of sentence.—Form of sentence *disapproved* in the conviction of a statutory offence, for which imprisonment was competent only in the case of failure to pay the penalty.

HIGH COURT. Lord Young. Lord Trayner. Ld. Moncreiff.

ON 29th March 1900 Solomon Westwood, 11 Brown Street, Buckhaven, was charged in the Sheriff Court at Cupar on a summary complaint at the instance of the clerk to the Parish Council of the Parish of East Wemyss, setting forth that the accused "has been guilty of an offence within the meaning of the 18th section of the Act 26 and 27 Vict. caput 108,† in so far as he refuses to allow his child Robina Westwood, aged 23 months or thereby, to be vaccinated by the vaccinator appointed by the said Parish Council to vaccinate the said Robina Westwood, in terms of order issued to the said vaccinator on 23d February 1900, as instructed by the said Parish Council at a meeting held on the 22d day of said month of February 1900, of which order the said Solomon Westwood was duly informed on said 23d day of February 1900 by letter addressed and posted to him by the complainer, all in terms of the said Act, whereby the said Solomon Westwood is liable to a penalty not exceeding twenty shillings, and failing payment to be imprisoned for any period not exceeding ten days."

The accused stated objections to the relevancy of the complaint, which were thus set forth in the minutes of procedure:—"1. That no relevant statement of any offence under the Vaccination Act had been libelled; it was only an offence under section 18 of said Act if a refusal is made under the following circumstances:—(1) The accused must fail to return certificate. (2) A list must be returned by the registrar. (3) The Inspector of Poor must have submitted the

* Decided July 18, 1900.

† The Vaccination (Scotland) Act, 1863 (26 and 27 Vict. cap. 108), sec. 18, is quoted *infra*, p. 28, note.

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Dec. 6, 1900. Westwood v. Taylor.

list to the Parish Council. (4) The Parish Council must have issued an order for vaccination. (5) Notice in writing must have been sent to the respondent. (6) In pursuance of the order the vaccinator must have called not less than ten nor more than twenty days after the date of the notice. All of these steps must be libelled in the complaint to make it relevant, whereas only Nos. 4 and 5 have been so libelled. 2. That the place where the offence was committed was not stated in the complaint. 3. That the date of the offence was also omitted."

The Sheriff-substitute (Armour) repelled the objections. The accused then pleaded not guilty.

The Sheriff-substitute, after evidence had been led, pronounced the following conviction and sentence:—"The Sheriff-substitute, in respect of the proof adduced, convicts the said Solomon Westwood of the contravention charged, and therefore adjudges him to forfeit and pay to the complainer the sum of ten shillings of modified penalty, to be applied by him to the funds for the support of the poor of the parish of Wemyss, and allows the accused fourteen days to pay said sum: And in respect it is inexpedient to issue a warrant of poinding and sale, ordains the said Solomon Westwood to be imprisoned for the period of four days; and grants warrant to officers of Court to apprehend the said Solomon Westwood and convey him to the prison of Dundee, thereafter to be dealt with in terms of law on the lapse of said fourteen days."

Westwood brought a suspension, in which he pleaded that suspension ought to be granted in respect "(1) that the complaint is irrelevant and wanting in specification; (2) that it was incompetent and illegal to impose a sentence of imprisonment, except in the event of failure to pay the penalty imposed."

Argued for the complainer;—(1) The complaint was not relevant. It was necessary to libel all the preliminary steps, because it was only after all these steps had been gone through that an offence could be committed. (2) The sentence was illegal. It could not be construed otherwise than as imposing a penalty and a sentence of imprisonment cumulatively.

Argued for the respondent;—(1) It was not necessary, in order to a relevant complaint under section 18 of the Act, to specify that all the requirements of the Act had been gone through. The tender of his services by the vaccinator was not in a different position from the other statutory requirements. (2) The conviction and sentence might not be very happily expressed, but it plainly meant that there was to be imprisonment only if the fine had not been paid on the lapse of the fourteen days.

Lord Young.—I am of opinion that this charge is irrelevant. I think the public vaccinator, in obedience to the statutory requirements and the order of the Local Authority, between the 5th and 15th days of the month of March, ought to have tendered his services to the accused party, in this case the parent of the child. When this has been done the parent of the child is not entitled to refuse to allow his child to be vaccinated, unless on the ground either that the child has already been in fact vaccinated or that a certificate has been granted that the child cannot be vaccinated with safety. Should the parent without such excuse refuse to allow the vaccinator to vaccinate the child the statutory offence is committed. The

statute provides for the offer within a stated period being made by the vaccinator, and only thereafter can the statutory offence emerge. It is not stated in this complaint that the offer was ever made, and on that ground I hold the complaint irrelevant. No. 1. Dec. 6, 1900. Westwood v. Taylor.

On the other point raised I offer no opinion, but would only remark upon the terms of the sentence, that such a form as is here used would best be avoided in future.

LORD TRAYNER and LORD MONCREIFF concurred.

THE COURT quashed the conviction.

DAVID DOUGAL, W.S.—MACPHERSON & MACKAY, S.S.C.—Agents.

No. 2.

JOHN THOMSON, Appellant.—*Salvesen, Q.C.—W. Thomson.*
GEORGE NEILSON (Procurator-Fiscal, Glasgow Police Court), Respondent.—*Lees—Deas.*

Dec. 6, 1900.* Thomson v. Neilson.

Proof—Witness—Examination—Question as to person who has given facilities to police—Allowance of question subject to condition of non-disclosure of person's name.—At a trial in a Police Court on a summary complaint charging betting in a street contrary to the local Police Acts, a police-constable deponed in cross-examination for the accused that he had from the window of a house seen the accused commit the offence charged. The constable having been further asked to identify the house, the Procurator-fiscal objected to the question on the ground that the answer would lead to the public disclosure of the person who had given facilities to the police, but stated that he had no objection to the answer being communicated in writing to the Magistrate and to the agent for the accused—the latter to make no use of it in further cross-examination. The agent for the accused refused to accept the answer on this condition, whereupon the Magistrate disallowed the question. The accused having been convicted appealed.

The Court *sustained* the appeal, holding that the question was a competent and proper question, and the condition one which the Magistrate was not entitled to impose.

HIGH COURT. Lord Young. Lord Trayner. Ld. Moncreiff.

ON 12th April 1900 John Thomson, 551 Duke Street, Glasgow, was charged in the Northern Police Court, Glasgow, with betting in Hope Street, Glasgow, contrary to the Glasgow Police Acts, particularly the Glasgow Police (Further Powers) Act, 1892, section 20.

The accused pleaded not guilty, but was convicted, and fined £10, with the alternative of sixty days' imprisonment.

He obtained a case. The case stated, *inter alia*;—"In the course of the evidence for the prosecution, during the cross-examination of James M'Pherson, sergeant of police, Northern Division of Police, Glasgow, the law-agent for the accused asked the witness where he was at the time the alleged offence was being committed, which he had been describing, and of which he said he was an eye-witness. The witness replied that he was looking from a window in Hope Street, in a house entering from Sauchiehall Street, on the north side of Sauchiehall Street, close to Hope Street, three stairs up. On further questions being asked, which would have disclosed the house and name of the occupant of it, the acting fiscal objected to the witness giving particulars that would lead to the public identification of the house and its occupant, but at the same time stated that he had no objec-

* Decided July 18, 1900.

No. 2.
Dec. 6, 1900.
Thomson v. Neilson.

tion to the witness writing on a slip of paper the name of the occupant of the house and the number of the street in which it was situated, and handing the same to the law-agent for the accused and the Court, on the understanding that the agent would not, in the course of his further cross-examination, publicly disclose the name and address of the person who had given the police facilities for taking observations from his house. The witness thereupon wrote on a slip of paper the name of the tenant and the number of the street, and offered the slip to the agent for the accused, but the agent declined to accept same on such condition. Whereupon I sustained the objection of the acting fiscal." The case further stated that a similar procedure took place during the cross-examination of William Cannon, a constable who was with Sergeant M'Pherson at the time spoken to by the latter.

The following question of law was stated:—"Whether I was right in sustaining the objection of the acting fiscal to the question put to the said James M'Pherson and William Cannon as before set forth?"

Argued for the appellant;—The question was competent, and the condition imposed on it was *ultra vires*. The appellant had thus been prejudiced by reason of competent evidence having in effect been disallowed.

The respondent (the Procurator-fiscal) argued that the matter was one within the discretion of the Magistrate, with which the Court would not lightly interfere.

LORD YOUNG.—I am of opinion that the question in this case was a competent question and a very proper question to put to the police-constables, and that the Magistrate was wrong in imposing any condition upon the allowance of the question, such as that the answer should be in writing and that the agent of the accused should not make use of it in cross-examining the witness, or disclose the information in any way.

This competent evidence having been disallowed, the appeal must be sustained.

LORD TRAYNER and LORD MONCREIFF concurred.

THE COURT answered the question in the negative, sustained the appeal, and quashed the conviction.

J. DOUGLAS GARDINER & MILL, S.S.C.—CAMPBELL & SMITH, S.S.C.—Agents.

No. 3.
Dec. 6, 1900.*
Mackenzie v. Somerville.

ROBERT MACKENZIE, Complainer.—*Salvesen, Q.C.—T. B. Morison.*
GEORGE SOMERVILLE (Procurator-Fiscal, Edinburgh Burgh Court), Respondent.—*Guthrie, Q.C.—Cook.*

Police—Street—Regulation of hackney carriages—Bye-law—Ultra vires—Edinburgh Municipal and Police Act, 1879 (42 *and* 43 *Vict. cap. exxxii.*), *sec.* 304.—The Edinburgh Municipal and Police Act, 1879, sec. 304, empowers the magistrates to make from time to time "such orders and bye-laws as they shall think fit for all or any of the following purposes: (that is to say)" *inter alia*, "(1) For regulating the conduct of the owners and drivers of hackney carriages in their several employments: (7) For regulating all matters affecting or relating to the safety, comfort, or convenience of persons hiring or using hackney carriages and of the public."

* Decided July 18, 1900.

No. 3.
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The magistrates made a bye-law in the following terms:—"The driver of a hackney carriage shall not stand with the same longer than is necessary for taking up or setting down passengers on any part of the public streets not allotted as a hackney carriage stance, except at the dismissal of the theatres, assemblies, public meetings, and the like."

Held that the bye-law was not *ultra vires* of the magistrates.

A hackney cab-driver, in pursuance of a written order from the manager of a hotel to the driver's employers instructing them to send a cab to the hotel every day at a specified hour, was ordered by his employers to drive his cab to the hotel and take his orders from those in charge there. He was there told by the hotel boots to wait until he was discharged, and he waited accordingly for about an hour, when the boots told him that he was discharged. He had not been hired by anyone wishing to use his cab.

Held that the hotel manager's order did not constitute a hire of the cab, and that the cab-driver had rightly been convicted of a contravention of the bye-law.

HIGH COURT.
Lord Young.
Lord Trayner.
Ld. Moncreiff.

ON 28th May 1900 Robert Mackenzie, hackney carriage-driver, Edinburgh, was charged in the Burgh Court, Edinburgh, on a summary complaint, setting forth that he had "contravened the existing Orders and Bye-laws made, ordained, and enacted by the Magistrates of Edinburgh, for regulating the hackney carriages of Edinburgh, and the owners and drivers thereof, in terms of the powers conferred on them by 'The Edinburgh Municipal Police Act, 1879,' section 304, and particularly bye-law made by the said Magistrates on 15th December 1899,* in lieu of bye-law 35, which was repealed, in so far as, upon the 24th day of April 1900, in Princes Street, Edinburgh, opposite the Balmoral Hotel, he did stand with his hackney carriage on part of the public street not allotted as a hackney carriage stance for an hour, namely, from half-past two o'clock to half-past three o'clock in the afternoon, which was longer than was necessary for taking up or setting down passengers, said time and place above libelled not being at the dismissal of the theatres, assemblies, public meetings, or the like."

The accused objected that the bye-law mentioned in the complaint was *ultra vires* of the Magistrates. The Magistrate repelled the objection. The accused then pleaded not guilty, but, after evidence had been led, he was convicted, and fined 5s.

He brought a bill of suspension, in which he founded on an order (produced at the trial) sent to his employers, Messrs John Croall & Son, Limited, by the manager of the Balmoral Hotel on 9th April 1900, instructing Messrs Croall to send a cab to the hotel every morning at 8.30. The complainer averred that in consequence of this order he received written instructions from Messrs Croall to drive his cab every morning to the hotel at 8.30, and also at other hours specified during the day, and take his orders from those in charge at the hotel; that in accordance with these instructions he drove to the hotel at 2.30 on the day in question, and was told by the head boots at the hotel to wait until he was discharged; and that he waited accordingly until 3.30, when the head boots discharged him. The complainer did not aver that the proprietors of the hotel had paid anything to Messrs Croall for sending the cab to the hotel.

Argued for the complainer;—(1) The bye-law in question was *ultra vires*. It was not authorised by section 304 of the Act of 1879. (2)

* See rubric.

No. 3.
Dec. 6, 1900.
Mackenzie v. Somerville.

The complainer had not contravened the bye-law, assuming its validity. Construed literally, it would make it illegal for anyone to keep a cab waiting anywhere, at a house while he was calling, for example. But construing the bye-law reasonably, the complainer was entitled and bound to keep his cab waiting at the hotel door, in obedience to the orders of those in charge of the hotel. He had been hired by the hotel manager, who found it convenient to have a cab ready for any guest who might want a cab.

The respondent (the Procurator-fiscal) was not called upon.

LORD YOUNG.—I think that this is not a good objection. I think that the bye-law contains a very reasonable and sensible provision, the effect of which is that there shall be no standing by cabs on the streets of Edinburgh except on stances provided for the purpose, or for the convenience of persons who have hired cabs. This bye-law does not apply to the case of persons who have hired cabs, and an order to send a cab to this hotel is produced, and has been appealed to as justifying this cab-driver in keeping his cab at the door of the hotel from half-past eight in the morning till someone might require him. I cannot assent to that. This defender would be entitled to stand at the hotel if he was doing so in obedience to the lawful orders of a person who had hired him, but he is not entitled to stand waiting for someone to hire him, which is what he was doing here notwithstanding this so-called order. I think, therefore, this suspension should be refused.

LORD TRAYNER and LORD MONCREIFF concurred.

THE COURT refused the bill.

P. MORISON & SON, S.S.C.—PARTY—Agents.

No. 4.
Dec. 6, 1900.
Neilson v. Dunsmore.

GEORGE NEILSON (Procurator-Fiscal, Glasgow Police Court), Appellant.—*Ure, Q.C.*—*Lees.*
WILLIAM DUNSMORE, Respondent.

Public-house—Hawking exciseable liquors—Trafficking in streets—Public-Houses Acts Amendment (Scotland) Act, 1862 (25 *and* 26 *Vict. cap.* 35), *secs.* 16 *and* 37.—The Public-Houses Acts Amendment Act, 1862, enacts:—

Sec. 16—"Every person hawking spirits or other exciseable liquors shall thereby be guilty of an offence, . . . and on being convicted of such offence shall forfeit and pay a penalty not exceeding ten pounds," &c.

Sec. 37, *inter alia*—"The expression 'trafficking' shall mean and include bartering, selling, dealing in, trading in, exposing or offering for sale by retail."

"The word 'hawking' shall mean and include trafficking in or about the streets, highways," &c.

In a complaint charging a contravention of sec. 16 of the above Act, it was proved that the accused, who was a member of a club which supplied exciseable liquors to its members on Sunday, received money in a street from a man on a Sunday, went to and entered the club, and returned with a small bottle of whisky, which he handed to the man from whom he had received the money; that he procured whisky in this way for three different persons on the same Sunday; that none of these persons were members of the club; that one of them at least was previously unknown to the accused; and that the accused made a profit of 3d. on each transaction. The magistrate having found the charge not proved, the prosecutor appealed.

Held that the facts proved constituted a contravention of sec. 16 of the

statute, and warranted a conviction against the accused for hawking excisable liquor.

Dewart v. *Neilson*, 2 F. (Just. Cases) 57, *commented on.*

No. 4.

Dec. 6, 1900.
Neilson v. Dunsmore.

HIGH COURT.
Lord Justice-General.
Lord Adam.
Lord M'Laren.

ON 15th September 1900 William Dunsmore, 16 Church Place, Glasgow, was charged in the Glasgow Police Court (Northern District) on a complaint at the instance of George Neilson, the Procurator-fiscal, setting forth that the accused "did, on 26th August 1900, hawk exciseable liquor, *videlicet* whisky, by trafficking therein, between the hours of eleven o'clock forenoon and twelve o'clock noon of said date, in Garscube Road, Glasgow, with two men, whose names and addresses are to the complainer unknown, by offering for sale, and selling and supplying to each of said two men a half-mutchkin or thereby of whisky, in a glass bottle, and also by trafficking therein between the hours of twelve o'clock noon and one o'clock afternoon, in Garscube Road aforesaid, and in a close at 20 Corn Street, Glasgow, with James M'Ilvride, of 14 Roslin Place, Glasgow, by offering for sale, and selling and supplying to the said James M'Ilvride a half-mutchkin or thereby of whisky, in a glass bottle, contrary to the Laws for the Regulation of Public-Houses in Scotland, and particularly the Public-Houses Acts Amendment (Scotland) Act, 1862, sec. 16 thereof:* whereby," &c.

The accused pleaded not guilty.

After evidence had been led the Magistrate found the charge not proven, and assoilzied the accused.

The Procurator-fiscal obtained a case for appeal.

The case stated that, proof having been led for the prosecution, the respondent stated that he had no witnesses, and did not desire to give evidence on his own behalf; and that the Procurator-fiscal having been heard, the respondent stated that he did not desire to address the Court.

The following were the facts stated in the case as proved:—Two police-constables, who gave evidence for the prosecution, had taken up a position (in plain clothes) at a window on the opposite side of Corn Street from the Working Men's Club after mentioned. The respondent was frequenting Corn Street and Garscube Road during the hours mentioned in the complaint on Sunday 26th August 1900. Between eleven o'clock forenoon and twelve o'clock noon, on that day in Garscube Road, at the corner of Corn Street, he received money from a man whose name and address had not been ascertained. The respondent then proceeded to a working men's club, situated at No. 6 Corn Street, of which he was a member, and at which exciseable liquor was supplied to members on Sundays. The respondent came out of the club in five or six minutes and joined the man in question, to whom he handed a half-mutchkin glass bottle, containing a clear liquid which looked like whisky. The respondent then loitered about in Garscube Road, when another man, whose name and address had not been ascertained, handed money to the respondent, who again visited the club, and returned and handed the man last referred to a half-mutchkin glass bottle, containing a clear liquid which looked like whisky. The respondent thereafter continued to loiter in Corn Street, where, between twelve o'clock noon and one o'clock afternoon, opposite the club door, James M'Ilvride, named in the complaint, handed him 1s. 6d. in money. The respondent there-

* Quoted in the rubric.

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upon entered the club again, and on coming out in a short time he joined M'Ilvride, who proceeded with him to the close, 20 Corn Street, where the respondent handed to M'Ilvride a half-mutchkin or thereby of whisky in a glass bottle. The respondent was thereupon apprehended and taken to the police station, where he volunteered the statement that he had received 1s. 6d. from M'Ilvride to get the whisky, and that he got about threepence on each of the other two transactions, and threepence on the transaction with M'Ilvride. There was no previous acquaintanceship between the respondent and M'Ilvride, who alleged that he applied to the respondent for whisky simply because he had seen the respondent supply others.

The case further stated that, but for the decision in the recent case of *Dewart* v. *Neilson*,[1] the Magistrate would have convicted the respondent of selling whisky to M'Ilvride in contravention of the Act.

The question of law was—"Whether the facts proved are sufficient to constitute a contravention within the meaning of the Public-Houses Acts Amendment (Scotland) Act, 1862, section 16 thereof, and to warrant a conviction against the accused for hawking exciseable liquor?"

At the hearing of the appeal no appearance was made for the respondent.

LORD JUSTICE-GENERAL.—The facts of this case are short and simple. The accused Dunsmore, on the forenoon of Sunday, 26th August 1900, was hanging about for nearly two hours in the neighbourhood of a working men's club in Glasgow. On three occasions he entered into conversation with persons who seem to have been passers-by, and who, as the result of the conversations, handed him money. He then on each occasion went into the club and got a certain amount of whisky served to him in it. On returning to the street he handed this whisky to the man who had last given him money, and he kept the money to himself. It is not said that any of the three men were members of the club, and we are bound to assume that they were not. Nor is it alleged that the club was a shebeen, or that the whisky was sold illegally in it, so that we must assume that the sales were made to Dunsmore as a member of the club. Under these circumstances it does not appear to me doubtful that Dunsmore, having got the whisky as a member of the club, and handed it on to each of three men for a money payment, was trafficking in the whisky within the meaning of the Act.

The case, however, does not stop there. On each of these three transactions Dunsmore made a profit of threepence. Evidence to this effect was given in the inferior Court in his presence, and he did not take the opportunity of going into the box and denying it. We must therefore accept the statement as true. Such being the facts we do not require to consider what the law would be if Dunsmore had gone to the club and got the whisky as a messenger. I may, however, say that I do not see how, without something being wrong at the club, any messenger from a person who was not a member could have been supplied. But we have no such case here. What we have to do with is a perfectly clear case of hawking exciseable liquor by trafficking in it on the public street.

[1] July 18, 1900, 2 F. (Just. Cases) 57.

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LORD ADAM.—I am of the same opinion. The facts proved are that this man was loitering on the street near the club, received money from a man, went into the club, came out in five minutes, and was seen to hand a bottle of whisky to the man who had given him the money. This happened on two other occasions. On each occasion the accused made a profit of threepence, and it was proved that in the case of M'Ilvride, one of the three persons to whom the accused brought out whisky, there was no previous acquaintanceship between him and the accused. This is a very clear case of trafficking in liquor. With regard to the case of *Dewart* v. *Neilson*,[1] to which we were referred, I do not say anything against that decision. The facts of the case with which we are dealing are different.

LORD M'LAREN.—I have never been able to see why a club should not pay licence-duty for the sale of exciseable liquor, like any other person who trades in such liquor. I suppose that the theory is that when a member of a club gets a glass of whisky and soda, he is receiving a share in the distribution of the assets of the club. But, then, to make that theory complete it would be necessary that every other member of the club should receive an equal number of glasses in the course of the year, in order that he should receive his dividend in kind. But as the Inland Revenue does not claim licence-duty from clubs, great or small, one must assume that clubs are entitled to sell liquor to their members without contravening the licensing laws. Now, the only question put to us in this case is, whether the facts proved are sufficient to constitute a contravention of the Public-Houses Acts Amendment (Scotland) Act, 1862, section 16, and to warrant a conviction against the accused of hawking exciseable liquors. This Court does not review the decision of a Magistrate on facts. Yet if there is a legal principle involved we can answer a question put to us in this form. Having regard to the facts which the Magistrate says he held to be proved, it is a very clear case of trafficking in liquor in the public street. The Magistrate says that the case of *Dewart* v. *Neilson* [1] stood in the way of his convicting. I do not find it necessary to consider the case of *Dewart* [1] very carefully, because the Judges who decided that case were of opinion that the person charged was only a messenger, who did not participate in any act of trafficking. The question whether that principle was rightly or wrongly applied on the facts of the case of *Dewart* [1] is one with which we have nothing to do. But this principle does nothing to solve the present case. The question of contravention only arises after Dunsmore, a member of the club, had obtained the whisky by a lawful contract of purchase and sale. I assume that Dunsmore was lawfully in possession of the whisky. That being so, if he chose to give it away to his friends, it might have been a good defence that he was not disposing of it for money or gain. But we must consider what was actually done. Dunsmore proceeded to dispose of the whisky at a profit. If that is not trafficking, I should despair of finding any definition that would exclude the most flagrant and plain infringement of the statute.

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[1] 2 F. (Just. Cases) p. 57.

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Dec. 6, 1900. Neilson v. Dunsmore.

THE COURT pronounced this interlocutor:—"Answer the question in the case in the affirmative; sustain the appeal; reverse the determination of the inferior Judge, and decern."

CAMPBELL & SMITH, S.S.C., Agents.

No. 5.

Dec. 6, 1900. Santongeli v. Neilson.

CARLO SANTONGELI, Appellant.—*Salvesen, Q.C.—W. Thomson.* GEORGE NEILSON (Procurator-Fiscal, Glasgow Police Court), Respondent.—*Lees—Crabb Watt.*

Lottery—Distribution of prizes by lot or chance—Mechanism operated by spring—Glasgow Police (Further Powers) Act, 1892 (55 *and* 56 *Vict. cap. clxv.*), *sec.* 22.—The Glasgow Police (Further Powers) Act, 1892, sec. 22, enacts:—"No person shall keep, or be concerned in the keeping, management, or conduct of any place, or exercise, keep open, shew, or expose to be played, drawn, or thrown at, or in, either by dice, lots, cards, balls, or by numbers or figures, or by any other way, contrivance, or device whatsoever, any lottery."

The keeper of an ice-cream shop was charged with a contravention of this enactment. The following facts were proved:—The accused exposed on the counter of his shop a machine called the Automatic Tivoli Cigar Machine intended to be and actually used by his customers. The machine was put in operation by putting a penny in a slot, and by pressing a spring. The amount of the pressure applied to the spring determined the course taken by the penny inside the machine, and this in turn determined whether the person who had put in the penny got it back, lost it to the accused, or won from him a cigar valued at twopence. A certain amount of skill might be acquired in giving the requisite pressure to the spring, but it was not proved that the customers of the accused had any opportunity, or ever attempted, to acquire such skill. The accused was convicted.

Held on appeal that the machine as worked and used was a lottery within the meaning of sec. 22 of the Act, and that the accused had rightly been convicted.

HIGH COURT. Lord Justice-General. Lord Adam. Lord M'Laren.

On 2d October 1900 Carlo Santongeli, ice-cream dealer, 530 Gallowgate, Glasgow, was charged in the Eastern Police Court, Glasgow, on a complaint at the instance of the Procurator-fiscal setting forth that the accused "did on the 8th day of September 1900, in the shop occupied by him at 530 Gallowgate, Glasgow, keep, shew, and expose, a lottery, consisting of a box enclosing a mechanical contrivance, with seven receptacles, put into action by any person inserting a penny in a slot, which penny is thrown upwards by a spring set in motion by the person desirous of trying for the prize offered on said lottery, viz., a cigar (as said prize may be determined by lot or chance by the said penny falling into the centre receptacle in said machine); and that said accused did, date above libelled, suffer Ernest Smith, of 18 Garriochmill Road, Glasgow, to exercise said lottery by the insertion of a penny in the slot, in which lottery cigars to the value of twopence, deliverable forthwith by the said accused, were offered as prizes aforesaid, contrary to the Glasgow Police Acts, particularly the Glasgow Police (Further Powers) Act, 1892, section 22,* whereby" &c.

* The Glasgow Police (Further Powers) Act, 1892 (55 and 56 Vict. cap. clxv.), sec. 22, enacts:—"No person shall keep, or be concerned in the keeping, management, or conduct of any place, or exercise, keep open, shew, or expose to be played, drawn, or thrown at, or in, either by dice,

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The accused objected to the relevancy of the complaint on the ground that there was no proper description of a lottery under the Act in the body of the complaint. The Magistrate repelled the objection. The accused then pleaded not guilty, but, after evidence had been led, was convicted and admonished.

He obtained a case for appeal. The case stated that the accused on the date libelled kept on the counter in his shop, exposed so as to be available to customers, a box produced in evidence by the Procurator-fiscal, known as the Automatic Tivoli Cigar Machine. "That said box enclosed a mechanical contrivance with seven receptacles, put into action by any person inserting a penny in the slot, which penny is thrown upwards by a spring set in motion by the person desirous of trying for the prize offered—viz., a cigar—as said prize may be determined by the said penny falling into the centre receptacle in said machine; that said penny, when discharged by said spring, falls, according to the strength of the spring applied by the person using it, into one of the three channels or courses into which the face of the machine is divided. If the penny falls into the centre channel it drops into said centre receptacle (becoming then the property of the accused), and a ticket falls out of a slot below said centre receptacle, which entitles the said person operating to get forthwith a cigar valued twopence from said accused. If, however, it falls into either of the said side channels, it passes in and out, between a number of pins, and drops into one of the three receptacles immediately below each of said side channels. If it falls in the centre receptacle of said side channels it returns to the person operating through another slot immediately below same; but if it falls in either of the side receptacles of said side channel, then it drops into a till in the bottom of the machine, becoming then the property of the accused. That by practice a certain amount of skill may be gained in putting the amount of force into said spring necessary to send the penny into said centre channel; but if the penny enters either of the side channels it is then a matter of chance whether it will fall into the centre receptacle of said side channel and be returned to the person who inserted it in the slot, or fall into one of the side receptacles of said side channel, and drop into said till." Then followed a statement of facts shewing that the accused suffered Ernest Smith, mentioned in the complaint, to use the machine.

The following were the questions of law:—"*First*, Whether said complaint is relevantly stated, and *second*, whether, on the facts held by me as proved, I was right in finding that said machine was a lottery under section 22 of the Glasgow Police (Further Powers) Act, 1892, and in convicting said accused as I did?"

Argued for the appellant;—The complaint was irrelevant, because the *species facti* alleged shewed there was not a lottery, but at most a game. A lottery might, for instance, be determined by the throw of dice, but betting between two persons on the throw of dice was not a

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lots, cards, balls, or by numbers or figures, or by any other way, contrivance, or device whatsoever, any lottery, and no person shall suffer to be exercised, kept open, shewn, or exposed to be played, drawn, or thrown at, or in, either by dice, lots, cards, balls, or by numbers or figures, or by any other way, contrivance, or device whatsoever, any such lottery in any place; and any person contravening the provisions of this section shall for every offence be liable to a penalty not exceeding £10."

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lottery, but a game. Here there were only two persons, and what was said to be done by means of the machine was betting (with odds in favour of the higher stake) between the member of the public who put his penny in the slot and the accused. It was against all common use of language to describe a mechanical contrivance of this kind as a lottery. 2. On the facts the Magistrate had held that "a certain amount of skill" might be acquired in so manipulating the spring as to secure a prize. In England, under the Gaming Act, 1802[1] (the language of which was similar to that of sec. 22 of the Glasgow Police Act, 1892), it had been held that if the determination of the prize was not entirely a matter of chance, there was no lottery, and, accordingly, that a distribution of prizes among the persons who would most successfully name the winners of certain future horse races was not a distribution "by chance," and so not a lottery.[2] Again, a prize for the most approximately correct prediction of the number of births and deaths in London during a particular week was not a lottery, since knowledge of statistics and skill in dealing with them entered into the matter.[3] On the other hand, where the charge was under the Betting Act, 1853, it was immaterial whether skill entered into the betting or not.[4] Cases under that Act had thus no application to the case of lotteries. The terms of the conviction and complaint in this case were inconsistent with the finding in fact that skill might be acquired in using the spring.

Argued for the respondent;—Practically the winning of a prize by this machine was a matter of pure chance; it was not sufficient that an infinitesimal element of skill should enter into the competition. In the "missing word" competitions an appropriate word had to be selected, but the number of possible words was so large that the Court were satisfied that chance was the main element, and that the competition was a lottery.[5] The combination of a number of persons did not appear to be necessary to constitute a lottery.[6] This was a "distribution of prizes by chance," and was as clearly a lottery as the distribution of coupons to purchasers of a pound of tea was in *Taylor's*[6] case. The context of the section shewed that what might be properly called games were to be treated as lotteries, *e.g.*, things that were to be thrown at with a ball, and it was plain that less skill would enter into the working of this machine than in taking aim with a ball thrown by the hand.

LORD JUSTICE-GENERAL.—The question depends upon the true construction of section 22 of the Glasgow Police (Further Powers) Act of 1892. The mechanism and what is done with it are clearly described by the Magistrate in the case. The box encloses a mechanical contrivance with seven receptacles, put into action by any person inserting a penny in the slot, which penny is thrown upwards by a spring set in motion by the person desiring to try for the prize offered, viz., a cigar. The penny when discharged by the spring, falls, according to the strength of the spring

[1] 42 Geo. III. cap. 119, sec. 2.

[2] Caminada v. Hulton, 1891, 60 L. J. Mags. Cases, 116; Stoddart v. Sagar, L. R. [1895], 2 Q. B. 474.

[3] Hall v. Cox, L. R. [1899], 1 Q. B. 198.

[4] The Queen v. Stoddart, Nov. 17, 1900, 17 Times Law Reports, 55.

[5] Barclay v. Pearson, L. R. [1893], 2 Ch. 154.

[6] Taylor v. Smetten, 1883, L. R., 11 Q. B. D. 207.

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applied by the person using it, into one of three channels or courses into which the face of the machine is divided. If it falls into the centre channel, it drops into the centre receptacle (becoming the property of the accused), whereupon a ticket falls from a slot entitling the person operating to a cigar valued 2d. If the penny falls into either of the side channels it passes in and out between a number of pins, and drops into one of the three receptacles immediately below each of the side channels. If it falls in the centre receptacle of the side channel, it returns to the person operating through another slot immediately below the same; but if it falls in either of the side receptacles of the side channel, it drops into a till in the bottom of the machine, becoming the property of the accused. The Magistrate says that "by practice a certain amount of skill may be gained in putting the amount of force into said spring necessary to send the penny into said centre channel; but if the penny enters either of the side channels it is then a matter of chance whether it will fall into the centre receptacle of said side channel and be returned to the person who inserted it in the slot, or fall into one of the side receptacles of said side channel and drop into said till." To this state of facts we have to apply the words of section 22 of the Glasgow Police Act of 1892. These words are:—(His Lordship quoted the section). We have not here to determine what is comprehended under the term lottery by going to a dictionary or applying our common knowledge, because the things which for the purposes of this Act are or constitute a lottery are fully described in the section. If a thing is within the description of this section, then it is a lottery for the purposes of the Act whether or not it is a lottery for other purposes. The operation is performed by the pressing of the spring; the penny goes into different places according to the amount of pressure applied to the spring, and the course of the penny determines the winning or losing of the prize. Counsel for the appellant maintained that this was a matter of skill and not of chance, or that, in any event, skill entered into it as a material ingredient. It is true that the Magistrate mentions that a certain amount of skill may be brought to bear on the operation of this machine, but I do not think it is possible to read the description of the machine which the Magistrate gives, and to follow the clear exposition of its working we have had from the bar, without seeing that for practical purposes it is mainly and substantially a matter of chance where the penny will go. Its course is determined by mechanical forces, but it will be difficult, or practically impossible, for the ordinary frequenters of an ice-cream shop to calculate these, so that the precise direction which the penny will take is for all practical purposes a matter of chance. It is plain from the other parts of the section that things which are more dependent upon the skill or strength or knowledge of the operator, *e.g.*, throwing balls or other things at objects put up, are lotteries within the meaning of it. I am therefore of opinion that the Magistrate was right in holding that this mechanism, as worked and used, was a lottery within the definition of section 22.

It was argued that the term lottery involves the idea of the distribution by chance of a fund to which a number of persons contribute. The idea of contribution and distribution, with a profit to the keeper of the lottery, is historically familiar, but to say that nothing can be a lottery which does

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not involve contribution and distribution is against the ordinary use of language. Almost everything which is struck at by section 22 takes place solely between the person who keeps the lottery and the person who deals with him. There may be more than two persons engaged, but more than two persons are not required.

LORD ADAM.—The question is, what is the meaning of the term lottery as used in section 22 of the Glasgow Police Act of 1892. Lottery as defined in the dictionaries (Century Dictionary) has two meanings—(1) the distribution of anything by lot, or the determination of anything by chance. This is the general sense. (2) A scheme for raising money by selling chances to share in a distribution of prizes. This is the secondary sense. The term as used in section 22 is employed in the first sense, and taken in that sense it covers this machine, which substantially is a game of chance and nothing else. It is said that a lottery must be a game into which no skill can enter, and that the moment skill becomes an ingredient it ceases to be a lottery. I agree that a game of skill is not a lottery, but I demur to the view that a minimum of skill possible in a game of chance prevents the game from being a lottery. This machine does not cease to be a lottery because someone—perhaps the proprietor—has by assiduous practice acquired a certain skill in operating it. It is exposed to the public to be used by the public, and members of the public have no opportunity of acquiring skill at it by practice. To them its working depends wholly on chance.

LORD M'LAREN.—I should not have been sorry if we could have seen our way to set aside this conviction. It seems to me that the putting of a penny in the slot of this machine on the chance of getting a cigar is such a very mild form of speculation that it can do no harm to anyone. But the question whether it is desirable to prosecute in cases of this kind is one for the magistrates, and is not a matter which can enter into the determination of this Court. I agree that this mechanism is to all intents and purposes an instrument of chance. It is true that a certain amount of skill may be acquired in the working of this machine, but the machine is not constructed to develop or to exercise skill. It would also be very unlikely that members of the public frequenting the restaurant should have such opportunities of practice as would develop skill in the use of the machine. I have more difficulty on the other question raised—whether this is a lottery. This enactment is not happily worded. It suggests that a lottery may be a material thing to be thrown at. I consider that in the true literary sense of the term, and also according to ordinary usage, a lottery is the distribution of a prize or a definite number of prizes among people who buy tickets on the chance of getting a prize. I agree, however, with what your Lordship has said about the construction of the statute. It is intended to apply to certain known forms of amusement. It treats as a lottery equally a thing which may be played, drawn, or thrown at, and covers such familiar applications of chance as are known to be made by instruments in which balls or counters of any kind are used and the result is determined by chance. In this extended sense of the word lottery, required by the context of this

enactment, I am of opinion that the accused was guilty of a contravention of the statute, and that the conviction should be sustained. No. 5. Dec. 6, 1900. Santongeli v. Neilson.

THE COURT pronounced this interlocutor:—"Answer both questions in the case in the affirmative; sustain the appeal, and decern."

W. & J. BURNESS, W.S.—CAMPBELL & SMITH, S.S.C.—Agents.

JAMES ALLAN, Complainer.—*F. T. Cooper.*
ROBERT LAMB (Procurator-Fiscal, Aberdeen Police Court), Respondent.—*Guthrie, Q.C.—W. Brown.*

No. 6. Dec. 7, 1900. Allan v. Lamb.

Review—Suspension—Mora.—Suspension of a conviction on a summary complaint *refused* on the ground that ten months had elapsed since the conviction had been obtained and the fine paid without protest, and that there was no satisfactory explanation of the delay.

Conviction and Sentence—Competency in form—Sentence on two or more persons.—A conviction and sentence on a summary complaint found the accused A and B guilty of the crimes charged: "Therefore fines and amerciates them in the sum of twenty shillings sterling each, . . . and unless said fines are instantly paid by them respectively, decerns and adjudges the said A and B to be imprisoned for the space of ten days each, unless said fines shall be sooner paid." The fines were paid.

In a suspension of the conviction on the ground that under it both A and B were liable to imprisonment if either failed to pay the fine, *opinion* (by Lord M'Laren) that the objection was good.

HIGH COURT. Lord Justice-General. Lord Adam. Lord M'Laren.

ON 11th January 1900, upon a summary complaint in the Police Court at Aberdeen, charging James Allan, spirit-dealer, Menzies Road, and Kenward Kinnair, barman, Victoria Road, both of Aberdeen, with assault and breach of the peace, Robert Lamb, procurator-fiscal, obtained a conviction and sentence in the following terms:—

"The Magistrate, in respect of the evidence adduced, finds the said James Allan and Kenward Kinnair guilty of the crimes of assault and breach of the public peace as charged: Therefore fines and amerciates them in the sum of twenty shillings sterling each, to be paid to the complainer and disposed of in terms of law, and unless said fines are instantly paid by them respectively, decerns and adjudges the said James Allan and Kenward Kinnaird to be imprisoned for the space of ten days each, unless said fines shall be sooner paid, and thereafter to be set at liberty; and for that purpose grants warrant to officers of law to convey them to the prison of Aberdeen, thereafter to be dealt with in due course of law."

On 13th November 1900 Allan presented a bill of suspension in which he craved the Court to suspend the above conviction and sentence, *inter alia*, "in respect that it ordered the imprisonment of both parties complained against in the event of either failing to pay the fine imposed upon him."

At the hearing the respondent, the procurator-fiscal, maintained that the complainer was barred by *mora* in bringing the suspension.

The only statement by the complainer in the bill of suspension as to the delay in bringing the conviction under review was a statement to the effect that owing to circumstances specified, the complainer's agent was, through inadvertence, too late in applying for a stated

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case, and "the complainer was thus prevented from bringing the conviction under review by way of a stated case."

On the question of *mora* the undernoted cases were cited.[1]

LORD JUSTICE-GENERAL.—Only one of the objections stated to this conviction deserves serious consideration, viz., the objection to the form in which the adjudication of imprisonment was made. The question we have to consider is, whether the words used did not decern that both of the two persons convicted should be imprisoned if either of them failed to pay his fine. This objection might have been serious if it had been taken timeously. When we come, however, to look at the dates, we find that the sentence was on 11th January 1900, and that the bill of suspension was not presented till 13th November 1900. For more than ten months the suspender allowed the conviction to stand, and made no complaint. The fines were promptly paid, and though I do not attribute great importance to the fact that they were paid without protest, it makes the objection a highly technical one. I think that such an objection, with no substantial interest behind it, should, if it is to prevail, be stated within a reasonable time, and not only after an interval of more than ten months. Accordingly, I am of opinion that the suspension should be refused.

LORD ADAM.—The only objection of any weight submitted to us was as to the form of the sentence. If this objection had been taken timeously it might have been successful. As it is, no injustice has been done, so that the objection is quite technical. The cases cited by Mr Brown entirely support the view that such an objection must be brought without any undue delay. It is a matter for the Court to consider what delay is reasonable in the circumstances. I agree that a delay of ten months without explanation is unreasonable.

LORD M'LAREN.—If this bill of suspension had been brought within a reasonable time, I should have been disposed to regard the objection to the conviction as good. The conviction fines each of the persons convicted, and then provides that unless both pay the fines each shall suffer imprisonment. In this case no injustice resulted from the error, because the fines were paid. Nevertheless, if a suspension had been brought within a reasonable time, such a technical objection as this might have been fatal to the conviction. In the Court of Justiciary, where two or more persons are prosecuted under the same indictment, the practice is that each sentence is complete in itself, and it is better not to attempt to combine them as is done here.

Prima facie every convicted person who pays a fine must be held to have acquiesced in the sentence unless he has made a protest. In the absence of a protest indulgence will be granted only if he takes steps to

[1] *For the Complainer*:—Bonthrone v. Renton, Nov. 19, 1886, 1 White, 279; Murray v. Jones, June 17, 1872, 2 Coup. 284, 44 Scot. Jur. 458; French v. Smith, June 25, 1855, 2 Irv. 198, 27 Scot. Jur. 499. *For the Respondent*:—M'Lure v. Douglas, Jan. 31, 1872, 2 Coup. 177, *per* Lord Cowan at p. 181, 44 Scot. Jur. 238; Russel v. Sprot and Lang, Jan. 25, 1845, 2 Broun, 385; Skinner v. Adamson, March 12, 1842, 1 Broun, 67.

bring the matter before this Court within a reasonable time. This is especially true in cases like the present, where the objection is purely technical. No. 6. Dec. 7, 1900. Allan v. Lamb.

THE COURT refused the bill.

DAVIDSON & MACNAUGHTON, S.S.C.—ALEX. MORISON & Co., W.S.—Agents.

No. 7. Dec. 10, 1900. Stirling v. Dickson.

JAMES ALEXANDER STIRLING, Complainer.—*Clyde—W. Thomson.*
JAMES BIRNIE DICKSON (Procurator-Fiscal of Argyllshire), Respondent.—*Mackenzie, Q.C., A.-D.—Younger, A.-D.*

Procedure—Instance—Procurator-Fiscal of Sheriff Court—Public-Houses Acts Amendment (Scotland) Act, 1862 (25 *and* 26 *Vict. cap.* 35), *sec.* 25.—*Held* that section 25 of the Public-Houses Acts Amendment (Scotland) Act, 1862, does not exclude the instance of the Procurator-fiscal of a Sheriff Court to prosecute complaints in his Court for contraventions of the Act.

Procedure—Complaint—Inducice—Statute—Repeal—Public-Houses Acts Amendment (Scotland) Act, 1862 (25 *and* 26 *Vict. cap.* 35), *sec.* 18—*Home Drummond Act*, 1828 (9 *Geo. IV. cap.* 58), *sec.* 23—*Summary Procedure (Scotland) Act*, 1864 (27 *and* 28 *Vict. cap.* 53), *secs.* 3 *and* 6—*Statute Law Revision Act*, 1893 (56 *Vict. cap.* 14), *sec.* 1.—By sec. 23 of the Home Drummond Act, 1828, complaints charging a breach of certificate are to be tried on *inducice* of six free days. The Public-Houses Acts Amendment (Scotland) Act, 1862, sec. 26, incorporates the procedure of the Home Drummond Act, "except where inconsistent with the provisions and conditions of this Act." By sec. 18 of the Act of 1862 complaints charging any contravention of the Act except breach of certificate are to be tried on *inducice* of not less than forty-eight hours. The Summary Procedure (Scotland) Act, 1864, enacts (secs. 3 and 6), that all complaints brought under that Act should be tried on *inducice* of not less than forty-eight hours. The Statute Law Revision Act, 1893, repealed the above provision in sec. 18 of the Public-Houses Acts Amendment (Scotland) Act, 1862.

In a suspension of a conviction on a complaint, under the Summary Procedure (Scotland) Act, 1864, charging trafficking without a certificate contrary to the Public-Houses Acts Amendment (Scotland) Act, 1862, sec. 17, *held* that the repeal of sec. 18 of the Public-Houses Acts Amendment (Scotland) Act, 1862, did not make applicable the *inducice* of six free days provided by sec. 23 of the Home Drummond Act, and that the complaint had competently been tried on *inducice* of not less than forty-eight hours, in terms of the Summary Procedure (Scotland) Act, 1864.

HIGH COURT. Lord Justice-General. Lord Adam. Ld. M'Laren.

ON 13th November 1900 James Alexander Stirling was convicted, by the Sheriff-substitute (Shairp) in the Sheriff Court at Inveraray, on a complaint under the Summary Jurisdiction (Scotland) Acts, 1864 and 1881, and the Criminal Procedure (Scotland) Act, 1887, at the instance of James Birnie Dickson, Procurator-fiscal of the Sheriff Court, charging the accused with trafficking in exciseable liquors in the shop occupied by him in Pretoria Crescent, Thomnaboid Road, Dunoon without having obtained a certificate in that behalf, contrary to the Public-Houses Acts Amendment (Scotland) Act, 1862, sec. 17.

Stirling brought a suspension upon, *inter alia*, the following grounds.* (Stat. 2) Before the accused pleaded in the Sheriff

* The following statutory enactments were referred to :—

The Home Drummond Act, 1828 (9 Geo. IV. cap. 58), sec. 23, empowers any person to make complaint setting forth a breach of certificate, "and thereupon the Sheriff or Bailie or the Justices to or before whom such complaint shall have been made, shall grant a warrant to the officers of

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Court his agent "objected to the complaint in respect that respondent had no title to sue, and that the complaint for such an offence should have been at the instance of the Fiscal specially appointed to prosecute such offences, viz., the Justice of Peace Fiscal for the Cowal District of Argyllshire. The Minute-Book of the Quarter Sessions of the Peace for Argyllshire was produced, wherein is recorded the resolution of the said Justices held at Inveraray on 7th March 1893, appointing Mr William Disselduff, writer, Dunoon, to be the procurator-fiscal of their Court for the district of Cowal, in which Dunoon is situated, and to be the prosecutor under sections 25 and 30 of the Public-Houses Acts Amendment (Scotland) Act, 1862. Such an appointment, . . . excluded the right of the respondent to sue as prosecutor for the public interest. The respondent having therefore no right under the statutes nor at common law to prosecute, the complaint was radically defective, and should have been dismissed." (Stat. 3) "The complainer's agent also objected to the *inducie* of citation being insufficient—it was five days, whereas, in terms of 9 Geo. IV. cap. 58, sec. 23, the complainer was entitled to an *inducie* of at least 'six free days.' The complaint was served on

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Court to summon the party complained against to appear at a time and place to be specified in such warrant and summons (such summons being served at least six free days before the diet of appearance), to attend the hearing of such complaint. . . ."

The Public-Houses Act Amendment (Scotland) Act, 1862 (25 and 26 Vict. cap. 35), recites, *inter alia*, the Home Drummond Act, 1828, and enacts:—

Sec. 18—"In the case of any person complained of for any offence against the recited Acts or this Act, excepting for breach of certificate, it shall be lawful for any Sheriff or any one Justice or Magistrate to or before whom such complaint shall have been presented, unless by this Act otherwise provided, to grant warrant for summoning the person complained of, upon an *inducie* of not less than forty-eight hours, to appear to answer such complaint at a time and place to be therein specified. . . ."

Sec. 25—"Every person who, after the passing of this Act, shall commit any breach of certificate, or who shall in any other manner offend against either of the recited Acts or this Act, shall be prosecuted, and all penalties, together with the expenses of prosecution and conviction to be ascertained on conviction, shall be recovered, unless by the Act otherwise specially directed or authorised, before the Sheriff or any two or more Justices of the Peace of the county, or any magistrate of the burgh having jurisdiction in the county or burgh as the case may be, in which such offender shall reside or such offence shall have been committed, at the instance of the procurator-fiscal, or of such other party as shall be specially appointed to prosecute such class of offences by the Justices of the Peace of the county, in General Quarter Sessions assembled, or the magistrates of the burgh, as the case may be, and which appointment they are hereby specially authorised to make; and such Justices of the Peace in General Quarter Sessions, or magistrates, as the case may be, shall from time to time fix a reasonable sum in name of salary, or a reasonable rate of remuneration by fees for prosecutions, and all other business under this Act, to be paid annually to such procurator-fiscal or other party appointed to prosecute as aforesaid. . . ."

Sec. 26—"Every offence committed against the recited Acts and this Act, or any of them, may, except where inconsistent with the provisions and conditions of this Act, be tried and determined in a summary manner . . . before the Courts, and subject to the provisions and conditions provided in the said recited Acts or either of them. . . ."

Sec. 30—"For the purpose of trying offences against the recited Acts or

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the 7th November 1900 at 11 o'clock A.M., and the diet was held on the 13th day of November at 12 o'clock noon, not leaving six free days between the service and the diet. The complainer, residing at Dunoon, had to travel to the Court of Inveraray, and required the full *inducie* to arrange and prepare for his defence. The *inducie* of the complaint was irregular and illegal, and was a substantial deviation from statutory enactment. The Sheriff, however, repelled both the above preliminary pleas."

Argued for the complainer;—(1) The procurator-fiscal of the Sheriff Court had no title to bring a complaint for a contravention of the Public-Houses Acts Amendment (Scotland) Act, 1862. Where a person had been specially appointed to prosecute under sec. 25 of the Act, as had been done here, he alone had a title to prosecute. The provision as to the payment of the prosecutor, and the whole scheme of the Act, made it clear that prosecutions were to be entrusted exclusively to a specially appointed officer. The working of the Act in the county would otherwise be thrown into confusion. (2) There ought to have been at least six clear days' *inducie*. No doubt, so long as sec. 18 of the Act of 1862 stood *inducie* of at least forty-eight hours were sufficient. But that part of sec. 18 had been repealed, which let in sec. 23 of the Home Drummond Act. The Statute Law Revision Act, 1893, neither saved the procedure of sec. 18, for that was repealed, nor did it save the procedure of the Summary Procedure Act, 1864, for that procedure had never applied, being excluded by sec. 18.

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this Act, except in cases of breach of certificate and of imposing penalties and declaring forfeitures under the same, the expressions 'Magistrates of any Burgh,' 'Magistrate,' and 'Magistrates,' shall include any Judge officiating in any Court for the trial of police offences under the provisions of any local or general Police Act; and all such offences committed within the jurisdiction of any such Judge may be tried by and before him in any such Court at the instance of the procurator-fiscal or other party acting as prosecutor under the twenty-fifth section of this Act. . . ."

The Summary Procedure (Scotland) Act, 1864 (27 and 28 Vict. cap. 53), enacts:—

Sec. 3—"The provisions of this Act may be applied to," *inter alia*—

"(2) All proceedings to be taken before any Sheriff, Justices or Justice, or Magistrate, in Scotland for the prosecution of any person who has committed or is charged with having committed any offence or act for which, under the provisions of any Act of Parliament he is liable, upon summary conviction before any Sheriff, Magistrate, Justices or Justice, to be imprisoned or fined, or otherwise punished, or to be ordered to do or perform any act, and to be imprisoned in default of performance."

Sec. 6—"On such complaint [*i.e.*, under the Act] being laid before the Court, it shall be lawful for the Court to grant warrant to cite the respondent . . . to appear before the Court on *inducie* of not less than forty-eight hours. . . ."

The Statute Law Revision Act, 1893 (56 Vict. cap. 14), sec. 1, repealed, *inter alia*, the portion above quoted of sec. 18 of the Public-Houses Acts Amendment (Scotland) Act, 1862, subject to the proviso that "the repeal of any words or expressions of enactment described in the said schedule shall not affect the binding force, operation, or construction of any statute, or of any part of a statute, whether as respects the past or the future . . . nor shall this Act affect any principle, rule of law or equity, or established jurisdiction, form or course of pleading, practice, or procedure, or the general or public nature of any statute. . . ."

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Argued for the respondent;—(1) The jurisdiction of the Sheriff to try complaints for contravention of the Act of 1862 was clear on the face of sec. 18, and the instance of the procurator-fiscal of the Sheriff Court to prosecute complaints before the Sheriff would be excluded only by express language or necessary implication,[1] neither of which was to be found here. (2) The general provision of the Summary Procedure Act of 1864 had made the special provision of sec. 18 of the Public-Houses Acts Amendment Act of 1862 superfluous, and the only effect of the repeal of sec. 18 by the Statute Law Revision Act, 1893, was to sweep away this superfluity. The saving clause of the Act of 1893 was intended to save, and saved, general rules as to procedure such as that in the Summary Procedure Act of 1864.

LORD JUSTICE-GENERAL.—We have called for a reply on two points only. These two points are—(1) Whether there was the proper *induciæ*. (2) Whether the Sheriff's procurator-fiscal was entitled to prosecute.

In regard to the *induciæ* I think all complication disappears upon a consideration of the sections applicable to the point. The Public-Houses Acts, 1862, by section 18 provided for a forty-eight hours' *induciæ* in these cases. It was argued that this part of the section having been repealed by the Statute Law Revision Act of 1893, the long *induciæ* applicable to other cases came to apply to this, because there was no other *induciæ* provided. But we have in the Summary Procedure Act, 1864, a provision applicable to all statutory offences not otherwise provided for. I have no doubt that the part of section 18 referred to was repealed because the general provision of the Act of 1864 rendered it unnecessary.

As to the title of the procurator-fiscal, it seems to me that the only reasonable reading of section 25 is, that in each of the three Courts mentioned in the section the procurator-fiscal of that Court is to prosecute, and that it is competent for the Sheriff's fiscal to prosecute in the Sheriff's Court. It has been said that there is no provision made for his expenses, the expenses of the Justice of Peace fiscal or Magistrates' fiscal being alone provided for. But I do not think that this circumstance can affect the construction of the words which confer jurisdiction upon the Sheriff and provide for prosecution before him.

LORD ADAM.—I concur. The only observation I wish to make is about the title to prosecute. There are three Courts enumerated in the section—the Sheriff, Justice of Peace, and Magistrates' Courts. Then it is said the prosecution may be at the instance of the procurator-fiscal or other party specially appointed by the Justices in the county or Magistrates in the burgh. There is no power given to the Sheriff to appoint a prosecutor in his Court *pro hac vice*. Further, it is only to the Justices and Magistrates that power is given to fix a salary or fees for the payment of the procurator-fiscal or person appointed by them. It follows that the procurator-fiscal in the Sheriff Court has no means provided for his payment. The conclusion I draw is that the Legislature did not wish to encourage prosecutions

[1] M'Arthur v. Linton, Feb. 13, 1864, 2 Macph. 659, 36 Scot. Jur. 310; Nicholson v. Yoole, July 10, 1885, 12 R. (Just. Cases) 46, 5 Coup 628.

in the Sheriff Court, but at the same time it did not deprive that Court of jurisdiction or the procurator-fiscal of power to prosecute before it. No. 7.

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LORD M'LAREN.—I concur in what has been said by your Lordship in the chair, and in the additional observations of Lord Adam. I think it extremely probable that the framers of this Act had in view that the provisions of the Act would be enforced mainly by the Justices' and the Magistrates' Courts; but I agree that it conferred jurisdiction upon the Sheriff, and gave a right to the Sheriff's procurator-fiscal to prosecute before the Sheriff Court.

I wish to add, that if ever there was a case where it was right to bring the prosecution before the Sheriff, I think this was such a case. It was a case which was suitable to be tried before an experienced Judge and a lawyer.

THE COURT refused the bill.

JAMES PURVES, S.S.C.—CROWN AGENT—Agents.

ALEXANDER MARSHALL, Complainer.—*A. S. D. Thomson—W. Thomson.* No. 8.

CHARLES STEUART PHYN, Respondent.—*Dundas, Q.C.—Chree.*

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Fishing—Salmon-fishing—Solway—Complaint—Relevancy—"Owner"—Time—Penalty—Salmon Fishery Act, 1861 (24 *and* 25 *Vict. cap.* 109), *sec.* 11—*Salmon Fisheries (Scotland) Act*, 1862 (25 *and* 26 *Vict. cap.* 97), *sec.* 33.—The Salmon Fishery Act, 1861—an English Act—sec. 11, enacts, —"No fixed engine of any description shall be placed or used for catching salmon in any inland or tidal waters; and any engine placed or used in contravention of this section may be taken possession of or destroyed; and any engine so placed or used, and any salmon taken by such engine, shall be forfeited, and in addition thereto the owner of any engine placed or used in contravention of this section shall, for each day of so placing or using the same, incur a penalty not exceeding ten pounds; and for the purposes of this section a net that is secured by anchors, or otherwise temporarily fixed to the soil, shall be deemed to be a fixed engine. . . ."

The Salmon Fisheries (Scotland) Act, 1862, sec. 33, enacts that the provisions of the Salmon Fishery Act, 1861, "shall extend and apply to salmon fisheries in the waters and on the shores of the Solway Firth, situate in Scotland, as the same may be fixed by authority of this Act, and to the rivers flowing into the same, in so far as such provisions relate to the use of fixed engines for the taking of salmon: provided that all offences against such provisions shall be prosecuted and punished as directed by this Act."

A summary complaint set forth that the accused "did, between 2d July and 8th August 1900," at a specified *locus* in the Scottish portion of the Solway, "place and use for catching salmon" certain fixed engines described, "and did by means thereof take and kill 64 fish of the salmon kind" contrary to the Salmon Fisheries Act, 1861, sec. 11, made applicable to the *locus* libelled by the Salmon Fisheries (Scotland) Act, 1862, sec. 33; and prayed to have the accused adjudged to suffer the penalties provided by the "said Act."

Objections—(1) that the complaint charged as an offence something, viz., the taking of salmon, which was not an offence under section 11 of the Act of 1861; (2) that the specification of the time of the alleged offence was insufficient; and (3) that the prayer was ambiguous—*held* to be ill founded.

Held, further, that a complaint charging a contravention of section 11

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of the Salmon Fisheries Act, 1861, as applied to Scotland by the Salmon Fisheries (Scotland) Act, 1862, sec. 33, need not set forth that the accused was the "owner" of the engines specified in the complaint.

Opinions that the "owner" in the sense of the Act is the person having the control of the engines.

Fishings—Salmon-fishing—Sentence—Penalty—"Shall"—Salmon Fisheries (Scotland) Act, 1862 (25 *and* 26 *Vict. cap.* 97), *sec.* 32.—The Salmon Fisheries (Scotland) Act, 1862, sec. 32, enacts,—"The penalties incurred under this Act shall in all prosecutions at the instance of the clerk of any District Board be payable to and recoverable by such clerk, and shall in all other cases be paid and applied in such manner as the Sheriff or Justices may direct. . . ."

A person charged at the instance of the clerk of a District Fishery Board with a contravention of the Salmon Fisheries (Scotland) Act, 1862, was convicted and adjudged to pay a penalty to the Clerk of Court.

In a suspension *held* that the direction to pay the penalty to the Clerk of Court was a direction for the convenience of the accused, the duty of the Clerk of Court being to hand over the money to the Clerk of the District Board, and that the sentence was unobjectionable.

Record—Note of Documentary Evidence—Book—Plan—Summary Procedure (Scotland) Act, 1864 (27 *and* 28 *Vict. cap.* 53), *sec.* 16.—The Summary Procedure (Scotland) Act, 1864, sec. 16, enacts,—". . . The record shall set forth, in the form of the Schedule (I) to this Act annexed, . . . the names of the witnesses, if any, examined, . . . with a note of any documentary evidence that may be put in."

At the trial upon a summary complaint two witnesses when giving evidence used a business book to refresh their memory by referring to it, and a third witness gave his evidence with reference to a plan in his possession. The book and the plan were laid on the table and left there by the witnesses. No motion was made that the book or plan should be noted on the record, and they were not so noted.

Held that the omission to note the book and plan on the record did not invalidate the conviction.

HIGH COURT. Lord Justice-General. Lord Adam. Lord M'Laren.

ON 5th September 1900 Alexander Marshall, fisherman, Fisher's Hut, Caerlaverock Parish, Dumfriesshire, was charged in the Sheriff Court at Dumfries, on a complaint under the Summary Jurisdiction (Scotland) Acts, 1864 and 1881, and the Criminal Procedure (Scotland) Act, 1887, at the instance of Charles Steuart Phyn, solicitor, Dumfries, clerk to the Nith District Fishery Board, setting forth that the accused "did between 2d July and 8th August 1900, in tidal waters on the Blackshaw Bank on the side of the River Nith in the parish of Caerlaverock, Dumfriesshire, which flows into the Solway Firth, place and use for catching salmon two ranges of fixed engines known as paidle nets, one of the ranges containing three pockets or chambers, and the other two pockets or chambers, and did by means thereof take and kill 64 fish of the salmon kind, contrary to the Act 24 and 25 Victoria, cap. 109, section 11, made applicable to the *locus* above libelled, conform to the Salmon Fisheries (Scotland) Act, 1862, section 33,* as amended by the Act 26 and 27 Victoria, cap. 50, section 3: Whereby the said Alexander Marshall is liable to forfeiture of said nets, and, in addition thereto, to a penalty of £10 for each day of so placing or using the same, and for the expenses of prosecution, and, failing payment of said penalty and expenses, to poinding or imprisonment for recovery thereof in terms of the 28th section of the said Salmon Fisheries (Scotland) Act, 1862, said imprisonment

* See rubric.

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being modified in terms of the 6th section of the Summary Jurisdiction (Scotland) Act, 1881."

The complaint prayed the Sheriff to grant warrant to cite the accused, "and thereafter to convict him of the aforesaid contravention; and to adjudge him to suffer the penalties provided by the said Act."

Marshall stated objections to the relevancy and competency of the complaint. The Sheriff-substitute (Campion) repelled these objections. Marshall then pleaded not guilty, but after evidence had been led, the Sheriff-substitute pronounced this conviction and sentence:—"In respect of the evidence adduced, convicts the said Alexander Marshall of the contravention charged; and therefore adjudges him to forfeit and pay to the Clerk of Court the sum of £7 of modified penalty, with the sum of £3 sterling of expenses; and, in default of payment thereof within one week from this date, in respect it is inexpedient to issue a warrant of poinding and sale, decerns and adjudges the said Alexander Marshall to be imprisoned for the space of one month from the date of his imprisonment, unless the said sums shall be sooner paid, and thereafter to be set at liberty; and, for that purpose, grants warrant to officers of law to apprehend and convey the said Alexander Marshall to the prison of Maxwelltown, thereafter to be dealt with in due course of law."

Marshall brought a suspension.

The grounds of suspension, and the arguments of the parties at the hearing, sufficiently appear from the opinions of the Judges.[1]

LORD JUSTICE-GENERAL.—The objections taken to this conviction are numerous, but it appears to me that there is no substance in any of them.

1. It was objected that the complaint did not state that the present complainer was the owner of the nets, and it was maintained that this was an essential ingredient in the charge. The question whether it was so depends on the construction and effect of section 11 of the Act 24 and 25 Vict. c. 109. This is an English Act which is made applicable to the Scotch side of the Solway, and the Scotch rivers flowing into it, by the Salmon Fisheries (Scotland) Act, 1862, section 33. The form of section 11 is very material —(His Lordship read the section). It is plain that the offence is the placing or using a fixed engine for the catching of salmon, and in the earlier part of the section effective proceedings are authorised *in rem*, viz., the seizure and destruction of the fixed engine. Next the section goes on to say that, "in addition thereto the owner,"—that being the first mention of any person—"of any engine so placed or used shall incur a penalty." This provision as to persons is "in addition" to the provisions directed against the fixed engines. Down to this point the offence might be committed by anybody, but here the "owner" is introduced and proceedings prescribed against him. It seems to me that the word "owner" in the statute is used in a somewhat large sense. It does not, in my view, neces-

[1] *Cited by the Complainer*:—Young v. Richardson, Oct. 28, 1897, 25 R. (Just. Cases) 22, 2 Adam, 377; De Banzie v. Peebles, March 16, 1875, 2 R. (Just. Cases) 22, 3 Coup. 89; M'Callum v. Barrowman, Nov. 3, 1896, 24 R. (Just. Cases) 15, 2 Adam, 197; Lamond v. Baker, Feb. 9, 1860, 22 D. 718, *per* Lord Deas at p. 723, 32 Scot. Jur. 277; Strachan v. Watson, July 17, 1893, 20 R. (Just. Cases) 76, 1 Adam, 55.

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sarily mean the person in whom the technical right of property in the nets is vested.

The meaning of the statute in my judgment is that the person against whom proceedings are to be taken shall not be, *e.g.*, a servant fishing in the employment of another, but the person who has lawful possession and control of the nets, whether he is technically the proprietor of them or not. Accordingly, I am of opinion that it is not necessary to a good complaint that it shall state who is the owner. To put a strict construction on the term "owner" would be to render the section almost nugatory, for it would place an *onus* on the prosecutor which in many cases it might be impossible to discharge. Although the prosecutor might not know who the owner of the nets was, the person who had been using them and was prosecuted would know, and if a plea of this kind was to be set up, the proper time to state it would be when the proceedings were instituted.

2. It was objected that something is alleged in this complaint which is not an offence, viz., that fishing had been practised, and sixty-four fish of the salmon kind had been taken and killed. The Act, it was urged, did not make this an offence, the offence struck at being the placing or using of fixed engines. As I read the complaint, however, the substantive charge is the placing and using nets for the purpose specified, and the statement that sixty-four fish were taken and killed, though it may have been unnecessary, is merely an amplification of the statement that the net was used.

3. It was next objected that the complaint did not sufficiently specify the date of the offence, as it was essential that the accused should know whether he was charged with committing the offence during the whole time between 2d July and 8th August, or merely on one or more days during that period. The complaint states very plainly that the offence was committed between 2d July and 8th August, and inasmuch as the offence is alleged to have been committed by means of fixed engines, the natural, if not the only reasonable, meaning is that the nets were used continuously throughout the period between the dates mentioned, *i.e.*, twenty-nine days in July and seven in August.

4. The next objection was that two enactments are, as it was said, mixed up—the offence and the penalty being taken from the English Act, and the procedure from the Scotch Act of 1862. The two Acts were passed in the same session of Parliament, and they are plainly parts of one scheme of legislation. Section 33 of the Scotch Act simply applies the rules as to the use of fixed engines, which under the English Statute hold for the southern shore of the Solway, to the north shore of the Solway, and the rivers flowing into it there. There might otherwise have been difficulties as to jurisdiction, and the offence and penalty created by the English Act are carried over to the north side by the Scotch Act, and the machinery of prosecution is Scotch.

5. The next objection to the conviction, in respect that it adjudges the modified penalty to be paid to the Clerk of Court instead of to the Clerk of the Fishery Board. The objection is based on section 32 of the Salmon Fisheries (Scotland) Act, 1862, which provides that "the penalties incurred under this Act shall in all prosecutions at the instance of the clerk of any District Board be payable to and recoverable by such clerk." It is

noteworthy that this provision, as the rest of the section shews, applies not only to penalty but also to expenses. The direction in the conviction that the penalty shall be paid to the Clerk of Court does not imply that he is to keep the money. It is a direction for the convenience of the accused person, enabling him to pay the money at once to the Clerk of Court, instead of having to search out the prosecutor, the Clerk of the District Board, who may live many miles away. The Clerk of Court is merely a stakeholder, his duty being to hand over the money to the person entitled to it, the Clerk of the District Board.

6. The last objection is founded upon an alleged rejection of evidence. It is material to observe the statements of the complainer on which this objection is based. These statements are as follows:—"During the conduct of the trial the witnesses Archibald Fisher and David Fisher produced in evidence a note-book which contained entries shewing the extent of their business, and the witness George Jackson produced in evidence and gave evidence as regards a plan shewing the *locus*. These productions have not been noted, as they should have been, under the Summary Jurisdiction Acts." The expression "produced in evidence" is not a technical expression, and from the explanation given at the bar it appears that the witnesses mentioned, when giving evidence, produced a book and refreshed their memory by referring to it. It was a business-book, not a probative document. Its only use was to afford means of giving weight to the parole evidence. It is not the practice of witnesses to put in documents. That falls to be done by the party or his agent. We are told that the witness laid the book on the table, where it was left. But that is not enough. In order to make a relevant averment it would have been necessary to state that, the party having by his agent asked that the document should be received and made part of the process, the Sheriff refused to allow it to be received. The same observations apply to the plan. No motion appears to have been made that it should be received in evidence. Further, it was not a case where the exact *locus* was of importance, *e.g.*, a case of distinguishing between sea and river, and if it had been the plan would not have proved the *locus*.

LORD ADAM.—I am of the same opinion.

As to the objection based on the procedure at the trial, viz., that certain books produced in evidence were not noted as is required under the Summary Jurisdiction Act, the Act provides merely that a note should be taken of any documentary evidence that may be "put in." A witness may refer to documents merely to refresh his memory, and may take them away. It is not necessary that a document should be noted unless it is put in process, and with the producing of evidence in process the witness has nothing to do. That is the business of the parties, or the agents of the parties. It is not said here that either the books or the plan were put in or tendered as evidence.

The objections founded on the terms of the complaint are equally unsubstantial. It is said that the time referred to in the complaint is ambiguous, inasmuch as it may mean during the whole time or on one or more days during the time. I read the complaint as clearly meaning that the nets

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were used during the whole period named. It is said there are two offences set forth. But a careful reading of the complaint shews that there is really only one offence stated—the placing and using of fixed engines—and that the expression about taking or killing 64 salmon is inserted merely as explanatory, *i.e.*, as explaining the result of using the fixed engines. Another objection taken to the complaint was that it ought to have set forth that the complainer was owner of the nets, since it was only the owner of the nets in question that could be convicted under the statute. A reference to the statute shews that the real offence struck at is the placing or using of fixed engines, and that it is only when the statute comes to prescribe penalties that the "owners" of the nets come in. It would certainly be for the person using the nets to prove that he is not the owner of them, and here it is not even said that the nets did not belong to the complainer.

In regard to the penalties both the Scots and English Acts were libelled. There are penalties provided in the English Act, and it must be taken that by section 33 of the Scots Act these penalties are carried over when it provides that the provisions of the English Act shall extend and apply to salmon fisheries on the Scotch shore of the Solway. The last objection taken had reference to the direction that the fine should be paid to the Clerk of Court. Section 32 of the Salmon Fisheries (Scotland) Act, 1862, provides that the penalties incurred under the Act "shall in all prosecutions at the instance of the clerk of any District Board be payable to and recoverable by such clerk." This is permissive. It is different from cases in which the statutory provision is imperative. It does not seem to me to exclude the fines being paid in the first instance to the Clerk of Court and by him transmitted to the Clerk of the District Board.

LORD M'LAREN.—I think it would be too strict a construction to hold this complaint irrelevant or defective because it does not libel in terms that the defender is owner of the nets. I have doubts whether, under section 11 of the Act 24 and 25 Vict. cap. 109, a prosecution can be directed against anyone except the owners of the nets,—meaning, as I take it, the persons having the control of the nets. As to the proceedings first prescribed under section 11, the language of the section is impersonal, but clearly the persons who have the property in the nets are the persons upon whom the loss from the destruction or forfeiture of the nets would fall. The Act then proceeds to provide that "in addition" thereto there are to be proceedings against the owners. If the accused means to say he is not the owner the *onus* is on him to prove it. This is the general rule wherever in an indictment anything is libelled as the property of anyone.

In regard to the objection that productions were not noted, I observe that the record sets forth that certain productions were made for the complainer, and so it appears that the Sheriff was not forgetful of the duty of noting documents put in evidence. There is therefore an *onus* on the complainer of shewing that the documents in question were put in evidence. The Summary Jurisdiction Act of 1864, section 16, provides that the record shall set forth in the form of the Schedule I. to the Act a note of any documentary evidence that may be "put in." In the Schedule I. there

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is an instruction to this effect,—"Note also the production of any documents produced in evidence by either party." The expression "put in" is thus explained to mean "produced in evidence." To make a good objection to a record on the ground that a document produced in evidence was not noted, it would be necessary that the complainer should state that the document in question was tendered and admitted but not noted, or that it was tendered and refused. It is not so stated here. There is a case—*Strachan* v. *Watson*[1]—where a conviction was set aside on the ground that there had been an omission to note a plan which had been made part of the evidence. While I concurred in that judgment I was not a strong partisan for it. I was not present at the first hearing, and merely accepted what the Judges who were then present did in sending the case back to the Magistrate for a report. The decision went entirely on the facts as reported by the Magistrate. *Prima facie* a plan is only explanatory of the evidence given on oath. I doubt whether a plan is ever "documentary evidence" in the strict sense of that expression, except perhaps in the case of a person who is charged with stealing the plan. My opinion is, that as there is no power of review on the merits, there must, in order to open up the decree, be a definite statement that the document was offered in evidence.

In regard to the conviction, it is noteworthy that according to the form of conviction set forth in the schedule of the Summary Jurisdiction Act it is unnecessary to say to whom the penalties are to be paid. The conviction, then, would have been good if nothing had been said about the person to whom complainer was to pay the penalties. The addition of the words "to the Clerk of the Court" is innocuous, as it only informs the accused that he will be discharged by paying the money into Court. It is then the duty of the Clerk of Court to find out who is the ultimate recipient of the fines.

THE COURT refused the bill.

WILLIAM BALFOUR, S.S.C.—CONSTABLE & JOHNSTONE, W.S.—Agents.

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Wallace v. Summers.

ANDREW WALLACE (Inspector of Poor of Govan), Appellant.—*Deas.*
JAMES SUMMERS, Respondent.—*Cullen.*

Vaccination—Procedure where child removed from parish of birth before order for vaccination executed—Ultra vires—Vaccination (Scotland) Act, 1863 (26 *and* 27 *Vict. cap.* 108), *secs.* 1, 5, 18, *and* 30—*Regulations by Board of Supervision, 15th December* 1864, *Art.* 7.—The Vaccination Act, 1863, enacts,—Sec. 5, "The Parochial Board [now, by the Local Government (Scotland) Act, 1894, the Parish Council] of every parish or combination . . . shall, in the exercise of the functions conferred upon them by this Act, conform to the regulations which may from time to time be issued by the Board of Supervision in relation thereto, which regulations the Board of Supervision is hereby authorised and required to make and issue."

Sec. 18 enacts that "the registrar of each district shall once in every six months transmit to the inspector of poor of the parish or combination in which such district is situated, a list of the names and addresses of such persons as have failed to transmit or lodge a certificate of vaccination in

[1] 20 R. (Just. Cases) 76.

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terms of this Act, and on the receipt of such list the inspector of poor shall lay the same before the Parochial Board of such parish or combination, and thereupon the Parochial Board shall issue an order to the vaccinator appointed by them to vaccinate the persons named in such list . . . and if any such person or the parent . . . of any such child shall refuse to allow the operation to be performed, he shall for every such offence be liable to a penalty," specified.

By article 7 of Regulations issued by the Board of Supervision, 15th December 1864, entitled "Proceedings under sec. 18 of the Vaccination Act," it is provided,—"If any child named in the registrar's list shall have left the parish for another known place of residence in Scotland before an order to vaccinate such child has been issued and executed, the inspector of the poor shall give immediate notice of the fact and of the circumstances connected therewith to the inspector of the parish to which such child shall have gone, whose duty it shall be to use all lawful endeavours to have the said child vaccinated."

Held that article 7 of the Regulations was *intra vires* of the Board of Supervision, and (2) that in the case provided for in that article it was competent for the Parish Council of the parish to which the child had gone to take proceedings for the vaccination of the child, in terms of section 18 of the Act, and to prosecute the parent for failure to vaccinate in contravention of that section.

Held further, that looking to the terms of sections 1 and 30 of the Act, it was not competent for a parish to take proceedings for the vaccination of a child which had left the parish.

HIGH COURT. Lord Justice-General. Lord Adam. Lord M'Laren.

ON 28th June 1900 James Summers was charged in the Sheriff Court at Glasgow, on a complaint at the instance of Andrew Wallace, Inspector of Poor for the parish of Govan Combination. The complaint set forth,—"That James Summers, presently residing at Ellerslie, Laurel Street, Partick, in the parish of Govan Combination, and lately residing at 111 Hill Street, Glasgow, in the parish of Glasgow, has been guilty of an offence within the meaning of the Vaccination (Scotland) Act, 1863,* particularly secs. 8 and 18 thereof, in so far

* The Vaccination (Scotland) Act, 1863 (26 and 27 Vict. c. 108), enacts,—

Sec. 1—"Within two months after the passing of this Act the parochial board of every parish or combination of parishes in Scotland shall appoint a registered medical practitioner or practitioners to be the vaccinator or vaccinators within such parish or combination."

Sec. 5—"The parochial board of every parish or combination, and each vaccinator, and any other officers engaged in the administration of the laws for relief of the poor in any parish or combination, shall, in the exercise of the functions conferred upon them by this Act, conform to the regulations which may from time to time be issued by the Board of Supervision in relation thereto, which regulations the Board of Supervision is hereby authorised and required to make and issue."

Sec. 8 made provision for parents or guardians causing children to be vaccinated, and obtaining certificates of vaccination.

Sec. 18—"The registrar of each district shall once in every six months transmit to the inspector of the poor of the parish or combination in which such district is situate a list of the names and addresses of such persons as have failed to transmit or lodge a certificate of vaccination in terms of this Act, and on the receipt of such list the inspector of the poor shall lay the same before the parochial board of such parish or combination, and thereupon the parochial board shall issue an order to the vaccinator appointed by them to vaccinate the persons named in such list; and notice in writing of such order shall be given to such persons, or, if children, to their father

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as the Inspector of Poor for the parish of Glasgow having received from the registrar of Kelvin District of the parish of Glasgow a list, dated 22d February 1900, of the names and addresses of the persons who had failed to transmit to or lodge with said registrar a certificate of vaccination in terms of said Act, which list contained the name and address of the respondent as the father of Evelyn Summers, aged three years and six months or thereby, born in the said Kelvin District, the said Inspector of Poor for the parish of Glasgow on or about 23d February 1900 forwarded said list and intimated to the complainer that the respondent now resided in his parish, viz., at Ellerslie, Laurel Street, aforesaid, and reported to him in order that he might attend to the vaccination of said child in terms of said statute and the regulations of the Board of Supervision, now the Local Government Board, whereupon the complainer duly submitted said list and intimation to the Parish Council of Govan Combination, and said Parish Council, under the hand of the complainer as inspector of poor foresaid, issued on or about 10th May 1900 an order to Dr Gilbert Campbell, 12 Hamilton Crescent, Partick, the vaccinator appointed to the said Parish Council of Govan Combination, to vaccinate the said Evelyn Summers, and notice of such order, partly written and partly printed, was delivered at the house of the respondent on or about the 10th day of May 1900, and in pursuance of said order the said Dr Gilbert Campbell called on or about the 29th day of May 1900, at the house of the respondent situated at Ellerslie, Laurel Street aforesaid, in the parish of Govan Combination, for the purpose of vaccinating the said Evelyn Summers, but the respondent refused to allow such operation to be performed, notwithstanding the fact that the said Evelyn Summers had not previously been vaccinated, nor

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or mother or the persons having care of them; and in pursuance of such order the vaccinator shall vaccinate the persons named therein, or any of them, at any time not less than ten nor more than twenty days after the date of such notice, unless such persons shall previously have been vaccinated, and a certificate of their vaccination or insusceptibility shall have been transmitted to the registrar; and if any such person, or the parent or person having the care of any such child, shall refuse to allow such operation to be performed, he shall for every such offence be liable to a penalty not exceeding twenty shillings, and failing payment to be imprisoned for any period not exceeding ten days."

Sec. 30—*Inter alia*, "The expression 'vaccinator' shall mean the medical practitioner appointed by any parish or combination to act as such in such parish or combination."

Article 7 of regulations, entitled "Proceedings under section 18 of the Vaccination Act" issued by the Board of Supervision, of date 15th December 1864, is in the following terms:—"If any child named in the registrar's list shall have left the parish for another known place of residence in Scotland before an order to vaccinate such child has been issued and executed, the inspector of the poor shall give immediate notice of the fact and of the circumstances connected therewith to the inspector of the parish to which such child shall have gone, whose duty it shall be to use all lawful endeavours to have the said child vaccinated, and a certificate of such child's vaccination transmitted to the registrar of the district within which the said child was born."

The Local Government (Scotland) Act, 1894 (57 and 58 Vict. cap. 58), sec. 21, enacts that "every reference in any Act of Parliament, scheme, deed, or instrument, to a parochial board . . . shall be read and construed as referring to a parish council . . ."

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had a certificate of her successful vaccination or insusceptibility to the vaccine disease been sent to the registrar in terms of the said Act, nor has a certificate been yet transmitted to the said registrar," whereby the respondent was liable in the penalty specified.

The respondent objected to the relevancy of the complaint on the following grounds, as stated in the case for appeal after mentioned :— "(First) That when the Inspector of Poor of the parish of Glasgow received from the Registrar of Kelvin District of that parish the list, dated 22d February 1900, of the names and addresses of the persons who had failed to transmit to or to lodge with the said registrar a certificate of vaccination in terms of the said Vaccination (Scotland) Act, he should have submitted the said list to the Parish Council of Glasgow, who should have then issued an order to the vaccinator appointed by them to vaccinate the respondent's child, and have given notice in writing of such order to the respondent, as the father of said child; and in pursuance of such order the said vaccinator should have vaccinated, or should have offered to vaccinate, the said child, within the period, and all as prescribed by the said Act; and (second) that it was not competent for the Inspector of Poor of the parish of Glasgow, in respect of the regulations of the Local Government Board, issued under section 5 of the said Vaccination (Scotland) Act, or otherwise, to devolve these duties on the Parish Council of Govan on account of the respondent having removed from the parish of Glasgow to the parish of Govan, where he then was and still is resident; and (third) that the proceedings under the said Vaccination (Scotland) Act for prosecution of the respondent and recovery of penalties for failure to vaccinate should have been at the instance of the Inspector of the Parish Council of Glasgow."

On 20th September 1900 the Sheriff-substitute (Boyd) sustained the objections for the respondent, and dismissed the complaint.

The Inspector of Poor obtained a case for appeal. The case narrated the complaint, and set forth the objections for the respondent above quoted, and the following questions of law :—"(1) Whether, in view of the provisions of the Vaccination Act, and the regulations of the Local Government Board issued in the terms of section 5 of that Act, the proceedings for the vaccination of the respondent's child (after the registrar's list had been received by the Inspector of Poor of Glasgow) should have been taken by the Parish Council of Glasgow; or (2) Whether it was competent for that Council or their Inspector of Poor to send the said registrar's list and intimate the default of the respondent to the Inspector of Poor of the parish of Govan, and for the Govan Parish Council to adopt proceedings for the vaccination of the said child; and (3) Whether it was competent for the Inspector of Poor of the parish of Govan to prosecute the respondent for failure to vaccinate and recover the statutory penalty."

Argued for the appellant;—It was plain, from sections 1 and 30, that the vaccinator appointed to a particular parish could not act as such beyond the limits of that parish. This being so, no proceedings for the vaccination of the child could be taken at the instance of the Parish Council of Glasgow, and if the Sheriff-substitute was right, neither could the Parish Council of Govan take proceedings, so that the Act would be defeated in every case in which a child was removed from its parish of birth before an order to vaccinate was executed. By the Act vaccination was made compulsory in every case, and the method of carrying this out was merely executorial, so that

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it was within the powers of the Board of Supervision to make the regulations in question by which the procedure of section 18 of the Act was adapted to the case of the removal of the child from its parish of birth before it had been vaccinated. The proceedings in this case were taken in conformity with article 5 of these regulations, and could only be invalid on the ground that the regulation was *ultra vires* of the Board of Supervision. The regulations had been acted upon, and their validity never questioned, since 1864.

Argued for the respondent;—The offence here charged was a statutory offence, and unless the conditions required by the statute to constitute it were present there could be no contravention. The offence charged was under sections 8 and 18 of the statute. In the former section there was no provision as to criminal proceedings, so that the complaint in this case must stand or fall by section 18. *Ex facie* of the complaint the conditions of that section were not fulfilled. There was nothing in the section to authorise an inspector of poor to transmit a notice of failure to lodge a certificate of vaccination to the inspector of poor of another parish, or to authorise the latter to act upon such notice as if it had emanated from the registrar of a district within his own parish. All the steps prescribed for compulsory vaccination under the section were to be taken in the parish. If this were so, the regulations passed by the Board of Supervision could not be invoked to create a statutory offence where, apart from them, there would have been none. It was not necessary to say the regulations were *ultra vires* to all purposes, but certainly they were so if and so far as they created new offences. It was not the case that the purpose of the Act would be defeated if this view were sound, because the respondent would have been liable to a penalty of the same amount under section 17 as that imposed by section 18, if proceedings had been timeously taken under the former section.

At advising,—

Lord Justice-General.—The first question is, whether the proceedings for the vaccination of the respondent's child (after the registrar's list had been received by the Inspector of Poor of Glasgow) should have been taken by the Parish Council of Glasgow, and I am of opinion that this question should be answered in the negative. These proceedings could only have been taken by the Parish Council of Glasgow and their vaccinator exercising what may be termed an extra-territorial jurisdiction, which they do not appear to me to have any power, under the Vaccination (Scotland) Act, 1863, to do. By section 1 of that Act the parochial board of every parish or combination of parishes in Scotland is required to appoint a registered medical practitioner or practitioners to be "the vaccinator or vaccinators within such parish or combination," and by section 30, the interpretation clause of the Act, it is declared that "the expression 'vaccinator' shall mean the medical practitioner appointed by any parish or combination to act as such in such parish or combination." The power of the vaccinator is therefore, in my judgment, confined to the parish or combination. It happens that in the present case the distance between the parishes is not great, but the principle involved is the same as if the parent of an unvaccinated child had moved, taking the child with him from a parish in the north to a parish in the south of Scotland.

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Argued for the respondent;—The offence here charged was a statutory offence, and unless the conditions required by the statute to constitute it were present there could be no contravention. The offence charged was under sections 8 and 18 of the statute. In the former section there was no provision as to criminal proceedings, so that the complaint in this case must stand or fall by section 18. *Ex facie* of the complaint the conditions of that section were not fulfilled. There was nothing in the section to authorise an inspector of poor to transmit a notice of failure to lodge a certificate of vaccination to the inspector of poor of another parish, or to authorise the latter to act upon such notice as if it had emanated from the registrar of a district within his own parish. All the steps prescribed for compulsory vaccination under the section were to be taken in the parish. If this were so, the regulations passed by the Board of Supervision could not be invoked to create a statutory offence where, apart from them, there would have been none. It was not necessary to say the regulations were *ultra vires* to all purposes, but certainly they were so if and so far as they created new offences. It was not the case that the purpose of the Act would be defeated if this view were sound, because the respondent would have been liable to a penalty of the same amount under section 17 as that imposed by section 18, if proceedings had been timeously taken under the former section.

At advising,—

LORD JUSTICE-GENERAL.—The first question is, whether the proceedings for the vaccination of the respondent's child (after the registrar's list had been received by the Inspector of Poor of Glasgow) should have been taken by the Parish Council of Glasgow, and I am of opinion that this question should be answered in the negative. These proceedings could only have been taken by the Parish Council of Glasgow and their vaccinator exercising what may be termed an extra-territorial jurisdiction, which they do not appear to me to have any power, under the Vaccination (Scotland) Act, 1863, to do. By section 1 of that Act the parochial board of every parish or combination of parishes in Scotland is required to appoint a registered medical practitioner or practitioners to be "the vaccinator or vaccinators within such parish or combination," and by section 30, the interpretation clause of the Act, it is declared that "the expression 'vaccinator' shall mean the medical practitioner appointed by any parish or combination to act as such in such parish or combination." The power of the vaccinator is therefore, in my judgment, confined to the parish or combination. It happens that in the present case the distance between the parishes is not great, but the principle involved is the same as if the parent of an unvaccinated child had moved, taking the child with him from a parish in the north to a parish in the south of Scotland.

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The second question is, whether it was competent for the Parish Council of Glasgow or their Inspector of Poor to send the registrar's list and intimate the default of the respondent to the Inspector of Poor of the parish of Govan, and for the Govan Parish Council to adopt proceedings for the vaccination of the child,—and the answer to this question appears to me to depend upon the construction and effect of section 5 of the Vaccination (Scotland) Act, 1863, and of No. 7 of the Regulations made and issued by the Board of Supervision on 15th December 1864. Section 5 of the Act provides that parochial boards, vaccinators, and other officers engaged in the administration of the laws for the relief of the poor in any parish or combination "shall, in the exercise of the functions conferred upon them by this Act, conform to the regulations which may from time to time be issued by the Board of Supervision in relation thereto, which regulations the Board of Supervision is hereby authorised and required to make and issue." The power, and indeed the duty, to make regulations is here expressed in large language, and seems to me to authorise such regulations as are contained in No. 7, which requires that "if any child named in the registrar's list shall have left the parish for another known place of residence in Scotland before an order to vaccinate such child has been issued and executed, the inspector of the poor shall give immediate notice of the fact and of the circumstances connected therewith to the inspector of the parish to which such child shall have gone, whose duty it shall be to use all lawful endeavours to have the said child vaccinated, and a certificate of such child's vaccination transmitted to the registrar of the district within which the said child was born." The normal case provided for by section 18 of the Act is that in which the parent and child are still in the parish or combination in which the child was born, and the inspector on receiving the list from the registrar has to lay it before the parochial board of that parish or combination, who thereupon issue the order to the vaccinator to vaccinate the persons named in the list. The section does not expressly provide for the case of a child having "with its parents removed to another parish or combination," and I think that this is just the kind of case which would naturally and adequately be provided for by regulations made under section 5. If this were not so, the Act would in many cases become a dead letter. Regulation No. 7 appears to me to supply the machinery for carrying out the provisions of the Act in such a case, and I consider that it authorised the course which was adopted in this case. The regulation has now been in operation for more than thirty-six years, and this is the first occasion, so far as I am aware, upon which either the power of the Board of Supervision to make it, or its applicability to such a case as the present, has been called in question. It would require some strong reasons to induce us to disregard or set aside a manifestly advantageous regulation which had been acted upon for so long a time.

The third question is, whether it was competent for the Inspector of Poor for the parish of Govan to prosecute the respondent for failure to vaccinate, and recover the statutory penalty, and for the reasons already given, I consider that this question should be answered in the affirmative.

LORD ADAM and LORD M'LAREN concurred.

THE COURT pronounced the following interlocutor:—"Answer the first question in the case in the negative and the second and third questions in the affirmative: Sustain the appeal; reverse the determination of the Sheriff-substitute, and remit to him to proceed, and decern." No. 9. Dec. 22, 1900. Wallace v. Summers.

GILL & PRINGLE, S.S.C.—DAVID DOUGAL, W.S.—Agents.

FREDERICK HAROLD RULE, Appellant.—*Cook.*
CHARLES THOMSON (Burgh Prosecutor, Alloa), Respondent.—*A. S. D. Thomson.*

No. 10. Mar. 4, 1901. Rule v. Thomson.

Complaint—Relevancy—Specification—Statutory Offence—Specification of sections of statute constituting offence—Public-House—Breach of certificate—Home Drummond Act, 1828 (9 *Geo. IV. cap.* 58), *sec.* 23.—A summary complaint set forth that the accused, "who holds a certificate for the sale of exciseable liquors at" a hotel specified "has been guilty of an offence against the laws for the regulation of public-houses in Scotland, in so far as he did between 1 and 2 o'clock in the morning" of a day specified "sell or give out from the said hotel" certain quantities of whisky to certain persons named.

Held, on appeal, that the complaint was irrelevant, in respect that it neither alleged that the things said to have been done by the accused were done in contravention of his certificate, nor specified any section or sections of the Public-Houses (Scotland) Acts as having been contravened.

Buchanan v. *Wilson*, 23 R. (Just. Cases) 86, *commented on.*

HIGH COURT. Lord Justice-General. Ld. Kyllachy. Lord Low.

ON 5th November 1900 Frederick Harold Rule, hotel-keeper, Mar Hotel, Alloa, was charged in the Police Court at Alloa, on a summary complaint at the instance of Charles Thomson, burgh prosecutor. The complaint set forth as follows:—

"That Frederick Harold Rule, hotel-keeper, residing at the Mar Hotel, Shore, in the burgh of Alloa, who holds a certificate for the sale of exciseable liquors at the Mar Hotel aforesaid, has been guilty of an offence against the laws for the regulation of public-houses in Scotland, in so far as he did, between 1 and 2 of the clock in the morning of Tuesday, 16th October 1900, or about that time, sell or give out from the said Mar Hotel to" three men named and designed as residing at places specified in Alloa, "or one or more of them, a quantity or quantities of spirits, being whisky, and such offence is the first offence.

"May it therefore please your honours to grant warrant to officers of law to summon the said Frederick Harold Rule to appear before the magistrate officiating in the Police Court of the said burgh, to answer to this complaint, and to be dealt with in terms of the Public-House Acts Amendment (Scotland) Act, 1862, and the Acts therein recited."

Rule objected to the relevancy of the complaint on the following grounds:—"1. The offence is not a common law one, and no statute is specified as having been contravened. 2. It is not stated that the persons alleged to have been supplied were not travellers or persons requiring to lodge in the premises, and if they were such persons, no offence was committed under the certificate."

The Magistrates repelled the objections, and found the complaint relevant.

Rule having pleaded not guilty, evidence was led. Thereafter the Magistrates pronounced a conviction and sentence in the following

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Marshall v. Phyn.

sarily mean the person in whom the technical right of property in the nets is vested.

The meaning of the statute in my judgment is that the person against whom proceedings are to be taken shall not be, *e.g.*, a servant fishing in the employment of another, but the person who has lawful possession and control of the nets, whether he is technically the proprietor of them or not. Accordingly, I am of opinion that it is not necessary to a good complaint that it shall state who is the owner. To put a strict construction on the term "owner" would be to render the section almost nugatory, for it would place an *onus* on the prosecutor which in many cases it might be impossible to discharge. Although the prosecutor might not know who the owner of the nets was, the person who had been using them and was prosecuted would know, and if a plea of this kind was to be set up, the proper time to state it would be when the proceedings were instituted.

2. It was objected that something is alleged in this complaint which is not an offence, viz., that fishing had been practised, and sixty-four fish of the salmon kind had been taken and killed. The Act, it was urged, did not make this an offence, the offence struck at being the placing or using of fixed engines. As I read the complaint, however, the substantive charge is the placing and using nets for the purpose specified, and the statement that sixty-four fish were taken and killed, though it may have been unnecessary, is merely an amplification of the statement that the net was used.

3. It was next objected that the complaint did not sufficiently specify the date of the offence, as it was essential that the accused should know whether he was charged with committing the offence during the whole time between 2d July and 8th August, or merely on one or more days during that period. The complaint states very plainly that the offence was committed between 2d July and 8th August, and inasmuch as the offence is alleged to have been committed by means of fixed engines, the natural, if not the only reasonable, meaning is that the nets were used continuously throughout the period between the dates mentioned, *i.e.*, twenty-nine days in July and seven in August.

4. The next objection was that two enactments are, as it was said, mixed up—the offence and the penalty being taken from the English Act, and the procedure from the Scotch Act of 1862. The two Acts were passed in the same session of Parliament, and they are plainly parts of one scheme of legislation. Section 33 of the Scotch Act simply applies the rules as to the use of fixed engines, which under the English Statute hold for the southern shore of the Solway, to the north shore of the Solway, and the rivers flowing into it there. There might otherwise have been difficulties as to jurisdiction, and the offence and penalty created by the English Act are carried over to the north side by the Scotch Act, and the machinery of prosecution is Scotch.

5. The next objection to the conviction, in respect that it adjudges the modified penalty to be paid to the Clerk of Court instead of to the Clerk of the Fishery Board. The objection is based on section 32 of the Salmon Fisheries (Scotland) Act, 1862, which provides that "the penalties incurred under this Act shall in all prosecutions at the instance of the clerk of any District Board be payable to and recoverable by such clerk." It is

noteworthy that this provision, as the rest of the section shews, applies not only to penalty but also to expenses. The direction in the conviction that the penalty shall be paid to the Clerk of Court does not imply that he is to keep the money. It is a direction for the convenience of the accused person, enabling him to pay the money at once to the Clerk of Court, instead of having to search out the prosecutor, the Clerk of the District Board, who may live many miles away. The Clerk of Court is merely a stakeholder, his duty being to hand over the money to the person entitled to it, the Clerk of the District Board.

6. The last objection is founded upon an alleged rejection of evidence. It is material to observe the statements of the complainer on which this objection is based. These statements are as follows:—"During the conduct of the trial the witnesses Archibald Fisher and David Fisher produced in evidence a note-book which contained entries shewing the extent of their business, and the witness George Jackson produced in evidence and gave evidence as regards a plan shewing the *locus*. These productions have not been noted, as they should have been, under the Summary Jurisdiction Acts." The expression "produced in evidence" is not a technical expression, and from the explanation given at the bar it appears that the witnesses mentioned, when giving evidence, produced a book and refreshed their memory by referring to it. It was a business-book, not a probative document. Its only use was to afford means of giving weight to the parole evidence. It is not the practice of witnesses to put in documents. That falls to be done by the party or his agent. We are told that the witness laid the book on the table, where it was left. But that is not enough. In order to make a relevant averment it would have been necessary to state that, the party having by his agent asked that the document should be received and made part of the process, the Sheriff refused to allow it to be received. The same observations apply to the plan. No motion appears to have been made that it should be received in evidence. Further, it was not a case where the exact *locus* was of importance, *e.g.*, a case of distinguishing between sea and river, and if it had been the plan would not have proved the *locus*.

LORD ADAM.—I am of the same opinion.

As to the objection based on the procedure at the trial, viz., that certain books produced in evidence were not noted as is required under the Summary Jurisdiction Act, the Act provides merely that a note should be taken of any documentary evidence that may be "put in." A witness may refer to documents merely to refresh his memory, and may take them away. It is not necessary that a document should be noted unless it is put in process, and with the producing of evidence in process the witness has nothing to do. That is the business of the parties, or the agents of the parties. It is not said here that either the books or the plan were put in or tendered as evidence.

The objections founded on the terms of the complaint are equally unsubstantial. It is said that the time referred to in the complaint is ambiguous, inasmuch as it may mean during the whole time or on one or more days during the time. I read the complaint as clearly meaning that the acts

No. 10.

Mar. 4, 1901.
Rule v.
Thomson.

certificate, or whether his offence consisted in some contravention of some special enactment of one or more of the Public-House Statutes.

LORD LOW concurred.

THE COURT answered the first question in the case in the negative, sustained the appeal, and quashed the conviction.

DUNCAN & HARTLEY, W.S.—FRASER, STODART, & BALLINGALL, W.S.—Agents.

No. 11.

Mar. 4, 1901.
Greig v.
Finlay.

ARTHUR GREIG AND OTHERS, Applicants.—*Watt, K.C.*—*Burt.*
JAMES FINLAY, Respondent.—*Constable.*

Appeal—Stated Case—Statutory conditions of obtaining case—Power to dispense with fulfilment of conditions—Summary Prosecutions Appeals (Scotland) Act, 1875 (38 *and* 39 *Vict. cap.* 62), *sec.* 3.—Persons who had been convicted on a summary complaint in a Police Court presented a note for an order on the Magistrate to state and sign a case for appeal. The respondent (the prosecutor) objected that it was incompetent for the Magistrate to state and sign a case in respect that the applicants had not lodged a bond of caution or made consignation and had not paid the Clerk of Court's fees within three days of the date of the conviction, as required by sec. 3 of the Summary Prosecutions Appeals (Scotland) Act, 1875. It appeared that the applicants' law-agent had done everything in his power to find the Magistrate and the Clerk of Court within the three days, but without success.

The Court, in the special circumstances, *pronounced* an order on the Magistrate to state and sign a case for appeal.

HIGH COURT.
Lord Justice-General.
Ld. Kyllachy.
Lord Low.

THIS was a note presented to the High Court of Justiciary by Arthur Greig, butcher, Foulford Road, Cowdenbeath, and eight other persons, who had, on 23d November 1900, been convicted in the Police Court at Cowdenbeath, by Bailie Andrew Wilson, on a charge of theft (in which James Finlay, sergeant of police, acted as prosecutor), and fined 2s. 6d. each.

The note stated that Bailie Wilson had refused to state and sign a case for appeal against the conviction, and prayed for an order on him and on Finlay to shew cause why a case should not be stated in terms of the Summary Prosecutions Appeals (Scotland) Act, 1875.*

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* The Summary Prosecutions Appeals (Scotland) Act, 1875 (38 and 39 Vict. cap. 62), enacts :—

Sec. 3. "On an inferior Judge hearing and determining any cause, either party to the cause may, if dissatisfied with the Judge's determination as erroneous in point of law, appeal thereagainst. . . . by himself or his agent applying in writing within three days after such determination to the inferior Judge to state and sign a case, setting forth the facts and the grounds of such determination, for the opinion thereon of a superior Court of law as hereinafter provided ; and on any such application being made, the following provisions shall have effect," *inter alia*—

"(1) The appellant shall not be entitled to have a case stated and delivered to him unless within the said three days he shall—

"(1) Lodge in the hands of the Clerk of Court a bond with sufficient cautioner for answering and abiding by the judgment of the superior Court in the appeal and paying the costs should any be awarded by that Court, or otherwise, in the discretion of the inferior Judge, shall consign in the hands of the Clerk of Court such sum as may be fixed by

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According to the statements in the note the alleged theft consisted in the applicants' leaving a restaurant without paying for suppers which had been supplied to them at a cost of 3d. each. They stated that one of their number was about to pay for the suppers when a quarrel arose in the restaurant, in consequence of which they left, and through inadvertence omitted to make payment; that payment was made two days afterwards; and that the charge of theft was not preferred against them until some days later.

The reasons stated in the note for granting the order craved were as follows:—"(1) On the day of the trial, and after the conviction of the appellants, their law-agent wrote to the Clerk of Court for a copy of the complaint and deliverances thereon. These were never sent. The law-agent had previously in Court verbally required that a case should be stated, and that his objections to the conduct of the case should be recorded. Since the copy complaint and deliverances were not forthcoming, the law-agent of the appellants wrote a letter on the 26th November 1900 to the inferior Judge, the said Andrew Wilson, requiring him to state and sign a case, on the grounds, *inter alia*, that the complaint was not relevant, and that the facts proved did not amount to theft, and did not warrant a conviction. On the same date the said law-agent also wrote to the Clerk of Court intimating the demand he had made upon the inferior Judge. The appellants' law-agent, who is in practice in Dunfermline, took the train to Cowdenbeath and called on the Clerk of Court, but found he had gone to Lassodie on business—a place some miles distant, and with no train or 'bus connection with Cowdenbeath—and was not to return until late in the evening. The appellants' law-agent had gone to Cowdenbeath for the express purpose of fulfilling all the requirements of the Summary Prosecutions Appeals (Scotland) Act, 1875. Finding that the Clerk of Court was not to be found, he called upon the said Andrew Wilson, but found that he too was from home. He left the letter at the house of the said Andrew Wilson, requiring a case to be stated, and added a postscript that he had called on the Clerk of Court, but found him out, and that he was prepared to find caution or consignation, whichever he preferred. He also added a postscript to his letter to the Clerk of Court to the same effect. If there was any failure to comply with the requirements of said Act, it was in no way due to the fault of the appellants. (2) On the facts stated the application was not frivolous, as the conviction was bad, and involved a slur upon the characters of the appellants, some of whom are in responsible positions. (3) Caution has been found, and the clerk's fees have now been paid."

Argued for the applicants;—It was an implied condition of the requirements of section 3 of the Summary Prosecutions Appeals Act, 1875, that the Magistrate and the Clerk of Court should be reasonably accessible, and the applicants, through their agent, having done all that was in their power to fulfil these requirements, they were

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the inferior Judge to meet the penalty awarded, if any, and the said costs of the superior Court.

"(2) Pay the Clerk of Court his fees for preparing the case."

Sec. 5. "When an inferior Judge shall refuse to state and sign a case the appellant may within three days of such refusal apply by a written note to the superior Court to which the case would, if stated and signed, have to be transmitted under this Act, for an order on such Judge and on the other party to shew cause why a case should not be stated. . . ."

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entitled to have a case stated.[1] It was impossible to fulfil the statutory requirements in the absence both of the Magistrate and the Clerk. The facts proved at the trial plainly did not amount to theft.

Argued for the respondent (Finlay);—The requirements of the statute were imperative, and the Court had no power to dispense with fulfilment of them[2]; the bond of caution might have been left in the Clerk of Court's office with his fees. On the facts stated in the note no question of law was raised; the Court therefore would not order a case to be stated.[3]

LORD JUSTICE-GENERAL.—We do not require to form any opinion as to the probable fate of a stated case,—*i.e.*, as to whether this conviction was right or wrong,—but merely to determine whether a case should be stated to give the appellants a chance to be heard. The statute prescribes certain conditions which require to be fulfilled in order to entitle a party to demand a stated case, and it enacts that an appellant shall not be entitled to have a case stated unless he complies with these conditions. If these conditions can in no circumstances be dispensed with or modified the appellants must fail. But I apprehend that if a person has done all that it was possible for him to do towards fulfilling the requirements of the statute, and if from certain classes of circumstances over which he had no control he has failed to fulfil these conditions, he may be entitled to have a case stated. What did the appellants do towards complying with these conditions? On the day of the trial, and after the conviction of the appellants, their law-agent wrote to the Clerk of Court asking for a copy of the complaint and deliverances thereon. These, for some reason unexplained, were never sent. Next the law-agent of the appellants, on 26th November, wrote a letter to the Magistrate requiring him to state and sign a case. On the same day the law-agent also wrote to the Clerk of Court intimating the demand which he had made upon the Magistrate, and his efforts did not stop there. He took the train to Cowdenbeath and called on the Clerk of Court, but ascertained that he had gone to Lassodie. When the Clerk of Court could not be found, the agent called on the Magistrate, but learned that he also was from home. The failure of the appellants to comply with the conditions precedent to obtaining a case thus resulted from the fact that neither the Clerk of Court nor the Magistrate could be found. We must take it that the agent went prepared to fulfil all the conditions required by the statute—either to lodge a bond of caution with the Clerk of Court, or otherwise to consign in the hands of the Clerk of Court. It is noteworthy that the alternative of lodging a bond of caution or of consigning is in the discretion of the Magistrate, and the amount to be consigned is also fixed by the Magistrate. But as the Magistrate could not be found, his decision could not be obtained upon either of these points. Again, how could money be consigned in the hands of the Clerk of

[1] M'Gregor v. Rose, Nov. 3, 1887, 15 R. (Just. Cases) 10, 1 White, 477; Niddrie and Benhar Coal Co., March 2, 1895, 22 R. 413.

[2] Hutton v. Garland, June 13, 1883, 10 R. (Just. Cases) 60, 5 Coup. 274; Robertson v. Malcolm, Dec. 15, 1891, 19 R. (Just. Cases) 18; M'Vean v. Jamieson, Jan. 8, 1898, 23 R. (Just. Cases) 25, 2 Adam, 69.

[3] Motion v. M'Fall, May 13, 1899, 1 F. (Just. Cases) 85, 3 Adam, 21.

Court when he could not be found? I consider that when all these things were done with the view to obtaining a case, it would be oppressive so to construe the statute that the appellants, who appear to be law-abiding citizens of Cowdenbeath and the neighbourhood, should be precluded from obtaining a stated case. I may add that if the appellants' statement of what occurred is correct, there was no theft, but the Magistrate will doubtless be careful accurately to state the facts when giving a case.

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LORD KYLLACHY.—I should be sorry to decide anything tending to relax the restrictions by which the right of appeal is in these cases fenced, and there is, of course, no doubt that within three days after the conviction certain requirements must be fulfilled by the convicted person who desires to have a case stated. But the requirements so presented are obviously of such a nature that they cannot be fulfilled if neither the Magistrate nor the Clerk of Court can be found. Accordingly it is, I am disposed to think, an implied condition of the statutory requirements that during the three days the Magistrate and Clerk shall be reasonably accessible, at least that they shall be so during business hours. Upon the facts stated, and not disputed, I am of opinion that the agent for these men made reasonable efforts to find the Magistrate and the Clerk, and failed to find either of them.

That, I think, is a sufficient ground for making the order which is here sought.

LORD LOW.—I am of the same opinion. The substantial accuracy of the statements of the appellants in this note is not disputed. The important fact is, that on 26th November the appellants' agent went personally to Cowdenbeath with the object of there and then complying with the statutory conditions. There is no reason for supposing that if he had found the Magistrate or the Clerk of Court all the statutory conditions would not have been complied with. As a matter of fact he could find neither of them, as they were both away from home. I therefore think that the appellants' agent did all that he could be reasonably expected to do in order to comply with the statutory requirements, and he was unable to effect his purpose simply because it was impossible, owing to circumstances beyond his control, to do so. In these circumstances I think that it is clear that the appellants cannot be held to have lost their right to have a case stated, and in so holding I do not think that we are going in any way contrary to the authorities which have been cited.

THE COURT pronounced the following interlocutor:—"Order the inferior Judge, Andrew Wilson, to state and sign a case in terms of the statute, and decern."

P. R. M'LAREN, Solicitor—CONSTABLE & JOHNSTONE, W.S.—Agents.

JOHN BYTH TAYLOR, Complainer.—*Wilson, K.C.—Wilton.*
ANDREW TARRAS (Burgh Prosecutor, Fraserburgh), Respondent.—*Clyde—W. Brown.*

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Review—Suspension—Oppression—Right of accused to adjournment of trial—Burgh Police (Scotland) Act, 1892 (55 *and* 56 *Vict. cap.* 55), *sec.*

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478—*Reformatory Schools Act*, 1866 (29 *and* 30 *Vict. cap.* 117), *sec.* 14.—The Burgh Police (Scotland) Act, 1892, sec. 478, gives a person charged upon a complaint under the Act right to have the hearing adjourned for a period of forty-eight hours, if a copy of the complaint has not been delivered to him personally forty-eight hours before the hearing.

A boy, thirteen years and eleven months old, was charged in Fraserburgh Police Court with theft upon a complaint under the Burgh Police (Scotland) Act, 1892. His father was dead, but his mother was alive. She was resident in Aberdeen, but a maternal uncle of the boy's lived in Fraserburgh. A week before the trial the boy and his uncle were informed by the police that they were making investigations with a view to bringing the charge. The boy was apprehended on the morning of the trial. A copy of the complaint had not previously been delivered to him or to anyone on his behalf. The uncle, having been informed by the police of the boy's apprehension, and of the hour at which the trial would take place, was present in Court when the case was called. No intimation of the boy's apprehension was sent to his mother. The boy pleaded guilty, and was convicted and ordered to be detained in a reformatory school for three years. The Magistrate did not inform the boy of his right, under the Act, to an adjournment. The boy, with consent of his mother, brought a suspension on the grounds that the Magistrate ought to have adjourned the case, and that the order for detention in a reformatory school was illegal, having been pronounced without notice to the mother. In the bill the boy stated that his uncle had requested that the case should be adjourned, in order that he might obtain a law-agent, and that this request had been opposed by the prosecutor and refused by the Magistrate. The prosecutor denied these statements. He averred further that the boy's mother had died since the bringing of the suspension. At the hearing the boy's counsel stated that he did not desire an inquiry into the facts.

Suspension *refused*, the Court holding that under section 478 of the Burgh Police Act (Scotland) Act, 1892, there was no absolute duty on the Magistrate to inform the accused of his right to an adjournment, and that, in the circumstances, there was no ground for suspending the conviction.

High Court. Lord Justice-General. Ld. Kyllachy. Lord Low.

On 22d November 1900 John Byth Taylor, factory worker, 1 Charlotte Street, Fraserburgh, a pupil, aged thirteen years and eleven months, was charged in the Police Court at Fraserburgh, on a summary complaint under the Burgh Police (Scotland) Act, 1892, at the instance of the Burgh Prosecutor, setting forth that the accused had stolen £3 from a dwelling-house in Fraserburgh.

He pleaded guilty, and the Magistrate pronounced the following conviction and sentence:—"The Magistrate, in respect of the judicial confession of the within-designed John Byth Taylor, finds the said John Byth Taylor, aged thirteen years and eleven months, guilty of the crime of theft, and therefore orders him to be sent to the Rossie Reformatory School for Boys, Montrose, being a certified reformatory school under the Act 29 and 30 Victoria, c. 117, the managers whereof are willing to receive him, there to be detained for a period of three years, and grants warrant for transmitting and detaining him there accordingly: Finds that the said John Byth Taylor is a Protestant."

Taylor, with consent of his mother as his guardian and tutor-at-law, presented a bill of suspension.

The complainer stated;—(Stat. 1) "On or about 14th November 1900 the complainer was arrested by the police in Fraserburgh upon an alleged charge of stealing £3. . . ." (Stat. 2) "The complainer is a pupil. His father . . . is dead. His mother, who

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is his sole guardian and tutor-at-law, resides at No. 15 Richmond Street, Aberdeen. The complainer has an uncle, Abercrombie Bogue Davidson, a brother of his mother, residing in Fraserburgh. The police and the respondent knew of the places of abode of the complainer's mother and uncle respectively."

The respondent (the Burgh Prosecutor) lodged answers. He did not dispute the substantial accuracy of the foregoing averments, with the exception of the averment that the police knew the address of the complainer's mother. He stated that she had died since the bringing of the bill of suspension.

The complainer made the following further averments, and the respondent the following answers thereto:—

(Stat. 3) "Upon the date of complainer's arrest as aforesaid, the complainer's said uncle heard thereof, and immediately went to the police-office and made inquiries, and thereupon called for and consulted John Leslie M'Callum, solicitor, of Robert Anderson & Company, solicitors, Fraserburgh. Mr M'Callum then took charge of the complainer's interests."

(Stat. 4) "The complainer's agent accompanied the complainer's said uncle to the police-office upon the same day, and informed the police that he was attending to the complainer's interests. The police then stated that the complainer had been released, as the information against him was not sufficient. The police also informed the complainer's agent, in presence of his uncle, at the same time, that in the event of the complainer being again apprehended in connection with the said charge he would receive immediate intimation from them of that fact."

(Stat. 5) "That on the morning of 22d November 1900, and about half-past nine, the complainer, without any previous warning, was reapprehended by the police and brought before James Mitchell, as one of the Magistrates of the burgh of Fraserburgh, at eleven o'clock in the forenoon of the same day, on the charge already mentioned."

(Stat. 7) "Notwithstanding the said undertaking of the police, no intimation of any kind was sent by the police or by the respondent to the complainer's agent of the fact of his reapprehension. No intimation thereof was made to his mother, his legal guardian. Apart from any undertaking, it was the duty of the respondent to communicate with the complainer's mother."

The respondent, in his Answers 3, 4, 5, and 7, admitted that complainer's uncle and Mr M'Callum called at the police-office on the day of the first apprehension. He did not dispute that the complainer had then been released. He denied that the police gave any undertaking that they would communicate with Mr M'Callum in the event of the complainer being reapprehended. He admitted that the complainer was reapprehended on the morning of 22d November, and that no intimation of the reapprehension was sent to Mr M'Callum or to the complainer's mother. "The complainer had deserted his home, and the police did not know where his mother resided."

(Stat. 8) "No copy of the said complaint was served on or delivered to the complainer, or delivered to anyone on his behalf." (Ans. 8) "Admitted. Explained that both the complainer and the said Abercrombie Bogue Davidson were perfectly acquainted with the nature of the charge."

(Stat. 9) "That about half-past ten o'clock upon said date the respondent sent an officer of the Court to the complainer's uncle, the

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said Abercrombie Bogue Davidson, with a verbal intimation that complainer was to be brought before the Court that day at eleven o'clock. Upon learning at the Court that the complainer was being prosecuted, and finding that the complainer's agent was not present, the complainer's said uncle inquired of the police whether complainer's agent had received intimation of complainer's reapprehension, and he was informed that such intimation had not been sent. The complainer's said uncle then went for complainer's agent, and not being able to find him at the time, returned to the Court and requested the said Magistrate to adjourn the case until such short space of time as would enable him to arrange for the attendance of the complainer's said solicitor at the Court. His attendance could have been secured within half an hour. The respondent opposed this request, and the said Magistrate refused it." (Ans. 9) "Admitted that intimation was sent to the said Abercrombie Bogue Davidson that the complainer was to be brought before the Court and charged with the theft at eleven o'clock on said 22d November. Said intimation was sent at ten o'clock in the morning. *Quoad ultra* denied. Explained that the said Abercrombie Bogue Davidson attended the Court, and before the complaint was read . . . stated that the boy had got beyond the control of his parents and that he and the said Mr M'Callum had been endeavouring to get him sent to the 'Mars' training ship. On the suggestion of the burgh prosecutor the hearing of the case was delayed that Mr Davidson might go for Mr M'Callum. Mr Davidson left the Court for that purpose, and after being absent for about a quarter of an hour, he returned and stated that Mr M'Callum could not be found."

(Stat. 10) "Thereupon the complainer was asked to plead guilty, and he did so in the absence of his law-agent, and without any opportunity being afforded him of getting legal advice." (Ans. 10) "Admitted that the complainer pled guilty. *Quoad ultra* denied. Explained that the complaint was read over to the complainer in the usual way, and the question was put to him by the Magistrate, 'Are you guilty or not guilty?' and the complainer answered 'Guilty.'"

(Stat. 13) "That after the complainer had pled guilty as aforesaid, the respondent moved the Court to convict the complainer of said charge and to send him to a reformatory. Whereupon the complainer's said uncle objected to this course, and again requested an adjournment until an opportunity had been given to obtain the services of the complainer's said law-agent. The respondent opposed the granting of this request, and the said Magistrate, declining to grant it, there and then ordered the complainer to be sent to Rossie Reformatory School for Boys, Montrose, and to be detained there for three years." (Ans. 13) "Denied. Explained that after the complainer had pleaded guilty the said Abercrombie Bogue Davidson repeated the statement which he had previously made about the complainer having got beyond the control of his parents and friends, and that he and Mr M'Callum had been endeavouring to get him sent to the 'Mars' training ship. No adjournment was asked for, nor was it even suggested that the case should be adjourned. The respondent then addressed the Court, and confirmed what had been stated by the said Abercrombie Bogue Davidson as to the complainer's habits and conduct, and, as the best method of dealing with the complainer, he suggested that he should be sent to a reformatory under section 2 of the Reformatories Schools Act, 1893. The said Abercrombie Bogue

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Davidson did not state any objection to the respondent's suggestion being followed. . . ." The respondent further stated that the complainer had previously been convicted of theft.

The complainer stated that he was not guilty of the offence charged.

The complainer, founding on the Burgh Police (Scotland) Act, 1892, section 478,* and the Reformatory Schools Act, 1866,[1] pleaded; —(1) The whole proceedings complained of being illegal, unjust, and oppressive, the same ought to be set aside, with expenses. (2) The presiding magistrate having wrongfully declined to adjourn the hearing of the case when requested by or on behalf of the complainer to do so, the procedure subsequent thereto is inept, and falls to be quashed. (3) *Separatim*, the order for detention of the complainer in a reformatory being in violation of the provisions of the statute thereanent, the same should be suspended in any event.

The respondent pleaded;—(1) The proceedings complained of having been regular and legal in all respects, and the complainer having been validly convicted, the suspension should be refused with expenses. (2) The complainer's statements, so far as material, being unfounded in fact, the suspension should be refused.

At the hearing counsel for the complainer stated that he did not ask for an inquiry into the truth of the facts in dispute.

Argued for the complainer;—Under section 478 of the Burgh Police (Scotland) Act, 1892, the terms of which were similar to those of section 11 of the Summary Procedure (Scotland) Act, 1864, the complainer had a right to an adjournment of forty-eight hours, and the Magistrate, in not informing him of this right, had acted oppressively, entitling the complainer to have the conviction suspended.[2] Apart from that the whole circumstances disclosed a case of undue haste amounting to oppression.[3] The fact that the complainer had pleaded guilty was not a bar to suspension.[4] Further, the order sending the complainer to a reformatory was illegal, there being no notice to the complainer's mother, and a sentence of imprisonment not having been pronounced on him.[5]

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* The Burgh Police (Scotland) Act, 1892 (55 and 56 Vict. cap. 55), sec. 478, enacts,—"Any person brought before the Court by a warrant of apprehension, or under the authority of this Act, shall be entitled to require a copy of the complaint, and also to require that the hearing shall be adjourned for a period of not less than forty-eight hours; and such requisitions shall be complied with if made before the examination of any witness on the merits shall have commenced; but no such requisition shall be competent where a copy of the complaint, or a summons stating the nature of the charge, shall have been delivered to the accused personally forty-eight hours before the hearing."

[1] 29 and 30 Vict. cap. 117.

[2] Pyper v. Walker, July 10, 1885, 12 R. (Just. Cases) 47, 5 Coup. 631; Gardiner v. Jones, March 4, 1890, 17 R. (Just. Cases) 44, 2 White, 474.

[3] Williams v. Linton, Nov. 27, 1878, 6 R. (Just. Cases) 12; M'Kenzies v. M'Phee, Jan. 28, 1889, 16 R. (Just. Cases) 53, 2 White, 188.

[4] Williams v. Linton, 6 R. (Just. Cases) 12; Farquharson v. Guthrie, July 15, 1884, 11 R. (Just. Cases) 55, 5 Coup. 454.

[5] Wilson v. Stirling, March 9, 1874, 1 R. (Just. Cases) 8, 2 Coup. 518; M'Quire v. Fairbairn, Nov. 9, 1881, 9 R. (Just. Cases) 4, 4 Coup. 536; Farquharson v. Guthrie, 11 R. (Just. Cases) 55; Mackenzies v. M'Phee, 16 R. (Just. Cases) 53.

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The argument for the respondent sufficiently appears from the opinions of the Judges.[1]

LORD JUSTICE-GENERAL.—The points raised in this case resolve themselves into two. First, whether there was any statutory obligation, or any obligation resulting from the decisions of this Court, requiring the Magistrate to inform the accused that under the provisions of section 478 of the Burgh Police Act he was entitled to demand an adjournment of at least forty-eight hours; and second, whether, apart from such statutory obligation, there was such haste and want of opportunity to prepare the defence that it would not be safe to allow the conviction and sentence to stand.

On the first point it seems to me to be clear that there was no statutory obligation on the Magistrate to inform the accused of his rights under section 478.

The section gives to the accused a right to require an adjournment, but it does not in terms impose any obligation upon the Magistrate to inform the accused of the right so conferred. It is a different question whether under certain circumstances it may become the duty of the Magistrate to do what he is not required by the statute to do, and I quite agree in what has been said in the decisions to which we were referred as to its being the duty of the Magistrate under certain circumstances to inform the accused of his statutory right to adjournment, especially if there was any danger of injustice being done by undue haste. But the decisions do not seem to me to go any further than this, and if this be so, I quite agree with the law laid down in them.

But the case before us raises no such special circumstances. The accused was a boy who had previously been convicted of theft and was in danger of becoming a habitual thief; he had broken loose from parental control, and was apparently living on his wits. The charge was not suddenly sprung upon him. A week before the trial both the boy and his uncle, who shewed a most commendable interest in him, were informed by the police that they were making investigations with a view to bringing the charge. Ample time was thus given to communicate with a solicitor and to prepare a defence, if any defence was possible. The police authorities seem further to have fully acted up to their understanding with the boy's uncle and to have duly informed him when the boy was about to be brought to trial. At the uncle's request the case was continued to allow him to obtain the services of his solicitor. He went, and came back saying the solicitor was not to be found. No further adjournment was asked for, and none was given. The charge was then read over to the boy, and the Magistrate asked him if he was guilty or not guilty, and the boy then pleaded "Guilty." It appears to me that a wholly different question might have arisen if the boy had pleaded "Not guilty." If in that case delay was requisite to enable him to prepare his defence and obtain witnesses or procure legal assistance, a wholly different duty might have lain on the Magistrate. But I cannot see in the present case what good an adjournment could have done. The boy required no legal advice to answer what

[1] Boyce v. Shaw, Dec. 15, 1891, 19 R. (Just. Cases) 13, 3 White, 73.

he knew better than anyone else—whether he was guilty or not guilty. He answered that he was guilty, and there is no reason to doubt that this answer was true. No delay was necessary in such circumstances.

As to the part of the sentence which directs that the boy should be sent to a reformatory, I did not understand the suspender's counsel to formulate any separate legal proposition in regard to it. To be sent to a reformatory seems to me to be in the circumstances the best thing that could have happened to the boy. We are told that his mother has died since these proceedings began, and that his uncle has not offered to receive him into his home. Accordingly, if we were to sustain this suspension we would practically turn the poor boy adrift upon the streets, whereas under the education and discipline of the reformatory school it is to be hoped that he may ultimately become a useful member of society.

For these reasons I am of opinion that the suspension should be refused.

LORD KYLLACHY.—I agree. I think it might have been better if there had been an adjournment, at least to the following day. But when we are asked to hold that the failure to inform the accused of his right to ask for an adjournment is *per se* a sufficient ground for upsetting this conviction, that raises another question. I am not prepared to affirm generally the existence of any such duty as is alleged. With respect to the circumstances of this particular case, all I need say is, that I do not consider that the circumstances involve any case of oppression or any failure of justice.

LORD LOW.—I have experienced considerable difficulty in this case. If the suspender's counsel had taken their stand upon the averments made in the bill of suspension and offered to establish them, it would have been very difficult in my opinion for the Court to do otherwise than remit the case for a report on the facts.

The statement for the suspender sets forth that the boy's uncle, finding that his law-agent was not present in Court, went to bring him, and not being able to find him, returned to the Court and requested the Magistrate "to adjourn the case until such short space of time as would enable him to arrange for the attendance of his solicitor. His attendance could have been secured within half an hour. The respondent opposed this request and the said Magistrate refused it." Further, it is stated that after the boy had pleaded guilty, and the prosecutor had moved for sentence, the uncle intervened and again requested an adjournment "until an opportunity had been given to obtain the services of his law-agent. The respondent opposed the granting of this request, and the Magistrate, declining to grant it, there and then" pronounced the sentence complained of. If these statements had been substantiated they would undoubtedly have raised a very serious question. But the suspender's counsel stated that they did not ask for an inquiry into the facts, and that being so we have been left to gather the facts from the statements made in the pleadings and by counsel, and I have no doubt that we now know with sufficient accuracy what admittedly took place. I need not recapitulate the circumstances, because they have been fully stated by your Lordship in the chair, and I entirely agree in the conclusion at which you have arrived.

It cannot be said that any positive rule was violated in the conduct of

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this case, but an appeal was made to the discretion of the Court on the ground that matters were conducted with such undue haste as to amount to a denial of justice.

The apprehension and trial, however, did not really come as a surprise either to the accused or to his uncle, because they had known for some days that the police were investigating a charge of theft against the lad, and that if they found sufficient evidence he would be put upon trial. In the interval the law-agent was consulted, and the only thing which seems to have been suggested was that the lad should be got into the "Mars" training ship. There is no doubt that he has been guilty of dishonesty, and if the sentence was to be set aside, and he were to be now again thrown upon the world, one would not have much hope of his future, whereas if he is detained for some years in a reformatory school he may then begin life afresh with the prospect of leading an honest life.

THE COURT refused the bill.

WM. DOUGLAS, S.S.C.—ALEX. MORISON & Co., W.S.—Agents.

No. 13.

Mar. 15, 1901.
Gardner v. Bremridge.

ANDREW GARDNER, Complainer.—*Orr*—*Lyon Mackenzie.*
RICHARD BREMRIDGE, Respondent.—*Salvesen, K.C.*—*T. B. Morison.*

Sentence—Penalty—Imprisonment—Poinding and Sale—Arrestment—Pharmacy Act, 1852 (15 *and* 16 *Vict. cap.* 56), *sec.* 12—*Pharmacy Act*, 1868 (31 *and* 32 *Vict. cap.* 121), *sec.* 15—*Summary Procedure* (*Scotland*) *Act*, 1864 (27 *and* 28 *Vict. cap.* 53), *sec.* 18, *subsec.* 6—*Summary Jurisdiction* (*Scotland*) *Act*, 1881 (44 *and* 45 *Vict. cap.* 33), *sec.* 8, *subsec.* 1—*Debtors* (*Scotland*) *Act*, 1880 (43 *and* 44 *Vict. cap.* 34).—In a proceeding upon a complaint under the Summary Jurisdiction (Scotland) Acts, 1864 and 1881, for a contravention of the Pharmacy Acts, which authorise the recovery of penalties by poinding—(1) it is competent, under the Summary Jurisdiction Act, 1881, to grant warrant for imprisonment, and (2) the warrant to imprison may be in default of payment of the penalty or recovery thereof by poinding and sale—it is not necessary that it should also be in default of recovery by arrestment.

HIGH COURT.
Lord Justice-General.
Ld. Kyllachy.
Lord Low.

ON 15th November 1900 Andrew Gardner, 119 High Street, Linlithgow, was charged in the Sheriff Court at Linlithgow, on a complaint under the Summary Jurisdiction (Scotland) Acts, 1864 and 1881, and the Criminal Procedure (Scotland) Act, 1887, at the instance of Richard Bremridge, Registrar under the Pharmacy Acts, 1852 and 1868, in name and by authority of the Council of the Pharmaceutical Society of Great Britain, with the concurrence of William H. Henderson, Procurator-fiscal of the county of Linlithgow. The complaint set forth that the accused "has been guilty of an offence within the meaning of the 1st and 15th sections of the Pharmacy Act, 1868, in so far as on or about the 3d day of November 1900, or on one or more of the days of said month, the said Andrew Gardner, not being a duly registered pharmaceutical chemist, or a chemist and druggist within the meaning of the said recited Act, and in or near the shop or premises at No. 67 High Street, Linlithgow, unlawfully, and contrary to the 1st and 15th sections of the said recited Act, did sell by retail to John Rutherford Hill, residing at No. 36 York Place, Edinburgh, a poison within the meaning of the said recited Act, to wit, a quantity of opium which at the time when sold by the said Andrew Gardner to

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the said John Rutherford Hill, as aforesaid, formed an ingredient in a quantity of laudanum or tincture of opium sold by the said Andrew Gardner to the said John Rutherford Hill, whereby the said Andrew Gardner became liable in a penalty of £5 sterling, and failing payment of the penalty imposed, to imprisonment in terms of sections 6 and 8 of the Summary Jurisdiction (Scotland) Act, 1881."

Gardner pleaded guilty.

The Sheriff-substitute (Macleod) pronounced the following conviction and sentence:—"In respect of the judicial confession of the said Andrew Gardner, convicted and hereby convicts the said Andrew Gardner of the offence charged, and therefore adjudged and hereby adjudges him to forfeit and pay the sum of Two pounds of modified penalty, with the sum of One pound two shillings of expenses, and in default of immediate payment thereof, granted and grants warrant for recovery of the said sum by poinding of his goods and effects, and summary sale thereof on the expiration of not less than forty-eight hours after such poinding, without further notice or warrant, and appointed and hereby appoints a return or execution of such poinding and sale to be made within 8 days from this date, under certification of imprisonment for the period of 3 days in default of payment or recovery of the said sums, with the expenses of diligence before the time allowed for such report."

Gardner brought a suspension.

The grounds of suspension, and the statutes on which the questions turned, are sufficiently set forth in the opinion of the Lord Justice-General.[1]

At advising,—

LORD JUSTICE-GENERAL.—(After narrating the conviction)—The complainer maintained that the sentence is bad, upon the ground that it authorised imprisonment, and alternatively that it does not as a preliminary require execution by arrestment as well as by poinding.

He admitted that prior to the abolition of imprisonment by the Debtors (Scotland) Act, 1880, imprisonment might have followed upon failure to pay a sum awarded under the Pharmacy Acts as a civil debt, but he contended that in order to warrant imprisonment now, it must be expressly authorised by statute, and that by the Pharmacy Acts it is not only not expressly authorised but is excluded by implication. He further maintained that the Sheriff should have granted warrant for arrestment as well as for poinding, and that assuming imprisonment to be competent, it could only follow upon failure to recover by arrestment as well as by poinding, and that the omission of this additional mode of recovery prior to imprisonment was fatal to the sentence. In order to judge of the validity of these objections it is necessary to advert to the terms of the Pharmacy Acts and of the Summary Procedure Acts.

The Pharmacy Act, 1868, section 15, declares that for every such offence as is therein specified (one being the offence to which the complainer pleaded guilty), the offender shall "be liable to pay a penalty or

[1] *Cited by the Complainer.*—Simpson v. Board of Trade, Feb. 3, 1892, 19 R. (Just. Cases) 66, 3 White, 167. *By the Respondent.*—Murray v. Jones, June 17, 1872, 2 Coup. 284, 44 Scot. Jur. 458; M'Kirdy v. M'Kendrick, Dec. 17, 1897, 25 R. (Just. Cases) 49, 2 Adam, 435.

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sum of £5, and the same may be sued for, recovered, and dealt with in the manner provided by the Pharmacy Act for the recovery of penalties under that Act."

By section 12 of the Pharmacy Act, 1852 (15 and 16 Vict. cap. 56), it is declared that penalties under it may in Scotland be recovered by action before the Court of Session in ordinary form or by summary action before the Sheriff, or in royal burghs before the Magistrates, and that it shall be lawful for the Sheriff or Magistrate in pronouncing judgment for the penalty or penalties and costs "to insert in such judgment a warrant, in the event of such penalty or penalties or costs not being paid, to levy and recover the amount of the same by poinding."

By section 18, subsection 6, of the Summary Procedure (Scotland) Act, 1864, it is, *inter alia*, declared that in all cases where, under the authority of any Act of Parliament, a penalty is recoverable by action, civil process, or diligence, the judgment of the Court shall authorise execution by arrestment, poinding and sale, and imprisonment, "unless recovery by imprisonment is excluded by the terms of the Act," and may be in the form No. 6 in the schedule; and that where, under the authority of the Act of Parliament, a penalty is declared to be recoverable by arrestment, poinding, or distress and sale, or imprisonment, or by any combination of those forms of diligence other than as above provided for, the judgment may be expressed in the said form No. 6 so far as applicable, and no warrant for imprisonment shall be issued upon a judgment in such form until after the period allowed for execution by arrestment or poinding, except in the event mentioned in form No. 6. It appears to me that upon these enactments it is clear that imprisonment is competent unless it is to be held as excluded by the Pharmacy Acts. The complainer maintained that it is excluded by these Acts, because they do not expressly authorise it, but I consider that this contention is not well founded.

If, however, the legislative provisions on the subject had stopped here, I should have thought it at least a question whether it would not have been necessary to authorise execution by arrestment as well as by poinding and sale before having recourse to imprisonment. I should also have considered that the power of imprisonment was affected by the general abolition of imprisonment for civil debt operated by the Debtors (Scotland) Act, 1880. But section 8, subsection 1, of the Summary Jurisdiction (Scotland) Act, 1881, declares that, subject to the provisions of section 6, in all proceedings under the Summary Jurisdiction Acts, where a warrant of poinding and sale is competent, a warrant of imprisonment in default of recovery of sufficient goods shall likewise be competent for a period not exceeding three months, and that the Court shall specify the term of imprisonment in the warrant. This, which is the last statutory provision on the subject, expressly provides for imprisonment, and makes no mention of arrestment, and therefore it appears to me that the warrant for imprisonment in default of recovery of sufficient goods must mean recovery by the method specified in the section, viz., poinding and sale, and that it is not now essential that execution by arrestment shall be authorised (as under the Summary Procedure Act, 1864) as well as by poinding and sale. In other words, the provisions of the Act of 1864, in so far as affected by the

Debtors Act of 1880, are practically restored, subject to the modifications (1) that execution by arrestment shall no longer be necessary, and (2) that the period of imprisonment shall be definite. No. 13. Mar. 15, 1901. Gardner v. Bremridge.

For these reasons, I am of opinion that the suspension should be refused.

LORD KYLLACHY and LORD LOW concurred.

THE COURT refused the bill.

T. F. WEIR & ROBERTSON, S.S.C.—P. MORISON & SON, S.S.C.—Agents.

DAVID HOGG, Appellant.—*Tait.*
JOHN MARR DAVIDSON (Procurator-Fiscal, Justice of Peace Court, Lanark), Respondent.—*Mercer.*

No. 14. Mar. 18, 1901. Hogg v. Davidson.

Public-house—Hawking excisable liquor—Responsibility of master for servant—Vanman—Public-Houses Acts Amendment (Scotland) Act, 1862 (25 *and* 26 *Vict. c.* 35), *sec.* 16.—A vanman, in the employment of and in charge of a van belonging to a licensed grocer, sold and delivered a pint of whisky from the van to A on a public road. A had not ordered the whisky previously. It was part of certain excisable liquors which the vanman had taken from his master's licensed premises in the morning. The master was not present when the whisky was sold to A. The vanman was in the habit of keeping a book in which the liquor taken out by him in the morning was noted. Liquor taken out by him was frequently returned by him to his master as being unsold or undelivered. The master occasionally examined the vanman's book, and the vanman's actings were known to him.

Held that the master, as well as the vanman, had, in respect of the sale to A, rightly been convicted of hawking excisable liquors in contravention of the Public-Houses Acts Amendment (Scotland) Act, 1862.

HIGH COURT. Lord Justice-Clerk. Lord M'Laren. Lord Pearson.

ON 24th September 1900 David Hogg, licensed grocer, and William Drummond, vandriver, Carnwath, Lanarkshire, were charged in the Justice of Peace Court at Lanark, on a summary complaint at the instance of the Procurator-fiscal of Court, setting forth that the accused "did, on 31st August 1900, from a van on the public road leading from Biggar to Dolphinton, both in the county of Lanark, at a part thereof" specified, "sell and deliver one pint of exciseable liquors, and particularly whisky, to David Black, wire-fencer, Dolphinton Green, Dolphinton, Lanarkshire, and did thereby hawk the same, contrary to section 16 of the Public-Houses Acts Amendment (Scotland) Act, 1862, whereby," &c.

The accused pleaded not guilty, but after evidence had been led were convicted of the contravention charged, and fined £5 each of modified penalty, with the alternative of thirty days' imprisonment.

Hogg obtained a case. The following were the facts stated in the case:—On the day in question Drummond sold and delivered one pint of whisky to Black, and thereby hawked the same at the place libelled. The whisky had not been previously ordered by Black. Hogg was not present at the time or place of sale. Drummond was at the time a vanman in the employment of, and in charge of a van belonging to, Hogg. The sale took place from this van. The vanman was in the habit of keeping a book, which he described as his order-book; this book was occasionally examined by Hogg. Frequently liquor sent out in the morning was returned by the vanman to Hogg as being unsold or undelivered. The liquors were supplied from

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Hogg's licensed premises in Carnwath. The vanman's actings were known to Hogg.

The question of law was:—"Are the facts held to have been proved sufficient to justify the conviction of the said David Hogg of the contravention charged?"

The undernoted cases[1] were cited by the appellant at the hearing. The respondent was not called upon.

LORD JUSTICE-CLERK.—I am of opinion that this conviction must be upheld. The vanman in the regular course of his employment took out liquor from his master's premises. He took with him on his rounds a book in which he entered a note of the liquor which he took out, and for which he had to account when he returned. The liquor might be delivered to customers who had ordered it, or it might be sold to chance customers, or it might be carried home again. In this case we have it found as a matter of fact proved to the satisfaction of the Justices that the whisky libelled was sold to one who had not given an order for it previously. And we are further told that the vanman's actings were known to the appellant.

That these facts are sufficient in law to entitle the Magistrate to hold that the appellant had trafficked in exciseable liquors, contrary to section 16 of the Public-Houses Act of 1862, I have no doubt whatever.

LORD M'LAREN.—The only point in this case is, that it is said there was not sufficient evidence that the appellant Hogg had authorised his vanman to make the sale of liquor in question.

No doubt the legal maxim *qui facit per alium facit per se* does not strictly apply in criminal cases. But there is a class of delicts in which, as in cases under the Licensing Acts, the offence is the acting in contravention of the trade conditions to which by Act of Parliament the master of the business is bound to conform. In such cases, where the actual sale is by a servant, the servant is presumed to sell in the ordinary course of his employment, and it is for the master to displace that presumption by proving that the servant acted either outwith the scope of his employment or in contravention of express and particular orders.

In the present case what is disclosed is a system of hawking by the servant in the course of his employment, and the master has not displaced the presumption that he was cognisant of the system, and therefore responsible for his servant's conduct in the particular act libelled.

LORD PEARSON.—The appellant here employed his vanman as his agent to sell exciseable liquors, and the facts shew that the vanman had a great authority. If that is so, the offence attached both to the master and the man.

THE COURT answered the question in the affirmative, and dismissed the appeal.

WILLIAM MACIVOR, Solicitor—R. & R. DENHOLM & KERR, S.S.C.—Agents.

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[1] Dewart v. Neilson, June 10, 1900, 2 F. (Just. Cases) 57; Neilson v. Dunsmore, Dec. 6, 1900, *supra*, p. 6; Galbraith v. Disselduff, Oct. 25, 1895, 23 R. (Just. Cases) 4, 2 Adam, 4.

JOHN FREW, Appellant.—*Fleming.*
THOMAS GUNNING, Respondent.—*Blair.*

No. 15.

Mar. 18, 1901.

Frew v. Gunning.

Statutory Offence—Sale of Food and Drugs Acts, 1875 (38 *and* 39 *Vict. cap.* 63)—*Sale of Food and Drugs Act Amendment Act*, 1879 (42 *and* 43 *Vict. cap.* 30)—*Sale of watered milk—Demand by inspector for milk from particular can—Warning by seller that milk in that can might not be sweet milk—Bona fides.*—A dairyman was charged with a contravention of the Sale of Food and Drugs Acts, 1875 and 1879, by selling to the prosecutor (an inspector under the Acts) to his prejudice twopence worth of sweet milk, which was not of the nature, substance, and quality demanded by the prosecutor, in respect that it contained 13 per cent of added water. The following facts were proved:—The accused on the day libelled started on his usual round in the country with a quantity of milk, the produce of his own dairy. Finding that his supply was running short, he called at a dairy and asked for two gallons of sweet milk. He was supplied with that quantity of milk, which he put into an empty can. He did not ask for or obtain a warranty with this milk, being content to rely upon his knowledge of the dairyman, from whom he had frequently obtained milk in similar circumstances. He thereafter met the prosecutor, of whose official position he was aware. The prosecutor having demanded twopence worth of sweet milk, the accused was proceeding to supply him with milk from a can containing the produce of his own dairy, as to the genuineness of which he had personal knowledge, but the prosecutor insisted on getting milk from the can containing the purchased milk. The accused then sold twopence worth of milk from this can to the prosecutor after informing him that the milk was not the produce of his own cows, and warning him that it might or might not prove to be sweet milk. The milk sold to the prosecutor contained 13 per cent of added water.

The Sheriff-substitute acquitted the accused on the ground that the prosecutor had been supplied with the milk which he insisted on getting after warning that it might not prove to be sweet milk.

Held, on appeal, that the Sheriff-substitute had rightly acquitted the accused.

HIGH COURT. Lord Justice-Clerk. Lord M'Laren. Lord Pearson.

ON 28th December 1900 Thomas Gunning, dairyman, Old Liston, in the parish of Kirkliston, Midlothian, was charged in the Sheriff Court at Linlithgow on a summary complaint at the instance of John Frew, sanitary inspector for the county of Linlithgow, who had been appointed by the County Council of the county of Linlithgow, being the Local Authority under the Sale of Food and Drugs Acts, 1875 to 1899, to enforce these Acts. The complaint set forth that the accused "did on 5th December 1900, on the public road or highway in Kirkliston, in the county of Linlithgow," at a point specified, "sell to the complainer to his prejudice twopence worth of sweet milk, which was not of the nature, substance, and quality demanded by the complainer, in respect that it contained thirteen per cent or thereby of added water, contrary to the 6th section of the Sale of Food and Drugs Act, 1875, as amended by the 2d section of the Sale of Food and Drugs Act Amendment Act, 1879."

The accused pleaded not guilty, and after evidence had been led the Sheriff-substitute (Macleod) acquitted him.

Frew obtained a case. The case set forth as follows:—

"2. The following facts were proved to my satisfaction:—

"(*a*) Early on the morning of 5th December 1900 (the date libelled), the respondent set out in his own van from his dairy on his usual rounds through the county of Linlithgow, to deliver milk to

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his customers. At the beginning of his journey he had about thirty-two gallons of sweet milk, the produce of his own cows, contained in nine or ten cans and barrels of various sizes, holding from one-half gallon upwards. In particular he used one large barrel for delivering sweet milk to those customers who came to his van for small quantities, while the smaller vessels were convenient when he had to leave his van and carry the milk to customers' houses.

"(*b*) About eleven o'clock in the forenoon of that day, the respondent had got as far as Dalmeny, and finding that his own sweet milk would not be sufficient to supply the usual customers whom he had still to serve, he called at a dairy near Dalmeny, asked there for two gallons of sweet milk, and was supplied with that quantity of milk. The two gallons of milk thus obtained the respondent poured into the large barrel above referred to, in order that he might more conveniently supply those customers who came for sweet milk to his van. The barrel was quite empty when respondent began to pour into it the milk which he had thus purchased. The respondent did not ask for nor obtain a written warranty with the purchased milk. He had frequently got his deficiency supplied at the same dairy, and was content to rely upon his knowledge of the person with whom he was dealing.

"(*c*) From Dalmeny the respondent proceeded to Kirkliston (about two miles distant), where he arrived about three quarters of an hour later, and there, at the place libelled, the appellant accosted the respondent with a demand for twopence worth of sweet milk. The official position of the appellant was well known to the respondent, and the nature of the transaction about to be entered into was further evidenced by the presence of two police-constables.

"(*d*) The respondent at once proceeded to comply with the appellant's demand. He took the lid off a small can which contained sweet milk, the produce of his own cows, and as to the genuineness of which he had personal knowledge, and was about to give the appellant twopence worth therefrom. The appellant, however, refused to accept milk from that small can. If the appellant had accepted what the respondent offered him he would have got sweet milk.

"(*e*) The appellant insisted on getting from the respondent the article contained in the large barrel above referred to, whatever it might prove to be. The respondent accordingly proceeded to supply the appellant therefrom, but before doing so he (i.) informed the appellant that the milk in his large barrel was not the produce of his own cows, but had been purchased by him; and (ii.) warned the appellant that it might or might not prove to be sweet milk. The said warning was conveyed by the respondent to the appellant in the following words, or words of similar import: 'This milk is not mine and if there is anything wrong with it I am not to blame,' or 'the fault is not mine.' Notwithstanding this warning, the appellant still insisted on getting the article contained in this large barrel, and the respondent accordingly supplied him, giving him the quantity usually given to a customer who asks for twopence worth of sweet milk.

"(*f*) After the purchase was completed, the appellant notified the respondent of his intention to have the milk analysed by the public analyst. The statutory requisites were all complied with, and subsequent analysis revealed the fact that the article purchased by the appellant from the respondent was not sweet milk, but milk which had been adulterated by 13 per cent of added water.

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"3. As the appellant was supplied with the article which he insisted on getting after warning from the respondent that it might or might not prove to be the article for which he originally asked, viz., sweet milk, it appeared to me that the proper course was to acquit the respondent, and this I did.

"The question of law for the opinion of the High Court of Justiciary is:—

"Whether I erred in acquitting the respondent upon the ground narrated in paragraph 3 of the foregoing statement?"

At the hearing on the appeal the respondent was not called upon.

LORD JUSTICE-CLERK.—The question here is, whether the Sheriff erred in acquitting the respondent, he being satisfied that the respondent warned the appellant that the milk in that particular barrel was not his, and that the respondent supplied the article which the appellant insisted on getting. In these circumstances the Sheriff thought proper to acquit the respondent. Now, I can understand that the carrying of two barrels with different qualities of milk, one for sale to inspectors and the other for sale to customers in general, opens the way for fraud. But until there is some proof of fraud, by its being shewn that customers were actually supplied with the inferior quality, we cannot consider it. This is a stringent statute. Many dealers in milk have to buy milk from other dealers when their own supply gives out, and a statute so stringent as this is not to be pressed further than is reasonable.

Where fraud is suspected I suggest that the right way to proceed would be to take means to ascertain whether the person accused has sold to customers any quantities of the article sold to the inspector. If he is found doing so, he can then be convicted of the previous sale on evidence as to the specimen bought by the prosecutor.

But to convict of a sale where the person selling could not legally refuse to sell, and where the person selling distinctly intimated that he could not sell the article as being what was demanded, would, I think, be most unjust.

LORD M'LAREN.—I am of the same opinion. If this were a case of a dairyman selling his own milk, or milk of which he had knowledge, I would be inclined to hold that the statement by the seller that he did not warrant the milk was a mere evasion and could not be accepted. But this is not the case here. The Sheriff has found in fact that the respondent started with an ample supply of his own milk, but that, on running short, he had bought two gallons—not a large quantity—from another dairyman to eke out his own supply. When the inspector came he told him he could not guarantee the quality of the milk in that particular barrel owing to the circumstances mentioned. I think that the Sheriff was justified in holding that there was here a *bona fide* sale of an article, the quality of which was not, and could not be, guaranteed, and that the dairyman was not chargeable with a contravention of the statute.

LORD PEARSON concurred.

THE COURT pronounced the following interlocutor:—"Dismiss the appeal, and decern."

Tods, Murray, & Jamieson, W.S.—Charles Garrow, Solicitor—Agents.

No. 16.

Mar. 18, 1901.
Baikie v. Charleson.

WILLIAM SINCLAIR BAIKIE, Complainer.—*Graham Stewart.*
MALCOLM MACKENZIE CHARLESON (Burgh Prosecutor, Stromness), Respondent.—*T. B. Morison.*

Police—Street—Regulation of traffic—Bye-law—Notice—Order—Ultra vires—Burgh Police (Scotland) Act, 1892 (55 *and* 56 *Vict. cap.* 55), *sec.* 385.—The Burgh Police (Scotland) Act, 1892, sec. 385, enacts,—"The magistrates may from time to time make bye-laws and issue notices and orders," *inter alia*, "(3) Prescribing the streets in or through which particular kinds of traffic shall not be permitted." Under the Act bye-laws require to be confirmed by the Sheriff and the Secretary for Scotland; there is no such requirement in the case of notices and orders.

The magistrates of a burgh, professing to act under section 385 of the Act, issued a notice and order permanently prohibiting all bicycle and tricycle traffic in the main thoroughfare of the burgh.

Held that the notice and order was *ultra vires* and ineffectual, in respect that, on a sound construction of section 385, in the case of a regulation intended to be permanent, the procedure must be by bye-law.

HIGH COURT. Lord Justice-Clerk. Lord M'Laren. Lord Pearson.

AT a meeting of the Police Commissioners of the burgh of Stromness, held on 12th June 1899, it was resolved that cycling should be prohibited in five streets forming the main thoroughfare of the burgh, and that the Magistrates should issue an order under section 385 of the Burgh Police (Scotland) Act,* on the subject.

At a meeting, held on 15th June, the Magistrates, having considered the subject of cycling in the streets of the burgh, and also the minute of meeting of the Commissioners of 12th June, approved of a notice on the subject referred to in that minute. This notice was approved by the Commissioners at a meeting held on the same day.

The notice was in the following terms:—

"Notice to Cyclists.—The Magistrates of the burgh of Stromness hereby give notice, in terms of section 385 of the Burgh Police (Scotland) Act, 1892, that all bicycle and tricycle traffic in the streets" above referred to "is prohibited from and after Monday, the 19th day of June curt., 1899, and every breach of this order shall be deemed

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* The Burgh Police (Scotland) Act, 1892 (55 and 56 Vict. cap. 55), sec. 385, enacts,—"The magistrates may from time to time make bye-laws and issue notices and orders:—

"(1) Regulating the traffic, or any particular traffic, in streets within the burgh:

"(2) Diverting temporarily out of any street or streets traffic of every kind, or such particular kinds of traffic as may be specified in any such order or notice:

"(3) Prescribing the streets in or through which particular kinds of traffic shall not be permitted, or, where permitted, the hours within which they are permitted:

"(4) Prohibiting or regulating public processions:

"And every breach of any such bye-law, notice, or order, shall be deemed an offence against this Act, and every person committing such an offence shall be liable to a penalty not exceeding forty shillings."

Under sec. 318, bye-laws under the Act (with certain exceptions not here material), before coming into operation, require to be confirmed by the Sheriff and by the Secretary for Scotland, and sec. 319 makes provision for the advertisement of notice of the intention to apply for confirmation, and authorises the hearing of objections to the proposed bye-law. There are no such provisions in regard to notices and orders.

an offence against said Act, and every person committing such an offence shall be liable to a penalty not exceeding forty shillings."

No. 16.

Mar. 18, 1901. Baikie v. Charleson.

William S. Baikie, steamboat agent, Stromness, having, on 2d August 1900, been convicted of a contravention of the order, brought a suspension, *inter alia*, on the ground that the order was *ultra vires*.

At the hearing the respondent cited the undermentioned authority.[1]

LORD M'LAREN.—This is not a case in which we have to consider a question of character or conduct, though in point of form it is a suspension of a conviction and sentence. The purpose of the case is to raise the question of the validity of an order by the Commissioners of Police of Stromness prohibiting certain vehicles being driven beyond a walking pace through a set of streets constituting the only thoroughfare in the burgh suitable for vehicular traffic. Under section 385 of the Burgh Police (Scotland) Act, 1892, certain things may be done by the Magistrates of burghs for the regulation of street traffic. (1) They can regulate the traffic, or any particular traffic, in streets within the burgh; (2) they can divert temporarily out of any street or streets traffic of every kind, or particular kinds of traffic; (3) they can prescribe the streets in or through which particular kinds of traffic shall not be permitted. These things are to be done by the Magistrates from time to time making bye-laws and issuing notices and orders. If a bye-law is made it has to be confirmed by the Sheriff before it comes into operation, and before such confirmation notice of the intention to apply for confirmation must be given in the newspapers. On a sound construction of this enactment it does not confer authority on the Magistrates to do all these things either by way of bye-law or by way of notice and order according to the pleasure of the Magistrates. Giving fairplay to section 385, it means that regulations are to be made by bye-law or by order according to the nature of the case. Where it is a case of temporarily regulating or prohibiting traffic through a street under repair, or on some public occasion, they can do so by notice to the inhabitants or by order. But where the magistrates desire to make the prohibition permanent they must proceed by bye-law, which must be confirmed by the Sheriff. It is noteworthy that in the case second mentioned in section 385—the only case in which the regulation is expressed to be by way of order and notice—the example given is one of regulation for temporary purposes. From this it may be inferred that where the regulation is to be permanent or of long duration it cannot be made by mere order and notice. It must be kept in view that the streets were intended to be free to all classes of the community. Some people prefer to go in carriages, some on horseback, and some on cycles, according to their means and ability, and to exclude the entire section of the community who favour this convenient though modern form of locomotion from the use of the only available street in the burgh is a strong measure. The regulation may possibly be right, but a regulation of that kind should only be passed with deliberation, and subject to the checks which the statute prescribes. I am therefore of opinion that the Magistrates have not taken the right way of dealing with this question, that the notice was insufficient, and that the conviction proceeding on what, in this view, was an unauthorised prohibition, should be quashed.

[1] Deakin v. Milne, Oct. 27, 1882, 10 R. (Just. Cases) 22, 5 Coup. 174.

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Baikie v. Charleson.

LORD PEARSON.—In my opinion the opening words of section 385 are to be read distributively. It may be difficult to lay down any precise line of distinction between cases in which a bye-law is necessary and cases in which it is enough to proceed by way of notice or order. I think, however, that a regulation permanently excluding a certain kind of traffic from the main thoroughfare of a burgh is clearly within the class of cases in which it is necessary to proceed by bye-law.

LORD JUSTICE-CLERK.—Section 385 of the Burgh Police Act, 1892, contemplates that in regulating street traffic the magistrates of a burgh may proceed in certain cases by bye-law and in certain cases by notice and order. Curiously enough it is expressly stated in article 2 of section 385 that regulations under it shall be by notice and order, and in that subsection the regulations referred to are definitely described as temporary. This is an indication of the intention of the Legislature as to when a bye-law is necessary and when a notice and order is sufficient. There are many temporary occasions, as when a drain bursts or a fire breaks out, when a regulation would be nugatory if it was necessary to proceed by bye-law to make it efficient. In such a temporary case the magistrates may act by order and notice. But the case we have here is not one of urgency, and its duration is indefinite. That being so, it is in my opinion a case for parties being heard and proceedings being taken by bye-law, so that the decision of the magistrates may be subject to review by the Sheriff.

THE COURT suspended the conviction.

JAMES GIBSON, S.S.C.—JAMES AYTON, S.S.C.—Agents.

No. 17.
Mar. 18, 1901.
Macnaughton v. Smith.

PETER MACNAUGHTON, Appellant.—*Clyde.*—*W. J. Robertson.*
ROBERT MACAULAY SMITH (Procurator-Fiscal, Edinburgh Police Court), Respondent.—*Guthrie, K.C.*—*F. T. Cooper.*

Police—Cleaning of Common Stair—Edinburgh Municipal and Police Extension Act, 1882 (45 *and* 46 *Vict. cap. clix.*), *sec.* 41, *subsec.* (5).—The Edinburgh Municipal and Police Extension Act, 1882, sec. 41, subsec. (5) enacts:—"The occupiers of every house, flat, or storey having entrance by a common stair, shall cause the stair and landing immediately below the flat or storey possessed by them to be swept every lawful day, and washed at least twice a week. . . . If any flat or storey of the tenement be unoccupied, the occupiers of the flats or storeys above shall cause the stairs and landings below such empty flat or storey to be swept and washed downwards to the next house which shall be occupied."

A club, in addition to its main premises, occupied a flat in an adjoining tenement. Entrance from the main club premises to this flat was obtained by a doorway through the gable wall between the tenements. Before the occupancy of the flat by the club, the entrance to the flat, as well as to the other flats of the tenement, was obtained from a common stair. The club made no use of this common stair, and the doorway therefrom, which formerly gave access to the flat, had been boarded up with wood battens.

The secretary of the club was convicted of a contravention of the above enactment in having failed to have the stair and landing immediately below the flat belonging to the club washed.

Held on appeal that the mere fact that the club had ceased to use the common stair did not relieve it of its obligation under the statute to have the stair washed, and that the conviction was right.

No. 17.
Mar. 18, 1901.
Macnaughton v. Smith.
HIGH COURT. Lord Justice-Clerk. Lord M'Laren. Lord Pearson.

ON 28th January 1901, Peter Macnaughton, S.S.C., secretary of the Union Club, Limited, occupying premises at 25 Hanover Street, Edinburgh, was charged in the Police Court at Edinburgh on a summary complaint at the instance of the Procurator-Fiscal, setting forth that, "contrary to the Edinburgh Municipal and Police Extension Act, 1882, section 41, subsection (5),* he, as representing the management of said Union Club, being the person having access to a flat or storey thereof by the common passage or stair at No. 27 Rose Street, Edinburgh, did fail to have said stair washed between 1st and 12th December 1900."

Macnaughton pleaded not guilty, but, evidence having been adduced, was convicted and fined 2s. 6d., with the alternative of one day's imprisonment.

He obtained a case. The case stated:—"The Union Club, Limited, of which the appellant is the secretary, occupies premises entering from the street at No. 25 Hanover Street. These premises consist of four flats and basement, and have a back entrance from Rose Street Lane. In addition to the main club premises, the club occupies the first flat of a tenement situated at the corner of Rose Street and Hanover Street. The ground flat of that tenement consists of shops entering from Hanover Street, and entrance to all the other flats previous to the occupancy of the said first flat by the club was obtained from a common stair, No. 27 Rose Street. The said first flat is used by the club in conjunction with, and as part of, the club premises, and entrance thereto is obtained from the club premises by an open arched doorway through the gable wall between the tenements. The club makes no use whatever of the common stair, No. 27 Rose Street. The doorway therefrom which formerly gave access to the flat, has been boarded up with half-inch wood battens painted similarly to the walls of the staircase. The back entrance of the club in Rose Street North Lane is 35 yards, and the front entrance in Hanover Street is 40 yards, from the common stair in question. The club premises have not been entered from that stairway for several years, and could not be so entered without removing the existing wooden partition."

The questions of law were:—"(1) Whether in the circumstances stated the club premises have entrance by a common stair within the meaning of section 41, subsection (5), of the Edinburgh Municipal and Police Extension Act, 1882, so as to bring the club under the obligation to wash the stair? (2) Whether the facts proved warrant the conviction?"

The argument for the appellant sufficiently appears from the opinions of the Judges.[1]

The respondent (the Procurator-Fiscal) was not called upon.

LORD JUSTICE-CLERK.—I entertain no doubt that in this case the conviction was right.

The Union Club took possession of a flat having an entrance upon this stair, and it has that entrance still. The club may choose not to use it, and for its own convenience may have filled up the doorway, but its right to have an entrance to the stair remains. If the club has that right, the fact that it does not use the entrance does not affect the liability of the club as occupier of a flat having a right of entrance by the stair to clean

* Quoted in the Rubric.

[1] Daish v. Paterson, Dec. 22, 1876, 4 R. (Just. Cases) 10, 3 Coup. 362.

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the stair. It has a right which no one can dispute, and it cannot place the burden of the duty attaching to that right on the other occupiers of the stair merely by not exercising the right.

One argument for the appellant's view is founded upon the provision of the section that where any flat is unoccupied, then the duty of cleaning the stair shall devolve on the occupier of the flat above. I can quite understand the policy of the Legislature in making this exceptional provision on sanitary considerations and considerations of convenience. The Legislature evidently thought that where a flat was temporarily unoccupied, it was inadvisable that the police should have to search out the owner or some third party on whom to place the duty of cleaning that portion of the stair. But this is not an unoccupied flat; that provision, therefore, is not here in point.

In the next place, the appellant relied on the case of *Daish*,[1] and it is proper that I should notice that case. If it had been decided in precisely similar circumstances, we should have felt bound to defer to the opinion there expressed. But the circumstances there were entirely different. In *Daish's*[1] case the true entrance to the house was by a main-door which was built for that house. The house had also a door into the passage giving access to the back-green, and as regards the portion of the passage between his door and the back-green there was no dispute that Daish was liable. The only question arose as to the portion of the passage between his door and the front door of the tenement, which no doubt Daish could use, but which he had no need to use. The Court held that that portion of the passage had not been provided for his use, but for the use of the occupants of the stair. He was therefore found not liable for the cleaning of it. That case has no application here. The appellants are occupiers of a flat which has an entrance to this stair, and they are liable under this statute for the cleaning of their portion of the stair.

Lord M'Laren.—In this case the appellants argue that they do not require to clean the stair because they do not use the stair. That is no answer to the charge against them under the statute. In order to avoid liability it would be necessary for them to be able to say that they had surrendered their right of entrance by that stair to the other occupants, and that the latter had accepted their surrender and agreed to relieve them of liability for the cleaning.

Then it is said that there is a provision in the statute that in the case of a flat being unoccupied the other tenants shall clean the whole stair. The answer to that contention is that this is not the case of an unoccupied flat, and that provision has therefore no application.

In regard to the argument founded on *Daish's*[1] case, I consider that there was such a difference in the physical structure of the building there described as to prevent that decision having any bearing on the decision of the question before us in the present case.

Lord Pearson concurred.

The Court answered the questions in the case in the affirmative, and dismissed the appeal.

Party—Thomas Hunter, W.S.—Agents.

[1] 4 R. (Just. Cases) 10.

No. 18.

HIS MAJESTY'S ADVOCATE.—*Younger, A.-D.*
JAMES WILSON DICK.—*Watt, K. C.—J. R. Christie.*

April 26, 1901.

H. M. Advocate v. Dick.

Bribery—Malversation of Office—Magistrate—Licensing Court.—An indictment set forth that in March 1900, the panel, being then a member of the Town-Council of Glasgow, did corruptly solicit and receive from G, then an applicant to the Magistrates of Glasgow for a certificate for a public-house licence, the sum of £600 as a bribe, "in consideration of which you undertook to procure the granting of the said certificate by the said Magistrates," and the said application for a certificate having been refused at the Licensing Court in April 1900, "and you having been thereafter, on 17th May 1900, appointed a Magistrate" of Glasgow, and the said G having, in the month of August 1900, "stipulated with you that you must repay the said sum of £600, or undertake to procure the granting of the said certificate at the then ensuing Licensing Court in October 1900 upon his renewing his application for the same, you did then and there, in consideration of your retaining the said sum of £600, corruptly undertake to procure the granting of the said certificate"; and the said G having presented a new application "you did, in consideration of the said bribe of £600, and in pursuance of your corrupt undertaking aforesaid, in breach of your duty as a Magistrate and to the malversation of your office, corruptly vote in favour of, and endeavour to procure, the granting of the said certificate."

Held by Lord Young that the indictment was irrelevant, the receiving of the £600 by the panel when he was a Town-councillor but not a Magistrate not being *per se* a crime, and there being no relevant averment that he had taken a bribe after he had become a Magistrate, or that before his appointment he had received money which was given and taken in anticipation of his appointment, and intended to influence his conduct after it was made.

Bribery—Solicitation of bribe by Magistrate—Attempt to commit a crime—Criminal Procedure (Scotland) Act, 1887 (50 *and* 51 *Vict. cap.* 35), *sec.* 61.—An indictment set forth that the accused being a Magistrate of Glasgow did corruptly solicit from M, an applicant for a certificate for a public-house licence a bribe of £500 "as a consideration for your corruptly voting for, and endeavouring to procure, the granting of" a certificate for a public-house licence, "and you did thus attempt to obtain the said bribe of £500 from the said M in breach of your duty as a Magistrate and to the malversation of your office."

Held by Lord Young that the indictment was irrelevant, in respect that it alleged nothing more than expression of willingness to commit a crime.

HIGH COURT (Glasgow). Lord Young.

JAMES WILSON DICK, Strathview House, Maryhill, Glasgow, was indicted at the instance of the Lord Advocate, the charge against him being—"(1) that on 25th March 1900, at 1 Ure Place, Glasgow, and on 26th and 27th March 1900, within Strathview House aforesaid, you, being then a member of the Town-Council of Glasgow, did corruptly solicit, and on said 27th March, within Strathview House aforesaid, corruptly receive, from Edward Gillan, spirit-merchant, 1 Ure Place, Glasgow, then an applicant to the Magistrates of the royal burgh of Glasgow for a certificate for a public-house licence for premises situated at 109 Earlston Avenue, Glasgow, the sum of £600 sterling as a bribe, in consideration of which you undertook to procure the granting of the said certificate by the said Magistrates, and the said Edward Gillan's application for a certificate having come before and been refused at the Licensing Court held in April 1900, and you having been thereafter, on 17th May 1900, appointed a Magistrate of the royal burgh of Glasgow, and the said Edward Gillan having in the month of August 1900, and within Strathview House aforesaid, stipu-

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lated with you that you must repay the said sum of £600 or undertake to procure the granting of the said certificate at the then ensuing Licensing Court in October 1900 upon his renewing his application for the same, you did, then and there, in consideration of your retaining the said sum of £600, corruptly undertake to procure the granting of the said certificate by the said Court, and the said Edward Gillan having presented a new application for said certificate to the said Magistrates, and the same having come before the said Magistrates, of whom you were then one, assembled in Licensing Court within the lesser City Hall, Glasgow, on 16th October 1900, you did, time and place last mentioned, in consideration of the said bribe of £600, and in pursuance of your corrupt undertaking aforesaid, in breach of your duty as a Magistrate, and to the malversation of your office, corruptly vote in favour of, and endeavour to procure, the granting of the said certificate of licence; and (2) that between 1st September and 16th October 1900, at 196 Main Street, Maryhill, Glasgow, and within your office at 33 College Street, Glasgow, you, being then a Magistrate of the royal burgh of Glasgow, did corruptly solicit from Charles James McElhaw, spirit-merchant, 170 Great George Street, Hillhead, Glasgow, then an applicant to the said Magistrates for a certificate for a public-house licence for premises situated at 108 Saltmarket, Glasgow, a bribe of £500 sterling as a consideration for you corruptly voting for and endeavouring to procure the granting of the said last-mentioned certificate at the then ensuing Licensing Court, to be held on 16th October 1900, and you did thus attempt to obtain said bribe of £500 from the said Charles James McElhaw, in breach of your duty as a Magistrate and to the malversation of your office."

At the first diet, on 16th April 1901, the panel, as noted by the Sheriff-substitute (Fyfe), "stated objections to the relevancy generally, and in particular on the first charge, in respect it is not libelled (*a*) on the 25th, 26th, or 27th March 1900—the dates of the alleged solicitation by and payment to the accused—the accused was a Magistrate or member of the Licensing Court of the city of Glasgow, but that, on the contrary, it is apparent from the terms of the indictment that he was not; nor (*b*) that said alleged payment was conditional on anything to be done by the accused in the event of his becoming a Licensing Magistrate, or that it was conditional on anything which might happen or be done subsequent to the Licensing Court of April 1900; nor (*c*) that the accused was in the month of August 1900, or subsequently, or at any time, under any obligation to repay to the said Edward Gillan the said sum in respect of the discharge of which by Gillan he was induced to undertake to vote in support of his application, and in respect that, in the absence of relevant antecedent circumstances inferring corruption, it does not form a relevant charge merely to state that the accused voted 'corruptly' without any specification: And on the second charge that dates insufficiently specified, and that mere solicitation not followed by any completed act of bribery or corrupt act is not a relevant charge at common law, and that no statute is libelled,—which are hereby reserved for the consideration of the Court at the second diet."

At the second diet, before Lord Young, at Glasgow, on 26th April, argued for the panel;—(1) The first charge was irrelevant. In May 1900, when the panel was alleged to have received the £600, he was not a Magistrate of Glasgow, and he, at that date, had no concern with the granting of licence certificates. It was stated in the

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indictment that the consideration which he gave for the £600 was that he undertook to procure the granting of a certificate in favour of Gillan, the person who was said to have given him the £600. The panel, not being at that date a Magistrate, but merely a Councillor, the consideration specified could mean only that he would use his influence towards getting the Magistrates to grant the licence. But it was not bribery, nor an indictable offence of any sort at common law, for a man to receive money in consideration of his promise to use his influence in persuading someone else. It might have been different if the indictment had averred that the panel had received the £600 in consideration of his promise himself to vote for Gillan's application, if and when he, the panel, became a Magistrate; but that was not the case which was averred. What was averred was that in August 1900, after the panel had become a Magistrate, Gillan stipulated with him that he was either to repay the £600 or to undertake to procure the granting of a certificate to Gillan at the Licensing Court in the following October, and that he fulfilled that stipulation by voting for Gillan's application in October. But if, on Gillan's application being refused in April, the panel had repaid the £600, such repayment would have been an entirely voluntary act on the panel's part; consequently the so-called stipulation in August was truly without consideration, and the panel's vote in October, therefore, was not given in consideration of a bribe. The mere general averment that the panel had voted corruptly, which was all that remained, was plainly irrelevant. If the receipt of the money was not at its date bribery, the circumstance that the panel subsequently became a Magistrate would not make it bribery.[1] Further, the receipt of the £600, even if the panel had been a Magistrate when he received it (assuming that he ever received anything), would not have amounted to malversation of his office of a Judge.[2] No doubt the Magistrates of a city were Judges, but sitting as the Licensing Authority they were not exercising judicial functions; their functions in that capacity were purely administrative.[3] The early Scots statutes dealing with the offence of bribery in a Judge—from 1424, cap. 45, to 1579, cap. 93—consequently had no application to the present. For the same reason the case of *Fife*,[4] in 1687, was inapplicable. (2) The second charge likewise was irrelevant. In the first place, the latitude of time was too great, and, secondly, mere solicitation, apart from any completed act of bribery, was not a crime.

The Advocate-Depute argued;—(1) The first charge was that the panel had acted corruptly in discharging his duties as a Magistrate.[5] The granting of public-house certificates was a judicial act; the Magistrates or Justices, sitting in a Licensing Court, were discharging judicial functions.[6] In England an information would lie against a Justice for corrupt practices.[7] It was not maintained that it was a

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[1] Lichfield case, 1895, 5 O'M. and Hard. 27.

[2] Russell on Crimes, 6th Edit., vol. i., p. 443.

[3] Boulter v. Kent Justices, L. R. [1897], A. C. 556.

[4] See Hume on Crimes, i., p. 407.

[5] Russell on Crimes, 6th Edit., vol. i., pp. 416 and 443.

[6] Sharpe v. Wakefield, 1888, L. R., 21 Q. B. D. 66, aff. L. R. [1891], A. C. 173; The Queen v. London County Council, L. R. [1892], 1 Q. B. 190.

[7] Rex v. Young and Pitts, 1758, 1 Burr. 557, at p. 560; Rex v. Williams, 1762, 3 Burr. 1317.

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crime for the panel to receive money while he was a Town-councillor merely. That was not the crime charged. The crime charged was that the panel, after he had become a Magistrate, corruptly undertook in August to procure the granting of the certificate in consideration of the money previously received, and subsequently, in October, in pursuance of this corrupt undertaking corruptly voted for granting the certificate. That was a crime.[1] It made no difference that the money was received before the panel became a Magistrate, since the bargain was renewed and carried into effect after he became a Magistrate. (2) The second charge was relevant. The latitude of time was not undue. Further, there was a relevant averment of a crime. If it was a crime for a Magistrate to accept a bribe in consideration of the abuse of his office, it was likewise a crime for him to solicit a bribe offering that consideration. Under section 61 of the Criminal Procedure Act, 1887, an attempt to commit any indictable crime was itself an indictable crime.

LORD YOUNG.—The indictment contains two charges which I will consider separately on the strictly legal question, which alone I can decide, whether the conduct thereby imputed to the prisoner amounts to an indictable offence.

The *first* charge is that in March 1900 the prisoner, being then a member of the Town-Council of Glasgow, corruptly solicited and received from Edward Gillan, then an applicant to the Magistrates of Glasgow for a certificate for a public-house licence, £600 as a bribe, in consideration of which he undertook to procure the granting of said certificate by the Magistrates; that the certificate being refused by the Magistrates at the Licensing Court held in April, and the prisoner having thereafter (on 17th May) been appointed a Magistrate, Gillan, "in the month of August" stipulated with him that "he must repay the said sum of £600 or undertake to procure the granting of the said certificate at the then ensuing Licensing Court in October upon his renewing his application for the same"; that the prisoner undertook "to procure the granting of the said certificate," and that Gillan having presented a new application, which came before the Licensing Court on 16th October, the prisoner did "corruptly vote in favour of, and endeavour to procure, the granting of the said certificate."

The objection stated to the relevancy of this charge is in substance that in March, when the prisoner is alleged to have solicited and received £600 from Gillan, and in consideration thereof undertaken to procure the granting of his application to the Licensing Court held in April, he was not a Magistrate, or a member or officer of the Licensing Court, and had not as a town-councillor or otherwise any duty or concern with the granting of licence certificates; that his receipt of the money in March and his failure in April to satisfy the expectations of the giver did not make him debtor to the giver for that sum, or the recipient of a bribe when (*i.e.*, in August) he is alleged to have undertaken to procure the granting of a new application, or when (*i.e.*, in October) he is charged with corruptly voting for it.

In answer to this objection the Advocate-Depute, while conceding

[1] Fife, cited in Hume on Crimes, i., p. 407.

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(rightly, as I thought) that a town-councillor, who is not a magistrate, has no duty or concern with the granting of licence certificates, and that the reception of money by him from an applicant for a certificate as a consideration for using his influence to procure the granting of it, however discreditable such conduct may be, is not an indictable offence, contended that although the crime imputed to the prisoner consisted only in what he did after he was appointed a Magistrate (*i.e.*, after 17th May), yet in judging of it account must be taken of what he did before, viz., that he solicited and received money from an applicant who desired his influence with those who could grant his application although he was not one of them, and which money he had not returned; that what he is charged with doing when a Magistrate is that in August, when told that he must either repay the money which he had thus received from the disappointed applicant, or undertake to procure the granting of a new application by him, he preferred and so undertook the latter alternative, and in October acted on that undertaking by voting for the new application. This the Advocate-Depute contended was equivalent to the soliciting and receipt by the prisoner of a bribe after he became a Magistrate.

Town Magistrates and County Justices to whom is committed the duty of granting or refusing certificates for licences are at liberty to act upon their individual knowledge and the result of such inquiries as they individually may think proper to make as to the worthiness or fitness of applicants and the suitability of premises with respect to locality and otherwise; and there is, so far as I know, no objection to their taking such advice as they think proper, and no law to hinder those whom they are willing to hear volunteering their opinions. This of course is not permissible to, or with, Judges administering justice, who it is superfluous to say cannot so act or be so approached. I asked the Advocate-Depute if he could refer to any authority for the proposition that a private individual who solicited or accepted a money or other consideration for using such influence as he possessed to obtain for the giver from the Magistrates of a burgh or any such body a licence certificate, a contract for work, or an appointment to an office, thereby committed an indictable crime, and received, as I expected, an answer in the negative. The conclusion necessarily is that on 17th May 1900, when the prisoner was appointed a Magistrate, he was free of crime. Of the propriety or impropriety (as distinguished from criminality) of his conduct prior to that date, as imputed, it is not my duty to express an opinion.

The first date subsequent to 17th May 1900 on which the prisoner is charged with doing anything is "the month of August 1900," when it is averred that in consideration of being allowed to retain the money which he had received in March for his private influence, which proved unavailing, he undertook to give his influence and vote as a Magistrate in favour of the disappointed applicant if he renewed his application. This undertaking it is averred that he fulfilled on 16th October by supporting the new application.

It is not alleged that, at any time subsequent to March, Gillan gave or promised to give anything whatever to the prisoner. Take it that in August Gillan said to the prisoner that he might keep what he got from

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him in March, would that be giving a bribe? I do not think so. If a creditor said to his debtor that he would forgive him his debt if he did so and so, I should not, as at present advised, be prepared in this Court and in the administration of criminal law to characterise that as giving a bribe. But it is not necessary for me to decide that question now, being of opinion that, taking the facts to be as stated in the indictment, the relation of debtor and creditor did not exist between Gillan and the prisoner, and that there was no discharge of any claim legal or moral, and recognisable in a Court of law, which the former had against the latter.

In what I have hitherto said I have assumed that a burgh Magistrate who accepts a bribe given as an inducement to support an application for a licence certificate commits a crime indictable at common law, and that the giver of such bribe also does so. But on that assumption, being of opinion that the indictment I am considering is irrelevant, it is unnecessary that I should now decide or even express an opinion on the soundness of the assumption which was disputed by the counsel for the prisoner on grounds worthy of serious consideration. It is sufficient here to decide, as I do, that there is no relevant averment that the prisoner took a bribe when a Magistrate, or before his appointment had received money which was given and taken in anticipation of it, and intended to influence his conduct after it came.

The second charge is that in September or October 1900 the prisoner unsuccessfully solicited a bribe of £500 from an applicant for a licence certificate. The relevancy of this charge was objected to on grounds too obvious to require expression. The Advocate-Depute's defence of it was that it really amounted to a charge of attempting to commit a crime, viz., the crime of the taking of a bribe by a Magistrate. If it is a crime at common law for a Magistrate to express his willingness or desire to take a bribe of a certain amount if he can get it, then to do so would be not attempt to commit but actual commission of crime. But the expression of willingness or desire to do anything which it would be a crime to do is not indictable at common law. Suppose a broker or dealer expressed to someone whom he thought likely to further his views that he was willing and indeed desirous, if opportunity occurred, to purchase stolen goods, and that nothing followed, would that be indictable as an attempt to commit the crime of reset? I am unable in any view of this novel and indeed unprecedented charge to sustain it as relevant.

There may be grounds—although I am, I hope excusably, not aware of them—for thinking that the public interest requires more protection than the common law rules and practice of the criminal law afford against the misconduct of Magistrates in cities and burghs and Justices in counties in such matters as I have had occasion to refer to. It is for the Legislature, not for this Court, to consider this. On the legal question before me I am of opinion that this indictment is irrelevant.

THE following was the interlocutor:—"The Court sustained the objections stated to the relevancy of the indictment; deserted the diet against the panel *simpliciter*; and dismissed him from the bar."

CROWN AGENT—SIMPSON & MARWICK, W.S.—Agents.

JOHN CUNNINGHAM AND OTHERS, Appellants.—*Salvesen, K.C.*—*A. S. D. Thomson.*
ROBERT WILSON (Procurator-Fiscal of Lanarkshire at Hamilton), Respondent.—*Mackenzie, K.C., A.-D.*—*Younger, A.-D.*

No. 19.

Apr. 26, 1901.*
Cunningham v. Wilson.

Deforcement—Warrant.—It is not essential to the crime of deforcement that the officer should have the principal warrant in his possession at the time of the alleged offence, if the accused knows that the officer is an officer of the law engaged in execution of his duty in serving the warrant.

HIGH COURT.
Lord Justice-General.
Lord Adam.
Lord M'Laren.
Lord Justice-General.
Ld. Kyllachy.
Lord Low.

JOHN CUNNINGHAM, checkweighman, Watson Place, Hamilton, and nine other persons were charged in the Sheriff Court at Hamilton, on summary complaint setting forth that the accused, "acting in concert with each other, and with a large number of other persons to the complainer unknown, did, on 6th August 1900, in Austine Street, Cadzow Colliery Rows, Hamilton, with the view of preventing the service of a summary ejection complaint issued from the Sheriff Court at Hamilton at the instance of Cadzow Coal Company, Limited, coal-masters, Cadzow Colliery, Hamilton, against Thomas Neilan, miner, 52 Austine Street, Cadzow Colliery Rows, Hamilton, which contained a warrant of the Sheriff of the county of Lanark to cite the said Thomas Neilan to appear and answer the said complaint in the Court-House at Hamilton on the 9th day of August 1900, at ten o'clock forenoon, stand closely packed together upon the steps leading to the door of the house occupied by the said Thomas Neilan, of 52 Austine Street aforesaid, as well as on the roadway in front of and round about said door, thus blocking the way to said door, and did kick John Dobson Taylor, sheriff-officer, 5 St Vincent Place, Glasgow, who was charged with the duty of serving said complaint, on the left knee, thrust pins or needles into his legs, curse, swear, and shout at him, wave their arms about in a threatening manner, and repeatedly push or thrust him back from the door of said house when he attempted to reach it for the purpose of serving said complaint, and this they did well knowing, or having good reason to know, that the said John Dobson Taylor was an officer of the law, and was engaged in the execution of his duty as such in serving said complaint, by all which the said John Dobson Taylor was driven off and prevented from serving said complaint and warrant, and was thus deforced by the said" accused.

The accused pleaded not guilty, but after evidence had been led the Sheriff-substitute (Davidson) found each of them "guilty of the crime charged, except the kicking, thrusting the pins or needles, and the cursing, swearing, shouting, and waving the arms charged," and fined them each thirty shillings, with the alternative of twenty-one days' imprisonment.

They obtained a case. The case stated;—"From the evidence adduced I found it proved that on 6th August 1900 the said John Dobson Taylor, sheriff-officer, Glasgow, proceeded to Austine Street, Cadzow, Hamilton, to serve summary ejection complaints; that at the door of 52 Austine Street, where Thomas Neilan resided, upon whom an ejection complaint and warrant were to be served, a number of people thronged the steps in front of the door, so that the officer was unable to reach it; that no actual violence was used by the people to the officer; that the officer did not request the people to make way for him, nor did he display his blazon, or in any way declare or inti-

* Decided March 4, 1901.

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mate that he was a sheriff-officer, but the crowd and the accused shewed by their conduct that they knew he was, [*and particularly that they (the accused) knew he was an officer of the law engaged in the execution of his duty in serving the summary ejection complaint above referred to;*]* that he did not shew his warrant to anyone, and was not asked to do so, and had not with him at the time the principal complaint and warrant; that the accused were amongst the people round the door of Neilan's house; that the officer was pushed back, but not personally by the accused, and without violence, and no overt attack was made upon him; that he failed to serve the summons owing to the action of the accused and those acting in concert with them."

The question of law was,—"Whether the above facts found proved warrant the conviction?"

Argued for the appellants;—It was essential to the crime of deforcement that the officer should have his warrant with him,[1] which the sheriff-officer here had not; the conviction therefore could not be sustained. Further, the Sheriff-substitute did not state in the case that he found it proved that the accused knew that the officer was in the execution of his duty, and if they did not know that, they could not be guilty of deforcement.

Argued for the respondent;—It was not essential to the crime of deforcement that the officer should have the warrant in his possession. The Sheriff-substitute must have held that the accused knew that Taylor, the officer, was in the execution of his duty, for he found them "guilty of the crime charged," and the complaint set forth that they did what they were charged with doing, "well knowing, or having good reason to know, that the said John Dobson Taylor was an officer of the law, and was engaged in the execution of his duty as such in serving" such complaint.

On 7th December 1900,—

LORD JUSTICE-GENERAL.—There is one essential point in which the statement of the case by the Sheriff-substitute is defective. The complaint bears that the accused acted as they did, "well knowing, or having good reason to know, that the said John Dobson Taylor was an officer of the law, and was engaged in the execution of his duty as such in serving said complaint." This would seem to be affirmed by the finding of the Sheriff that the accused were guilty of the crime charged; but there is not a word about it in the statement of facts found proved. I do not think it safe to dispose of this appeal without knowing whether it is a fact or not that the accused knew, or had good reason to know, that the officer was at the time engaged in the execution of his duty as an officer of law. I therefore think we should send the case back to the Sheriff-substitute to enable him to state specifically how the fact stood in regard to this matter.

LORD ADAM.—I concur.

LORD M'LAREN.—An officer of law must be put in possession of the

* The clause in italics was not in the case as originally stated, but was added by the Sheriff-substitute on remit as after mentioned.

[1] Hunter v. Peacock, Jan. 16, 1860, 3 Irv. 518; Hume on Crimes, I. 390; Campbell on Citation and Diligence, p. 470; Macdonald, Criminal Law, 3d edit. p. 221.

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warrant which he is asked to execute before he executes it. But it does not follow that he must have his warrant on his person when he proceeds to execute it. If the officer anticipates obstruction in the performance of his duties, one can understand that he would leave the warrant at home for safety, and it is possible that this is why he did so in the present case.

I agree that the proper course is to send back the stated case to the Sheriff for amendment, in order that the attention of the Sheriff should be drawn to what is necessary to constitute the crime of deforcement. It is necessary that we should know whether the Sheriff held it proved—though it is probably merely by oversight that it is not stated in the case—that the accused knew that the officer was engaged in the execution of his duty.

THE COURT pronounced the following interlocutor:—"Remit to the Sheriff-substitute of Lanarkshire at Hamilton to amend the case by stating whether it was proved as matter of fact that the appellants knew, or had good reason to know or to believe, that John Dobson Taylor was an officer of the law engaged in the execution of his duty as such in serving the summary ejection complaint as mentioned in the stated case on 8th August 1900, when the alleged deforcement took place."

The Sheriff-substitute, on remit, added to the special case the words above quoted in italics.

THEREAFTER, on 4th March 1901, the Court (the Lord Justice-General, Lord Kyllachy, and Lord Low) pronounced the following interlocutor:—"Having considered this appeal as amended by the Sheriff-substitute, and heard counsel for the parties, answer the question in the case in the affirmative, dismiss the appeal, and decern."

SIMPSON & MARWICK, W.S.—CROWN AGENT—Agents.

No. 20.

Apr. 26, 1901.*
H. M. Advocate v. Fraser.

HIS MAJESTY'S ADVOCATE.—*Mackenzie, K.C., A.-D.*—*M'Clure, A.-D.*
PETER J. C. FRASER.—*Tait.*

Proof—Witness—Admissibility—Husband and Wife—Parent and Child—Prevention of Cruelty to Children Act, 1894 (57 *and* 58 *Vict. cap.* 41), *sec.* 12.—The Prevention of Cruelty to Children Act, 1894, sec. 12, enacts: "In any proceeding against any person for an offence under this Act, or for any of the offences mentioned in the schedule to this Act . . . the wife or husband of such person . . . shall be competent but not compellable to give evidence."

The schedule to the Act specifies a number of statutory offences, and concludes, "any other offence involving bodily injury to a child under the age of sixteen years."

Held by the Lord Justice-General that the concluding words of the schedule included the crime of culpable homicide, and that the wife of a man charged with the culpable homicide of his child aged twelve months, or alternatively with a contravention of sec. 1 of the Act, was a competent witness under sec. 12 of the Act.

* Decided Feb. 18, 1901.

No. 20.

April 26, 1901. H. M. Advocate v. Fraser.

High Court. Lord Justice-General.

PETER J. C. FRASER was indicted at the instance of the Lord Advocate, the charge against him being "that on 3d August 1900, in the house 2 Malloch's Close, Canongate, Edinburgh, then occupied by you, you did assault Catherine Fraser, aged twelve months, your daughter, and did beat her with your fists and knock her head against the wall or floor of said house and did kill her; or otherwise, time and place above libelled, you did wilfully assault the said child and beat her with your fists and knock her head against the wall or floor of said house, all in a manner to cause her unnecessary suffering or injury to her health, contrary to the Prevention of Cruelty to Children Act, 1894 (57 and 58 Vict. cap. 41), sec. 1."*

The case was tried before the Lord Justice-General and a jury on 18th February 1901.

At the trial the Advocate-Depute proposed to call the wife of the accused as a witness.

Tait, for the panel, objected, and argued;—The wife of the panel was not a competent witness. She would have been competent had the charge under the Act stood alone, but there was also the common law charge of culpable homicide, and in relation to that charge she was not a competent witness. The question turned upon section 12 of the Act and the relative schedule. The wife of a person accused of a common law offence against his child under the age of sixteen was a competent witness only if the concluding clause of the schedule was to be read in its widest generality, but on the contrary, the sound construction was that the words "any other offence" meant any other offence *ejusdem generis* with those specially mentioned, *i.e.*, statutory

* The Prevention of Cruelty to Children Act, 1894 (57 and 58 Vict. cap. 41), enacts:—

Sec. 1—"(1) If any person over the age of sixteen years who has the custody, charge, or care of any child under the age of sixteen years, wilfully assaults, ill-treats, neglects, abandons or exposes such child, or causes or procures such child to be assaulted, ill-treated, neglected, abandoned or exposed in a manner likely to cause such child unnecessary suffering or injury to its health (including injury to or loss of sight, or hearing, or limb, or organ of the body, and any mental derangement), that person shall be guilty of a misdemeanour; and" on conviction on indictment, or on summary conviction, shall be liable as specified.

"(2) A person may be convicted of an offence under this section either on indictment or by a Court of summary jurisdiction notwithstanding the death of the child in respect of whom the offence is committed.

. . . . . .

"(5) An offence under this section is in this Act referred to as an offence of cruelty."

Sec. 12—"In any proceeding against any person for an offence under this Act, or for any of the offences mentioned in the schedule to this Act, such person shall be competent but not compellable to give evidence, and the wife or husband of such person may be required to attend to give evidence as an ordinary witness in the case, and shall be competent but not compellable to give evidence."

The schedule to this Act was in the following terms:—

"Any offence under sections 27, 55, and 56 of the Offences against the Person Act, 1861, and any offence against a child under the age of sixteen years under sections 43 and 52 of that Act.

"Any offence under the Children's Dangerous Performances Act, 1879.

"Any other offence involving bodily injury to a child under the age of sixteen years."

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offences of which the essence was that the victim was under sixteen years of age, a construction which, of course, excluded the common law crime of culpable homicide. That construction had been adopted in England.[1]

Mackenzie, K.C., A.-D.—This was a remedial statute, intended, among other objects, to facilitate the proof of offences committed by parents against their children. The reason of the rule introduced by section 12 applied as strongly to common law offences against children as to statutory offences, and to offences in which the age of the victim was not of the essence of the offence as to offences in which it was. Section 1, subsection (2) of the Act contemplated the possibility of the death of the child. "Offence" was a sufficiently apt term to include culpable homicide.

LORD JUSTICE-GENERAL.—This is a somewhat narrow question relative to the interpretation of the schedule to the Prevention of Cruelty to Children Act, 1894. By section 12 of the Act it is enacted—(His Lordship read section 12 of the Act and the last clause of the schedule).

It was maintained on behalf of the panel that these words relate only to acts which would be offences if done to children under sixteen years of age, but would not be offences if done to persons above sixteen years of age, but I do not find any such limitation expressed in the Act, and I am unable to see any reason for holding it to be implied.

One of the objects of the Act was to facilitate proof of offences committed against young children by their parents, it being well known that not a few such offences remained unproved and unpunished because spouses were not competent witnesses against each other except in the case of offences committed by the one against the other. The reason for making the parents competent (though not compellable) witnesses in the case of offences committed by one of them against their children applies as much to common law as to statutory offences, and as much to acts which would be criminal whether the victim is above or below the age of sixteen as to acts which are only offences if done to persons under sixteen years of age. Seeing that there is no such limitation as has been contended for either in the words of the schedule or in the reasons which may be assumed to have led to the enactment, I would not feel warranted in introducing such a limitation by construction, especially in the case of a remedial statute. I shall therefore allow the evidence.

The wife of the panel having been warned that although competent she was not compellable as a witness, and having intimated her willingness to give evidence, was sworn and examined.

THE JURY found the panel guilty of culpable homicide, and he was thereupon sentenced to three years' penal servitude.

CROWN AGENT—ROBERT H. PATERSON, S.S.C.—Agents.

[1] Reg. v. Roberts, 1896, 18 Cox Criminal Cases, 530.

No. 21.

June 6, 1901. Macleman v. Middleton.

HUGH MACLEMAN AND OTHERS, Complainers.—*Munro.*
WALTER ROSS TAYLOR MIDDLETON, Respondent.—*Campbell, K.C.*—*Chree.*

Procedure—Review—Conviction and Sentence—Form of Sentence.—Where several persons were convicted on the same complaint of an offence and each adjudged to pay a fine, and in default of payment warrant was granted to poind their goods, the sentence was so worded as to be capable of being read to the effect that if any one of the persons failed to pay his fine the goods of all might be poinded. Conviction *quashed.*

HIGH COURT. Lord Justice-Clerk. Lord Trayner. Ld. Moncreiff.

HUGH MACLEMAN and nine other fishermen of Cromarty were tried summarily in the Sheriff Court at Dingwall, on a complaint at the instance of Walter Ross Taylor Middleton, clerk to the Conan District Fishery Board, of having committed an offence within the meaning of 7 and 8 Vict. c. 95, section 1, Salmon Fisheries (Scotland) Act, 1844, and were convicted.

The conviction and sentence, after setting forth the conviction of the ten accused of the contravention libelled, proceeded in these terms:—"And therefore adjudges each of them to forfeit and pay the sum of £2, 10s. sterling of modified penalty, and, in default of payment thereof within fourteen days from this date, grants warrant for recovery of the said sums by poinding of their goods and effects, and summary sale thereof, as provided by the Act 44 and 45 Victoria, cap. 33, section 8, subsection 2, and the Act 1st Victoria, cap. 41, section 20, therein referred to, and appoints a return or execution of such poinding and sale to be made within eight days from the expiration of the period herein allowed for payment, under certification of imprisonment for the period of twenty days in default of payment or recovery of the said sums, with the expenses of diligence, before the time allowed for such report."

The accused brought a bill of suspension, and pleaded, *inter alia*;—(4) The conviction is incompetent, illegal, and inept, and in particular, in the event of any of the parties complained against and convicted failing to pay the fine imposed upon him, all the parties were put under liability to have their goods poinded for recovery of the fines imposed upon the others, and also to be imprisoned for the space of twenty days.

In support of this plea counsel for the complainers referred to *Allan v. Lamb.*[1]

Counsel for respondent argued that warrant of poinding could only be granted in respect of such sums as had not been paid, and could therefore only affect defaulters. The intention was quite clear.

LORD JUSTICE-CLERK.—No one can look at this conviction and sentence without seeing that it is very loosely worded. It convicts ten persons named, and adjudges each of them to pay the sum of £2, 10s., and then in default of payment thereof proceeds to grant warrant for recovery of "the said sums" by poinding of their goods and effects. Then follows a certification of imprisonment in default of payment or recovery of "the said sums." This is grammatically wrong and misleading. It can be read in two senses besides the simple sense that the alternative lies against each only on his own failure to pay the fine. In the first place, it may be read

[1] Allan v. Lamb, Dec. 7, 1900, *ante* (Just. Cases), 15.

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as meaning that if any one of the ten convicted persons makes default in payment of his fine, the goods of the whole ten may be poinded for its recovery. In the second place, it may be taken as meaning that if there are certain defaulters the goods of all these defaulters can be poinded to pay the fine of each of them. No doubt the objection is very technical. The intention of the Sheriff-substitute is plain, that each shall answer for his own default only. But as I have said this intention is very badly expressed. Sufficient care has not been taken to see that the judgment is so expressed as not to be capable of being reasonably construed in a way which would involve a miscarriage of justice. In *Allan* v. *Lamb*,[1] we see that our brethren in this Court, who sat in a case somewhat similar, were of opinion that such an objection to the judgment would have been serious if timeously taken. Thinking, as I do, that it is important that Judges in the inferior Courts should in their convictions and sentences express their intention clearly, so as not to admit of its being misread in any substantial particular, I think this sentence should be quashed.

LORD TRAYNER.—I agree with your Lordship.

LORD MONCREIFF.—I am very reluctant to set aside a conviction and sentence where the previous proceedings have been regular and there is no doubt as to the intention of the Sheriff. At the same time a conviction and sentence must be fit to stand close scrutiny. In the present case the complaint properly distinguishes the case of each of the accused. But when we come to the conviction we find language used which, by putting a strict construction on it, can be construed as meaning that if any one of the prisoners fails to pay the fine imposed upon him, then the goods of the whole ten may be poinded. A little care would have prevented this, and I am not prepared to uphold a conviction capable of such a construction.

THE COURT quashed the conviction.

ALEX. ROSS, S.S.C.—J. C. BRODIE & SONS, W.S.—Agents.

No. 22.
June 6, 1901.
M'Douall v. Cochrane.

ANDREW KENNETH M'DOUALL (Complainer), Appellant.—*A. O. M. Mackenzie.*
JAMES COCHRANE (Respondent), Respondent.—*Wilton.*

Procedure—Instance—Private Prosecutor—Game—Title to prosecute—Ground Game Act, 1880 (43 *and* 44 *Vict. cap.* 47), *sec.* 6.—The proprietor of an estate, with concurrence of the procurator-fiscal, brought a complaint against a person having a right to kill game under the Ground Game Act, 1880, on a farm on the estate, charging him with having set spring traps elsewhere than in rabbit holes, contrary to section 6 of the Act.

Held that the instance was good.

Duke of Bedford v. *Kerr*, May 22, 1893, 20 R. (Just. Cases) 65, 3 White, 493, *distinguished.*

[1] Dec. 7, 1900, *ante* (Just. Cases), 15.

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HIGH COURT. Lord Justice-Clerk. Lord Trayner. Ld. Moncreiff.

ANDREW KENNETH M'DOUALL, of Logan, Logan House, Wigtownshire, "with consent and concurrence of John Marquis Rankin, solicitor, Stranraer, Procurator-fiscal of Court at Stranraer," served a complaint upon "James Cochrane, fisherman, residing at Cairngaan, Kirkmaiden parish, Wigtownshire, being a person having a right of killing ground game on the farm after mentioned, under the Act after mentioned, having been authorised to that effect by the occupier of the said farm, who as tenant under the complainer, the landlord thereof, has a concurrent right with the complainer of killing ground game on said farm," in which it was charged against the accused that he did "on 25th December 1900, in several fields on the farm of Barncorkrie, in said parish, occupied by Hugh M'Clymont, farmer, residing there, employ for the purpose of killing ground game fifty-four or thereby spring traps elsewhere than in rabbit holes, viz., on the open surface of the ground— . . . contrary to the Ground Game Act, 1880, section 6, whereby the said James Cochrane is on summary conviction liable in respect of each of said contraventions to a penalty not exceeding £2."

On 7th March 1901 the Sheriff-substitute at Stranraer (Watson) dismissed the complaint as irrelevant, in respect that it had not been brought at the instance of the public prosecutor alone.

The complainer appealed, the following question of law being stated for the opinion of the High Court:—"Has the appellant, as proprietor and landlord of the lands in question, a sufficient interest and title to prosecute, with the concurrence of the procurator-fiscal, the contraventions libelled, or can the contraventions libelled only be prosecuted at the instance of the public prosecutor?"

Argued for the appellant;—The Act was silent as to who might prosecute, and therefore anyone who, like the appellant, could qualify an interest could prosecute with the concurrence of the fiscal.[1] The case of *Bedford*[2] decided nothing to the contrary. There the private prosecutor was not proprietor of the lands on which the alleged contravention of the Act took place, and could qualify no interest.

Argued for the respondent;—No doubt the complainer as proprietor had an interest, but that did not give him a title to prosecute, and the concurrence of the public prosecutor could not cure that defect in his title.[2]

LORD JUSTICE-CLERK.—I have no doubt that the instance in this complaint was good. It is a general principle of our law that in criminal offences, whether statutory or at common law, the party injured has the right of prosecution provided he can obtain the concurrence of the public prosecutor. It is true that in certain cases of statutory offences the statute expressly excludes private prosecution, and leaves the matter entirely to the public authority. That is not done by the statute founded on here. In this case there can be no doubt about the interest of the private party prosecuting, and having the concurrence of the procurator-fiscal his title is undoubtedly good.

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[1] Burns v. Turner, Dec. 17, 1897, 25 R. (Just. Cases) 38, 2 Adam, 450; Great North of Scotland Railway Company v. Anderson, Oct. 28, 1897, 25 R. (Just. Cases) 14, 2 Adam, 381.

[2] Duke of Bedford v. Kerr, May 22, 1893, 20 R. (Just. Cases) 65, 3 White, 493.

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We were referred to the case of the *Duke of Bedford* v. *Kerr*,[1] and especially to the opinion expressed by Lord Adam, as justifying the Sheriff in throwing out this case. Now, as regards that case Lord Adam's opinion may easily be misread unless it be read altogether. In the earlier part of his opinion he deals with the case not of a party injured, but with the right to sue of a common informer. In the latter part of his opinion he finds that the interest of the party suing in that case was so remote as to place him outside the class of persons having an interest as the injured persons, and therefore outside the class of persons entitled to prosecute when they can get the necessary concurrence.

LORD TRAYNER.—I concur. I think the rule regarding the right of private prosecution is as laid down by Lord Moncreiff in the case of *Burns* v. *Turner*.[2]

LORD MONCREIFF.—The contravention charged being that the traps were used elsewhere than in rabbit holes on the complainer's land, he had an interest as landlord to prosecute, and having obtained the concurrence of the public prosecutor his title to raise the complaint is clearly good. We must answer the question put to us accordingly.

THE COURT sustained the appeal, and remitted to the Sheriff-substitute to proceed.

E. A. & F. HUNTER & Co., W.S.—WILLIAM DOUGLAS, S.S.C.—Agents.

No. 23.
June 7, 1901.
Slowey v. Threshie.

JAMES SLOWEY, Complainer.—*Salvesen, K.C.—Munro.*
JOHN MORTON THRESHIE (Procurator-Fiscal, Justice of Peace Court, County of Lanark), Respondent.—*Jameson, K.C.—Deas.*

Statute — Bye-law — Ultra vires — Betting — County Council — Local Government (Scotland) Act, 1889 (52 *and* 53 *Vict. cap.* 50), *sec.* 57 (1).—The Local Government Act, 1889, enacts, sec. 57, subsec. (1),—"The council of a county may from time to time make such bye-laws as to them seem meet for the administration of the affairs of the county, for the prevention of vagrancy, and for prevention and suppression of nuisances not already punishable in a summary manner by virtue of any Act in force throughout the county, and may thereby appoint such penalties, not exceeding in any case five pounds, as they deem necessary for the punishment of offences against the same."

A bye-law made by a County Council was in the following terms:—"Betting on roads.—No person shall frequent and use any road or other public place, on behalf either of himself or of any other person, for the purpose of bookmaking or betting, or wagering, or agreeing to bet or wager with any person, or paying or receiving or settling bets."

In a suspension of a conviction for a contravention of this bye-law on the ground that the bye-law was *ultra vires* of the County Council, *held* that the bye-law was not *ultra vires*, and suspension *refused*.

HIGH COURT. Lord Justice-Clerk. Lord Trayner. Ld. Moncreiff.

JAMES SLOWEY, Green Street, Calton, Glasgow, was charged in the Justice of the Peace Court, Glasgow, at the instance of the Procurator-fiscal, on a complaint which set forth that he had contra-

[1] 20 R. (Just. Cases) 65, 3 White, 493.
[2] 25 R. (Just. Cases) 38, 2 Adam, 450.

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vened "the bye-law, under the heading 'Betting on Roads,'* made by the County Council of Lanarkshire in virtue of the Local Government (Scotland) Act, 1889, section 57 (1),† by frequenting and using" a certain road in the county of Lanark for the purpose of betting.

The accused objected to the relevancy of the complaint, in respect that the bye-law founded on was illegal, as going beyond the powers conferred by the 57th section of the Local Government Act upon the County Council.

The Justices repelled the objection, and after a proof convicted the accused and adjudged him to pay £5 of a penalty, and in default to be imprisoned for twenty days.

Slowey brought a suspension, and pleaded;—The said conviction and sentence ought to be suspended *simpliciter*, and the respondent ordered to repay to the complainer the amount of said penalty, in respect that the bye-law founded on was *ultra vires* of the County Council, and that the complaint founded thereon was therefore irrelevant.

Argued for the complainer;—The bye-law was *ultra vires* of the County Council. The only ground on which betting could be suppressed was that of nuisance. Betting, however, could not in all cases be a nuisance; and the bye-law went too far, for under it persons might be convicted who could not in any reasonable sense be said to be guilty of nuisance. To make the bye-law good it would require the addition of "to the annoyance of the lieges."[1]

Argued for the respondent;—The County Council had not exceeded their powers. "Frequenting and using" for betting was a nuisance, and the suppression of it was part of the "administration of the affairs of the county." A similar bye-law in respect of similar powers had been judicially sanctioned in England.[2]

LORD JUSTICE-CLERK.—I am quite unable to see that this bye-law was *ultra vires* of the County Council.

With regard to the cases quoted from England, if they apply at all, they certainly apply quite in the direction of this prosecution. I do not see that there is any substantial difference between the words of the two statutes—"the administration of the affairs of the county" and "the good government of the county"—as it is expressed in the English Statute.

That the County Council can make a bye-law for the purpose of preventing people from frequenting the roads in the county for the purpose of carrying on betting, I have no doubt. It is admitted that it may be a nuisance, and the question whether in a particular case it was an injury to the interests of the public under the bye-law was for the Magistrates, and it is not said that they exercised their discretion wrongly if the bye-law was not *ultra vires* of the County Council. I think it was not *ultra vires*, and therefore I am for refusing this suspension.

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* Quoted in rubric. † Quoted in rubric.

[1] Eastburn v. Wood, July 14, 1892, 19 R. (Just. Cases) 100, 3 White, 300; Strickland v. Hayes, L. R. [1896], 1 Q. B. 290; Bonnar v. Walker, Jan. 9, 1896, 23 R. (Just. Cases) 39, 2 Adam, 85.

[2] Thomas v. Sutters, L. R. [1900], 1 Ch. 10; White v. Morley, L. R. [1899], 2 Q. B. 34; Burnett v. Berry [1896], 1 Q. B. 641; Hickey v. Hay, Nov. 15, 1900, 17 T. L. R. 52.

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LORD TRAYNER.—I cannot say that the bye-law in question is *ultra vires* of the Council, or is in excess of the power conferred upon them. I agree with your Lordship that the words "the administration of the affairs of the county" are general enough to cover such a bye-law as the County Council have issued. There does not appear to be any real difference between a provision which authorises the issue of bye-laws for the "administration of the affairs of the county," and one which authorises bye-laws for "the good government of the county," the language used in some of the statutes in force in England.

I am therefore of opinion with your Lordship that the only objection stated in this suspension, viz., that the bye-law was *ultra vires* of the Local Authority, should not be sustained.

LORD MONCREIFF.—I am of the same opinion. I think the bye-law was not *ultra vires* of the County Council.

I am indifferent whether the power under which the bye-law was framed was the power conferred for the administration of the affairs of the county or for the suppression of nuisances. I rather incline to the former. I think it is within the power of the County Council, in the administration of the affairs of the county, to resolve that they will put a stop to the habitual use of the roads and other public places within the county for the purpose of betting. That was this object of the bye-law, and I think it cannot be fairly read without seeing that that is its meaning. It does not refer to or strike at a casual meeting between persons who may have made a bet, and one of whom stops the other and pays him. But it refers to frequenting and using the road—that is to say, the habitual using of it for a considerable time and for the purpose of carrying on betting transactions.

I have no hesitation in holding that this bye-law was within the powers of the County Council.

THE COURT refused the bill of suspension.

SIBBALD & MACKENZIE, W.S.—J. & A. HASTIE, Solicitors—Agents.

No. 24.

June 7, 1901.
Phillips v. Currie.

ROBERT PHILLIPS, Complainer.—*Spens.*
DUGALD CURRIE, Respondent.—*Macfarlane—J. D. Robertson.*

Procedure—Relevancy—Objections to relevancy.—Held that objections taken to the relevancy of a criminal charge must be disposed of before proceeding with the trial, and that reservation of such objections by the magistrate for consideration after proof on the merits had been led was an illegality constituting a good ground of suspension.

HIGH COURT.
Lord Justice-Clerk.
Lord Trayner.
Ld. Moncreiff.

ROBERT PHILLIPS, merchant, Kames, by a complaint under the Summary Jurisdiction (Scotland) Acts, 1864 and 1861, and the Criminal Procedure (Scotland) Act, 1887, at the instance of the respondent, Dugald Currie, yachtsman, Kames, in the Sheriff Court at Dunoon, was charged with a contravention of 1 Vict. cap. 41, sec. 20, it being alleged that he had intromitted with certain poinded articles *in fraudem* of Currie's hypothec.

Before the accused was called on to plead at the trial his agent took various objections to the relevancy of the complaint, and lodged

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a note thereof. The Sheriff-substitute (Martin) did not deal with these objections at once, but reserved consideration of them till after proof had been led, and called on the accused to plead, which he did by pleading not guilty. Proof was led, and thereafter the Sheriff-substitute repelled the objections to the relevancy, and found the accused guilty of the contravention charged. No objection was taken at the trial by the agent for the accused to the course of procedure adopted by the Sheriff-substitute in relation to the objection to relevancy.

A suspension was brought by the accused, in which, after stating facts as above set forth, he pleaded, *inter alia*;—(3) The Sheriff-substitute acted improperly in departing from the statutory procedure in reserving the objections to the relevancy till after he heard the evidence.*

Argued for the complainer;—The course adopted by the Sheriff-substitute was prejudicial to the complainer, was irregular, and contrary to statute, and the irregularity was such as to vitiate the whole proceedings.[1]

Argued for the respondent;—Section 14 of the Summary Procedure Act of 1864 laid down no rule for dealing with objections to relevancy. No objection was stated by the complainer's agent at the trial to the course taken by the Sheriff-substitute, and there was no injustice. It was at least open to the Court now to consider the relevancy and see whether there was injustice. In the absence of any imperative rule as to procedure as to relevancy, and no prejudice having been suffered by the accused, the conviction should stand.

Lord Justice-Clerk.—The question is, whether the statutory procedure prescribed in section 14 of the Summary Procedure (Scotland) Act, 1864, is imperative or not. I do not think that this Court should sanction the procedure followed in this case. The provisions in section 14 look as if they were imperative. They prescribe the order of the proceedings. A regular sequence is laid down. If no objections are stated to the competency or relevancy of the complaint, or if such objections having been stated are repelled, the accused's plea shall then be recorded, and if the plea is not guilty, the prosecutor is to proceed to establish his complaint by evidence. In no criminal Court has it ever been recognised that in dealing with a criminal charge a prisoner is to go to trial not knowing whether the Judge holds the charge relevant or not. A judgment on the relevancy of the charge is an essential preliminary to going on with the trial by hearing evi-

* Section 14 of the Summary Procedure Act, 1864 (27 and 28 Vict. cap. 53), enacts as follows:—"Where the respondent shall be present at the hearing, the substance of the complaint shall be read to him, and he shall thereupon be required to plead in common form, and the respondent may then state objections to the competency or relevancy of the complaint or proceedings, and if no objections are stated, or if such objections are stated and repelled . . . the respondent's plea shall then . . . be recorded, and the plea, if the same be guilty, shall be signed by the respondent . . . and if the plea be not guilty the prosecutor or complainer shall proceed to establish his complaint by such evidence as is competent, and the respondent may, if he think fit, lead such evidence as is competent, after which the Court shall pronounce judgment at the same or any adjourned diet."

[1] Jackson v. Stevenson, Feb. 6, 1897, 24 R. (Just. Cases) 38, 2 Adam, 255.

dence. It would be a most dangerous thing to sanction the view that a Judge may at his discretion reserve questions of relevancy and proceed with the trial without dealing with objections stated to the relevancy. It would be extremely prejudicial from the point of view of the administration of justice. A man who was tried on an irrelevant indictment could never be tried afterwards. He would have tholed his assize. It would also be very unfortunate in the interest of prisoners that a prisoner should in any circumstances be sent to trial when it is not clear whether the charge made against him is relevant. Indeed, I do not understand how evidence can be led before the relevancy of the complaint is established. I am aware that in many cases where the departure from regular procedure is trivial, and can cause no real injury, or where the party himself or his agent is to blame, this Court is unwilling to interfere. On the other hand, where the departure is serious, it is necessary to enforce regularity. I hold that objections taken to the relevancy of the charge must be dealt with before proceeding with the trial, and that failure to deal with and dispose of objections taken to relevancy before evidence is allowed is an illegality constituting a good ground of suspension.

No. 24.
June 7, 1901.
Phillips v. Currie.

LORD TRAYNER and LORD MONCREIFF concurred.

THE COURT quashed the conviction.

GARDINER & MACFIE, S.S.C.—SIMPSON & MARWICK, W.S.—Agents.

PETER MURPHY, Appellant.—*W. Thomson.*
GEORGE NEILSON (Procurator-Fiscal, Police Court, Glasgow), Respondent.—*Lees—Deas.*

No. 25.
June 7, 1901.
Murphy v. Neilson.

Police—Street—Bye-law regulating carriage traffic—Loitering—Relevancy.—A bye-law, framed by the magistrates of a burgh, provided that "no driver of any carriage shall stand or loiter with the same . . . in any street or place not appropriated as a public stand except at places of public amusement or entertainment, and on the occasion thereof." A driver was charged with a contravention of the bye-law in so far as he did, on a certain date, with a horse and hackney carriage, loiter in a certain public street, not being a public stand nor at a place of public entertainment, and drive slowly up and down said street within a distance of 100 yards during a period of seventeen minutes, for the purpose of inviting or picking up passengers.

Held that the charge was relevant.

Fairfoul v. *Somerville*, Oct. 25, 1895, 23 R. (Just. Cases) 6, 2 Adam, 13, *distinguished.*

PETER MURPHY was charged under a complaint in the Central District Police Court, Glasgow, with a contravention of the following bye-law for the regulation of hackney carriages. The bye-law, number 45, was in these terms:—"No driver of any carriage shall stand or loiter with the same in any of the squares, streets, or places appropriated as public stands, at the time when the full number of carriages authorised to ply on the respective stands shall be thereon, or in any street or place not appropriated as a public stand, except at places of public amusement or entertainment, and on the occasion thereof,"

HIGH COURT Lord Justice-Clerk. Lord Trayner. Ld. Moncreiff.

The complaint bore that the accused "did, on the 4th day of April 1901, loiter in Gordon Street, Glasgow, from 3.55 to 4.12 P.M. with a

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horse and licensed hackney carriage, and drive slowly up and down said street, within a distance of only 100 yards in said period of seventeen minutes, for the purpose of picking up or inviting passengers whose names and addresses are to the complainer unknown, to travel by his said carriage, said street not being appropriated as a public stand, and not being at a place of public amusement or entertainment on the occasion thereof."

At the trial objection was taken to the relevancy of the complaint, but was repelled, and the accused thereafter pleaded not guilty, but evidence having been heard, was convicted of the contravention charged.

The accused craved a case, which was stated. It set forth,—"On the date libelled the appellant, who is a licensed hackney carriage driver, drove his horse and hackney carriage back and forward along that part of Gordon Street, Glasgow, extending from Hope Street to Renfield Street, the space between these two streets measuring nearly 100 yards. Gordon Street is a busy thoroughfare, and the part referred to is opposite to the carriage entrance to a principal railway station, but there was no proof—as there was no averment—of obstruction to the traffic. Including the space occupied or covered in turning, the appellant thus described an orbit of an elliptical shape which would amount in circumference to rather under 200 yards—viz., 80 yards going east, nearly 20 yards turning, 80 yards going west, and nearly 20 yards turning. The appellant went round this orbit three times in the period of time libelled, or within seventeen minutes. In so driving he kept to his proper side in accordance with the rules of driving. He drove at a walking pace, except when compelled to stop owing to the traffic. This was done for the purpose of picking up or inviting passengers to travel by his hackney carriage, and the said street was not appropriated as a public stand, and was not at a place of public amusement or entertainment."

The questions of law for the opinion of Court were,—"(1) Was the complaint relevant? (2) Did the facts held as proved amount to loitering, and thus constitute a contravention of the bye-law libelled?"

Argued for the appellant;—There was neither averment nor proof of any obstruction to traffic, and neither the case as libelled, nor the facts as proved, could warrant the conviction.[1]

Counsel for the respondent were not called upon.

Lord Justice-Clerk.—The Magistrate had, in my opinion, perfectly sufficient grounds for his conclusion. The case of *Fairfoul*[1] was the case of a large vehicle—a char-à-banc—intended to pick up passengers from time to time until it got its full complement. Such a vehicle as that could not get filled up except by driving up and down picking up passengers, or by standing at a particular spot. This is the case of a cabman, whose duty it is when he comes off any job to place himself at a cab-stand fixed by the Magistrates. Instead of that he went up and down within a narrow area, and kept going round and round in this small orbit in the endeavour to pick up a fare. The question of the space within which he was moving is a very important element. It is one thing to move round in an orbit of 200

[1] Fairfoul v. Somerville, Oct. 25, 1895, 23 R. (Just. Cases) 6, 2 Adam, 13.

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yards as here, and another thing to drive along from the one end of Princes Street to the other. Then again, if one cabman is to be allowed to act in this way every cabman must be allowed to do so, whereas it is the duty of every cabman, as I have said, to take up his position on a stand until he is hired. The case of *Fairfoul*,[1] for this reason, in no way rules this case.

LORD TRAYNER.—The case of *Fairfoul*[1] settles nothing except that in the particular circumstances there before the Court loitering was not established. As I did in the case of *Fairfoul*,[1] I confine myself strictly to answering the questions that are put to us. I think (1) that the complaint is relevant, and (2) that the facts proved amounted to loitering, and thus constituted a contravention of the bye-law libelled.

LORD MONCREIFF.—I concur.

THE COURT dismissed the appeal.

J. DOUGLAS GARDINER & MILL, S.S.C.—CAMPBELL & SMITH, S.S.C.—Agents.

No. 26.
June 11, 1901.
Thomson v. Scott.

JAMES THOMSON, Complainer.—*Crabb Watt.*
WILLIAM SCOTT, Respondent.—*M'Lennan—R. S. Horne.*

Offence against Education (Scotland) Acts—Failure to provide education for children—Certificate—Education (Scotland) Act, 1872 (35 *and* 36 *Vict. cap.* 62), *sec.* 70.—Conviction and sentence for failure to provide education for children *suspended*, in respect that the certificate required by section 70 of the Education (Scotland) Act, 1872 (*a*) did not state what the relationship of the two children named in the certificate was to the accused, and (*b*) referred in certain clauses to "the said child" instead of to "the said children."

Procedure—Instance—Delegation of title to prosecute—Education (Scotland) Act, 1872 (35 *and* 36 *Vict. cap.* 62), *sec.* 70.—Conviction and sentence for failure to provide education for children *suspended*, in respect that the officer appointed by the school board under section 70 of the Education (Scotland) Act, 1872, did not himself appear to prosecute, but sent his clerk.

HIGH COURT. Lord Justice-Clerk. Lord Trayner. Ld. Moncreiff.

ON 10th April 1901 James Thomson, carter, Clifton Road, Lossiemouth, was charged in the Police Court of the burgh of Lossiemouth and Branderburgh, on a summary complaint at the instance of "William Scott, solicitor, Elgin, the person appointed by the School Board of the parish of Drainie to prosecute in terms of the Education (Scotland) Acts, 1872 to 1893." The complaint set forth that the accused had "contravened the Education (Scotland) Acts, 1872 to 1893, particularly section 69 of the Education (Scotland) Act, 1872, and section 4 of the Education (Scotland) Act, 1883, in so far as the said James Thomson has for a period of at least one month immediately preceding the date hereof, without reasonable excuse, failed to discharge the duty of providing, as required by said Acts, efficient elementary education in reading, writing, and arithmetic, for James Henderson and Ellen Thomson, the latter being his child, and the former being under his guardianship and residing with him, whereby the said James Thomson is liable to a penalty not exceeding twenty

[1] Fairfoul v. Somerville, Oct. 25, 1895, 23 R. (Just. Cases) 6, 2 Adam, 13.

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shillings, or to imprisonment not exceeding fourteen days, in terms of sections 70 and 71 of the Education (Scotland) Act, 1872."*

The accused pleaded not guilty, but after evidence had been led the Magistrate convicted him of the contravention charged, and adjudged him to pay a penalty of ten shillings, and the sum of one pound of expenses, with the alternative of fourteen days' imprisonment.

He brought a suspension, in which he stated, *inter alia*,—(Stat. 6) At the diet "the respondent Scott was not present in Court. He sent his clerk, Mr David Cameron, to conduct the proceedings and move for sentence. The said David Cameron had no title or mandate or qualification to prosecute. He is not a law-agent, and he held no authority from the School Board of the parish of Drainie to prosecute." (Stat. 10) "No certificate had been issued by the School Board to the prosecutor of failure to educate, in terms of 69 and 70 of the Education (Scotland) Act, 1872, or at all events it was not produced as evidence."

The complainer pleaded;—The said conviction and sentence are illegal, unwarrantable, and oppressive, and ought to be suspended, in respect—(1) The said David Cameron had no title or authority to prosecute; (4) The condition-precedent to said prosecution and said conviction and sentence in the form of a certificate under sections 69 and 70 of the Education (Scotland) Act, 1872, had not been fulfilled.

The respondent, Scott, stated that he was procurator-fiscal of the Police Court as well as the person appointed by the School Board of Drainie to prosecute under the Education Acts, and that his clerk David Cameron had authority to act as his deputy as procurator-fiscal. The certificate quoted below † was stated in the minute of proceedings signed by the Magistrate to have been produced at the trial.

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* The Education (Scotland) Act, 1872 (35 and 36 Vict. cap. 62), sec. 70, enacts—"It shall be the duty of every school board to appoint an officer to ascertain and report to the school board what parents resident within the parish or burgh have failed and omitted, . . . to perform the duty of providing for their children such elementary education as aforesaid; . . . and the school board is hereby authorised to summon any such parent to appear before the school board at any meeting thereof, and to require from him every information and explanation respecting his failure of duty with respect to the education of his child or children, and if he shall either fail to appear, or on his appearance to satisfy the school board that he has not failed in such duty without reasonable excuse for such failure, and shall not undertake to the satisfaction of the school board to perform such duty by forthwith providing such elementary education as aforesaid for his children, it shall be lawful to and shall be the duty of the school board to certify in writing that he has been . . . without reasonable excuse failing to discharge the duty of providing elementary education for his child or children, and on such certificate being transmitted to the procurator-fiscal of the county or district of the county in which the parent resides, or other person appointed by the school board, he shall prosecute such parent before the Sheriff of the county for such failure of duty as is in the certificate specified; and on conviction the parent shall be liable to a penalty not exceeding twenty shillings, or to imprisonment not exceeding fourteen days. . . ."

† "DRAINIE SCHOOL BOARD.—Whereas, in terms of the Education (Scotland) Acts, 1872 to 1893, James Thomson, carter, Clifton Road, Lossiemouth, was duly summoned to appear before the School Board of Drainie at a meeting thereof held on the 13th day of March 1901, in order to explain

The authorities mentioned below were cited at the hearing.[1]

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LORD JUSTICE-CLERK.—In this case five or six very serious objections are stated against the proceedings before the Magistrates, but it will be sufficient if I deal with two of those on which we have heard counsel for the respondents.

The first of these objections is, that it being necessary to any such prosecution that there be a certificate from the School Board, the certificate produced mentions two children *nominatim*, but does not say who they were or what was their relationship to the accused. That in itself would constitute a fatal objection, but we find further that the certificate, when making direct reference to the failure to undertake to provide education only mentions "the said child" in the singular, and similarly when the board certifies that the failure was without reasonable excuse, it is "for the said child." It is said that there is a space left in each case, and that it was only *per incuriam* that the necessary alteration of "child" into "children" was not made. That may quite well be, but the certificate as it stands is unintelligible, and the objection taken is fatal to the proceedings, for this simple reason, that nothing can be held to be certified except as regards one child, and there is no means of knowing which. The complaint is as to two children, and the whole basis of the prosecution therefore falls.

The second objection is also very serious. The School Board have power under the Act of Parliament, if they see fit, to appoint a person to act for them in prosecutions under the Act. Here they appointed William Scott, and this complaint bears to be brought by William Scott, "the person appointed by the School Board of the parish," to prosecute. That being

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why he had failed to perform the duty of providing efficient elementary education in reading, writing, and arithmetic for James Henderson and Ellen Thomson; and whereas the said James Thomson failed to appear at the said meeting and to satisfy the said board that he had reasonable excuse for such failure, and has not undertaken to the satisfaction of the said board to perform such duty by forthwith providing such elementary education for the said child: Therefore the said School Board do hereby, in terms of the Education (Scotland) Act, 1872, as amended by section 28 of the Education (Scotland) Act, 1878, and section 5 of the Education (Scotland) Act, 1883, certify that the said James Thomson has been for a period of at least one month prior to this date without reasonable excuse failing to discharge the duty of providing efficient elementary education as required by the said Acts for the said child, and direct their clerk to transmit this certificate to William Scott, solicitor, Elgin, the person appointed by the said school board to prosecute in terms of the said Acts. Signed in name and by authority of the Board this 13th day of March 1901. C. TULLOCH, Chairman of School Board."

[1] *On the question as to the certificate.*—France v. Anderson, June 29, 1877, 4 R. (Just. Cases) 42, 3 Coup. 460; Macaulay v. Macdonald, June 4, 1887, 14 R. (Just. Cases) 43, 1 White, 376. *On the question as to the title to prosecute.*—Macrae v. Cooper, Feb. 10, 1882, 9 R. (Just. Cases) 11, 4 Coup. 561; Hill v. Finlayson, June 13, 1883, 10 R. (Just. Cases) 66, 5 Coup. 284; Walker v. Emslie, Dec. 19, 1899, 2 F. (Just. Cases) 18, 3 Adam, 102; Dunlop v. Sempill, June 4, 1900, 2 F. (Just. Cases) 46, 3 Adam, 159.

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the instance in this prosecution, William Scott was bound to appear in Court to prosecute. If he did not appear, no other person had any title to appear for him. No doubt, according to the reasonable practice of our law, if circumstances, such as ill-health, prevent the prosecutor from being present, the prosecution will not necessarily fall. In such a case the Court may appoint a prosecutor *pro hac vice* to proceed with the prosecution. Here we are told that when the case came on for trial the prosecutor did not attend, but sent a clerk to represent him. That was quite incompetent. It is said that he was procurator-fiscal as well as School Board prosecutor, and that as procurator-fiscal he could have raised these proceedings, and that his clerk had authority to act as his deputy as procurator-fiscal. That is not the question here. The instance in the complaint is not that of procurator-fiscal, but of the person appointed by the School Board, and the proceedings are therefore quite irregular. This suspension must be sustained.

LORD TRAYNER.—I am of the same opinion. A certificate by the school board is a necessary precedent to a prosecution such as we have here. The certificate produced is insufficient, and the prosecution necessarily falls.

The second objection is equally fatal. In a criminal trial there is no instance where the prosecutor fails to appear. This complaint appears to be brought by Mr Scott as the person specially appointed by the School Board. It may be that he is at the same time procurator-fiscal of the burgh, but he does not sue this complaint as procurator-fiscal. He sues as appointee of the School Board, and as such he has no power to delegate his authority.

LORD MONCREIFF.—I agree with your Lordships on both points.

THE COURT passed the bill, and suspended the conviction and sentence.

WM. GEDDES, Solicitor—MUSTARD & JACK, S.S.C.—Agents.

No. 27.

June 11, 1901. M'Alpine & Sons v. Ronaldson.

ROBERT M'ALPINE & SONS, Complainers.—*Hunter.*
JOHN MARTINE RONALDSON, Respondent.—*Guy, A.-D.*

Procedure—Complaint against a firm—Representation of firm at the trial—Representation of firm by its manager.—A summary complaint set forth that "Robert M'Alpine & Sons" had committed a contravention of the Factory and Workshops Acts. Robert M'Alpine & Sons was a firm consisting of four partners. The complaint was served on the firm by delivering a copy to the manager of the firm within the office of the firm. The manager appeared at the trial on behalf of the firm. The Sheriff-substitute refused to recognise the manager as representing the firm, found that the firm had failed to appear after having been duly summoned, and after evidence had been led in support of the complaint, convicted the firm of the contravention charged, and imposed a penalty.

Conviction *quashed*, in respect that the Sheriff-substitute was wrong in refusing to recognise the manager as representing the firm.

Opinion (*per* the Lord Justice-Clerk and Lord Moncreiff) that even if the Sheriff-substitute was right in refusing to recognise the manager, he ought to have adjourned the trial.

No. 27.

June 11, 1901.

M'Alpine & Sons v. Ronaldson.

HIGH COURT. Lord Justice-Clerk. Lord Trayner. Ld. Moncreiff.

A SUMMARY complaint in the Sheriff Court at Paisley, at the instance of John Ronaldson, H.M. Inspector of Mines, West of Scotland District, and as such vest with the powers of an inspector under the Factory and Workshop Acts, 1878 to 1895, in terms of sec. 3 (*a*) of the Quarries Act, 1894, set forth "That Robert M'Alpine & Sons, 188 St Vincent Street, Glasgow, who are the owners and occupiers of Williamwood Quarry, near Giffnock, Renfrewshire, being a quarry within the meaning of the said Quarries Act, 1894, and to which the Factory and Workshop Acts, 1878 to 1895, apply," were guilty of a contravention of the Factory and Workshop Act, 1878, section 5 (3), as amended by the Factory and Workshop Act, 1891, section 6 (2).

The minutes of procedure upon the complaint bore:—"At Paisley, upon the 9th day of April 1901 years, in presence of William Darling Lyell, Esquire, advocate, Sheriff-substitute of Renfrew and Bute, Robert M'Alpine & Sons, complained against, failed to appear after having been duly summoned. WILL. DARLING LYELL."

The minutes of procedure then set forth that certain witnesses were examined in support of the complaint, and a conviction and sentence pronounced in the following terms:—"In respect of the evidence adduced, convicts the said Robert M'Alpine & Sons of the contravention charged, and therefore adjudges them to forfeit and pay the sum of £10 sterling of penalty, and in respect that said sum is now paid at the bar, finds it unnecessary to pronounce further, and decerns."

Robert M'Alpine & Sons brought a suspension, in which they stated, *inter alia*;—(1) "The complainers carry on an extensive business as contractors in Glasgow and elsewhere, their head office being at 188 St Vincent Street, Glasgow. There are four partners of the firm, and at the date of the institution of the proceedings and conviction after mentioned the senior partner was confined to his house in Glasgow, suffering from a cold, and the other three partners were engaged on contracts which the firm were executing in England, Ireland, and Ayrshire respectively. The complainers employ as their business manager and cashier Mr J. D. Ferguson, who has been in their employment for upwards of ten years." (3) "On 3d April 1901 the complainers were served with" the complaint above mentioned. "The complaint was delivered to and received by the said J. D. Ferguson, in the complainers' office on said 3d April, the execution of service being in the following terms:—'To Robert M'Alpine & Sons, 188 St Vincent Street, Glasgow.—Take notice, that you are required to appear personally at the place and time specified in the warrant, of which the foregoing is a copy, to answer to the complaint to which this notice is attached, with certification. This I do on the 3d day of April 1901 years. Chas. Hesketh, officer of Court,' and the execution of service bears that the service was made on the said J. D. Ferguson, cashier, 49 Park Road, Glasgow (his house address), at 188 St Vincent Street aforesaid." (4) "The diet of compearance was fixed for the 9th of April at the Sheriff Court House in Paisley, and the said Mr J. D. Ferguson, on behalf of and as authorised by the complainers, attended the Court to conduct their defence." The complainers then narrated the procedure above set forth. (6) "The said conviction and the proceedings anterior to the same were most unjust, irregular, and grossly oppressive. It was impossible for the complainers as a firm to obey the citation; and if the respondent objected to their being represented by their responsible manager, who had been recognised in the citation of them, it

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was the duty of the respondent, before proceeding with the case, to have offered an adjournment, so that the accused, in view of the objection taken, might have made arrangements which would have been unobjectionable to the respondent, whereby they could have been heard in their defence. The respondent, however, not only failed to inform Mr Ferguson that he was entitled to an adjournment, but insisted on proceeding with the case on the footing that the complainers had failed to appear, and obtained a conviction accordingly."

At the hearing the complainers cited the undernoted authority.[1]

The respondent did not dispute the substantial accuracy of the statements in the bill of suspension. He stated that Mr Ferguson, the complainers' manager, was told by the Sheriff-substitute that while he could not be officially recognised as representing the accused, any questions which he desired to have put would be put from the bench.

LORD JUSTICE-CLERK.—The procedure here has been unfortunate. The accused is a firm consisting of a number of partners. Personal citation of the firm being impracticable, the service of the complaint bears to have been executed by delivery of the complaint to Mr Ferguson, the firm's cashier, within the office of the firm. When the *inducia* on this citation expired Mr Ferguson appeared to represent the firm, stating that he was the firm's manager and cashier. The Sheriff-substitute, however, refused to recognise him as the firm's representative, and proceeded with the trial on the footing that the accused had failed to appear. Now, the accused being a firm, could only be present by someone authorised to represent it. There is no rule of law requiring the representative of a firm to be a partner of the firm. All that was required was that the person appearing should be duly authorised to appear and represent the firm. Now, if Mr Ferguson was manager, he not only was a competent representative of the firm, but he was the best and most appropriate person to represent the firm. In my opinion the Sheriff-substitute went wrong in law in not allowing Ferguson to appear as representing the firm. That is sufficient to dispose of the case.

There is, however, another point which may not be applicable in every case, but is applicable where, as here, there is no suggestion of *mala fides*. Where the accused firm has *bona fide* made an effort to be represented at the trial, and the Sheriff has reasons for not being satisfied with the person whom the firm has sent as its representative, I think it would be advisable to allow an adjournment. There is no reason why he should at once proceed to try them in absence, and put them to the disadvantage of having no defence stated.

LORD TRAYNER.—I am of opinion that the complainers were properly and duly represented by their manager, and consequently that the Sheriff was wrong in the course he took.

LORD MONCREIFF.—I agree with your Lordship on both points.

THE COURT quashed the conviction.

MACPHERSON & MACKAY, S.S.C.—CROWN AGENT—Agents.

[1] Gray & Co. v. Mackinnon, March 17, 1899, 1 F. (Just. Cases) 65, 2 Adam, 691.

JOHN NEIL, Appellant.—*A. M. Anderson.* No. 28.
DAVID M'NAIR AND ANOTHER, Respondents.—*Graham Stewart.*

June 11, 1901.*
Neil v. M'Nair.

Sheriff—Decree—Furthcoming—Parole proof of circumstances under which decree obtained—Sheriff—Reduction ope exceptionis—Debts Recovery (Scotland) Act, 1867 (30 *and* 31 *Vict. c.* 96), *sec.* 17—*Sheriff Courts (Scotland) Act*, 1877 (40 *and* 41 *Vict. c.* 50), *sec.* 11.—*Held* that it was not competent for a Sheriff sitting in the Small Debt Court to dismiss a furthcoming founded on a final decree in absence in the Debts Recovery Court on parole evidence that the parties had agreed to the decree passing on the footing that it was to be used merely as a decree of constitution.

Opinions per Lord Moncreiff (1) that it was not competent for the common debtor in an action of furthcoming to plead objections which were competent and omitted in the action in which the decree on which the furthcoming was based was pronounced, whether such decree was a decree *in foro* or in absence; and (2) that a decree of Court founded on by a party to a process is not a "deed or writing," in the sense of section 11 of the Sheriff Courts (Scotland) Act, 1877, which can be set aside in the Sheriff Court by way of exception.

HIGH COURT. Lord Justice-Clerk. Lord Trayner. Ld. Moncreiff.

ON 13th February 1900 John Neil, farmer, Maryfield, Blairgowrie, obtained decree in the Sheriff Court at Perth for £21, 11s. 6d., in an action under the Debts Recovery (Scotland) Act, 1867, against David M'Nair, farm-bailiff, Grange Farm, Worsley, Lancashire, executor-dative of the late Robert M'Nair, Errichtbank Cottage, Rattray. The decree decerned and ordained instant execution by arrestment.

Of the sum in the decree £13 was paid to account. Thereafter, on 4th May 1900, arrestments were used in the hands of John Sidey Nelson, solicitor, Blairgowrie, for the balance of £8, 11s. 6d., and on 11th May Neil brought an action of furthcoming for this balance in the Sheriff Court at Perth, under the Small Debts (Scotland) Act, 1831, against M'Nair and Nelson.

On 20th July 1900 the Sheriff-substitute (Sym) dismissed the summons of furthcoming.

Neil appealed to the High Court of Justiciary.

In his note of appeal the appellant stated:—"On the case being called in Court before Mr Sheriff-substitute Sym, respondents' agent objected to the summons on the plea of *res judicata*, which objection the Sheriff-substitute repelled, and ordered the case out for proof on the merits on 20th July 1900. The defences stated on the merits were that the appellant had agreed to accept a dividend on his claim against the said executry estate, and had acquiesced in regarding the said executry estate as a trust for creditors, upon which he was to rank as an ordinary creditor. After hearing the evidence of the appellant and one witness for the appellant, and the respondent Nelson, and one witness for respondents, the Sheriff-substitute repelled the defences stated on the merits, but he *brevi manu* granted decree dismissing the said furthcoming summons on the ground, it is believed, that said debts-recovery decree on 13th February 1900, which contained the warrant for the arrestment which preceded the furthcoming summons, had been allowed, in error, to pass unopposed owing to a misunderstanding on the part of the respondents' agent, who had been, the Sheriff-substitute believed, unintentionally misled by the appellant's agent, to the effect that the appellant would agree to accept a dividend upon his claim."

* Decided June 7, 1901.

No. 28.

June 11, 1901.
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The appellant set forth that he sought relief for the following reasons:—"*Firstly*, It was incompetent and *ultra vires* for the Sheriff-substitute to have considered the merits of, or the circumstances under which, the debts-recovery decree referred to was granted—that decree being *ex facie* regular and a valid warrant for the arrestment by virtue of which the furthcoming summons was brought. *Secondly*, The effect of the decision to the appellant is oppressive, and has prevented substantial justice being done to him within the meaning of section 31 of the Small Debt Act, 1837 (1 Vict. cap. 41), and in respect that he is barred from again using arrestments in the jurisdiction of the Sheriff of Perthshire on the warrant contained in said debts-recovery decree, or from doing any diligence upon it which could be brought under the review of the Sheriff Court of Perthshire. *Thirdly*, In dismissing said furthcoming summons the Sheriff-substitute was wilfully and oppressively deviating in point of form from statutory enactments contained in section 9 of the said Small Debt Act, and in respect that he was annulling and practically suspending said decree previously granted by himself on 13th February 1900, and which could only legally be annulled or suspended on cause shewn, after reponing, or by a process of suspension in the Justiciary Court."

On 18th March 1901 the Court (the Lord Justice-Clerk, Lord M'Laren, and Lord Pearson), after hearing parties, remitted to the Sheriff-substitute to report as to the procedure in the summons of furthcoming, and the facts and circumstances which occurred when that summons was dismissed.

On 21st March the Sheriff-substitute reported.*

* The Sheriff-substitute's report set forth, *inter alia*, as follows:—"Until receipt of your Lordships' interlocutor, with copy appeal and appendix, I had not seen the appeal, nor had I seen any of the documents since 20th July 1900. It is therefore with some hesitation as to the completeness of my recollection that I give the following report.

"It was maintained that the question of the furthcoming was *res judicata*, as the note of appeal states. After that contention was repelled proof was led. The matter sought to be proved on the one hand was, that the decree in absence in the debts-recovery action (upon which decree the arrestment proceeded) was obtained in consequence of an agreement between a Mr M'Alpine, writer, agent for the appellant Neil, and a Mr Nelson, writer, agent for M'Nair's executor, that a defence which the latter had stated to the debts-recovery action should be withdrawn, and that Neil should obtain decree, but only on the undertaking that the decree should be used to constitute a debt solely against the estate of the deceased M'Nair. On the other hand it was attempted to be shewn that Mr M'Alpine had agreed to recommend this to Neil merely, and that Neil had subsequently refused to agree, and had instructed an arrestment and furthcoming to be used.

"In law it was maintained on the one hand that Mr M'Alpine could by the alleged agreement bind his client Neil, and on the other hand that that was beyond the ordinary scope of a law-agent's powers without previous special authority.

"On the matter of fact, I was of opinion (without imputing to Mr M'Alpine any desire to misstate the truth according to his recollection) that he had agreed that the decree should be treated as one of constitution, but that he had no previous authority so to do. It was for that reason that the other party did not attend and oppose.

"In law, I was of opinion that it was beyond a law-agent's mandate to assent to such an arrangement, which was truly a compromise between Neill and M'Nair's executor, without previous authority.

"I considered, however, that Mr Nelson had withdrawn his defence,

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The parties were thereafter further heard. The nature of the arguments sufficiently appears from the opinion of Lord Moncreiff. The undernoted authorities were cited at the hearing.[1]

At advising,—

LORD MONCREIFF.—In this case the appellant John Neil obtained decree for £8, 11s. 6d. against the respondent David M'Nair as executor-dative of the late Robert M'Nair. That decree was pronounced on 13th February 1900, and was a decree under the Debts Recovery Act. *Ex facie* it was not qualified in any way. In the month of May thereafter the appellant raised in the Small Debt Court a summons of furthcoming, having previously arrested certain sums in the hands of the respondent Nelson by virtue of the warrant to arrest contained in the debts-recovery decree.

Now, it is averred by the appellant that in the process of furthcoming which followed the respondent M'Nair appeared and stated certain preliminary objections to the action; these the Sheriff-substitute repelled, but he allowed a proof as to certain defences stated on the merits. We are told that after proof had been led the Sheriff-substitute repelled the defences on the merits but dismissed the action on the ground that the decree in the debts-recovery action had been allowed to pass unopposed because the defender M'Nair had been unintentionally misled by the agent for the appellant, who had said that the decree would only be used as one of constitution, and that his client would agree to accept a dividend upon his claim.

On these statements this appeal came before this Court on 18th March last. On that occasion the Court, which was differently constituted, remitted to the Sheriff-substitute to report as to the course of procedure, and we have now to consider the case in the light of his report. I am not surprised that the Sheriff-substitute should indicate that his recollection of the case is not very clear, as a considerable time has elapsed since the action was before him. But on his report it seems to me that the result of his recollection of the facts is practically to confirm the statement made in the appeal and founded on by the appellant.

The Sheriff-substitute held that the appellant's agent had no authority to give such an undertaking; but he thought that previously to using arrestments on the decree the appellant knew the circumstances under which it had been obtained, and that he was therefore personally barred from thus

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because he believed, in consequence of what Mr M'Alpine had said, that the decree was to be treated as one of constitution only, that the agent who appeared for Neil and Neil knew this when the decree was taken, and that Neil was not in law and good faith justified in arresting and bringing a furthcoming on the decree when he knew that it had been allowed to pass in consequence of what his agent M'Alpine had represented on his behalf. The whole facts leading to this conclusion I cannot now pretend to detail. . . ."

[1] Donaldson v. Ord, July 5, 1855, 17 D. 1053, 27 Scot. Jur. 625; Wilson v. Glasgow Tramway Co., June 22, 1878, 5 R. 981; Alison v. Balmain, Oct. 25, 1882, 10 R. (Just. Cases) 12, 5 Coup. 137; Sturrock v. Welsh & Forbes, Nov. 14, 1890, 18 R. 109; Gordon v. Mulholland, Jan. 26, 1891, 18 R. (Just. Cases) 18, 2 White, 576; Gow & Sons v. M'Ewan, Jan. 26, 1897, 2 Adam, 215; Sprott v. Portpatrick and Wigtownshire Joint Committee, May 18, 1898, 25 R. (Just. Cases), 71, 2 Adam, 519; Clark v. Low, June 9, 1900, 2 F. (Just. Cases) 49, 3 Adam.

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enforcing the decree. On that ground the Sheriff-substitute dismissed the action of furthcoming, and we are asked to say whether in so doing he acted within his powers. I am of opinion that he did not, and that we must sustain this appeal.

The decree founded on in the action of furthcoming was a decree under the Debts Recovery Act, 1867. Certain modes of review are specified in that Act; and in particular, in the case of a decree in absence, there are provisions under which a party has the means of obtaining a sist and hearing within three months—section 7 of the Act of 1867, and section 16 of the Small Debt Act 1837, which is imported.

For decrees *in foro* provision is made for appeal on certain conditions from Sheriff-substitute to Sheriff and from the Sheriff to the Court of Session—sections 10, 11, 12, and 13. Then we come to section 17 of the Act, which is short and to the point—"No interlocutor, judgment, order, or decree pronounced under the authority of this Act shall be subject to reduction, suspension, or appeal, or any other form of review or stay of diligence, except as herein provided, on any ground whatever." That is quite as strong a limitation or rather exclusion of review as that contained in sections 30 and 31 of the Small Debt Act of 1837, to which reference was made at the debate. Although there was yet time to apply for a sist and hearing, even when the arrestment was used and furthcoming brought, the mode of review provided in the statute was not adopted in this case, and the decree with which we are dealing was therefore a final decree, and not subject to any kind of review, even by the Court of Session itself.

Such being the nature of the decree, what the Sheriff-substitute has done is on parole evidence in the Small Debt Court to refuse to give effect to a final decree of another Court. I do not say that in special cases, for instance where gross fraud is alleged and the party has had no opportunity of appealing, there may not be some mode in which the Supreme Court could in a formal process give redress against such a decree; but in the general case such a decree is not subject to review except in one of the statutory modes, and certainly is not liable to be set aside incidentally on parole evidence in the Small Debt Court.

This of itself is sufficient, but I shall notice two other points which were pleaded to us.

It is pleaded that the common debtor may in a furthcoming competently state all objections to the decree which he could have stated in the action in which decree was pronounced. This argument proceeds, I think, on a misapprehension. In the case of *Donaldson* v. *Ord*, 17 D. 1053, at p. 1065, to which we were referred yesterday, there is an exposition by the Lord Justice-Clerk of the nature and extent of the pleas available in a furthcoming following arrestment on a final decree—"The arrestee may have certain defences against giving up the fund, and others may have a preference by prior diligence; but of course the owner of the fund against whom a final decree for payment has been pronounced cannot be a competitor in such furthcoming with his creditor holding a final decree for payment. If the arrestment has not been laid on on a decree for payment, the common debtor may no doubt have objections to the right on which the

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arrestment is proceeding, but after trial of the arrester's right, and a decree for payment *in foro*, the owner of the fund is excluded." Later on he says,—"The reclaimers are the common debtors under this decree, which is one, beyond all doubt, for payment; and in the furthcoming they cannot raise points which were clearly competent and omitted in the action in which the decree was pronounced, even if well founded. Whether they could have obtained any limitation of the decree I need not inquire. Their attention was most specially directed to its terms and effects, as the correspondence shews; and in the full knowledge of its effect they acquiesced in it." His Lordship then proceeds to discuss the nature of the action of furthcoming in an instructive passage, which I need not quote. His Lordship is there speaking of a decree *in foro*, but I think the same considerations are applicable to the case of a decree in absence, where the debtor has not been reponed in terms of the statute. Of course the common debtor may state any objection which has arisen since the date of the decree.

This brings me to the argument stated to us, that the respondent was entitled by virtue of the provisions of section 11 of the Sheriff Courts Act of 1877 to state his objections to the decree by way of exception, without formally setting aside the decree by suspension or reduction. We were referred to the case of *Wilson* v. *Glasgow Tramways*,[1] where the late Lord Justice-Clerk and Lord Gifford expressed the opinion that it was permissible in the Small Debt Court to set aside an agreement to refer to arbitration by way of exception and without formal reduction. Lord Ormidale was of a different opinion—at least he was not prepared to say that section 11 of the Sheriff Courts Act of 1877 applied to the Small Debt Court. That was my impression, but we cannot disregard the decision without further consideration. But assuming that the provisions of section 11 of the Sheriff Courts Act of 1877 do apply to the Small Debt Court, I do not think that they can be applied to the effect of disregarding the decree of a Court, and that the decree of another Court, though a Court within the same sheriffdom. I think the provision of the statute applies where a document such as a receipt or discharge is produced in evidence and founded on in an action; in such a case the document may be set aside by way of exception, but I know of no case where an *ex facie* regular decree of a Court which is the foundation of a process has been set aside by way of exception in the Sheriff Court. Such a decree is not "a deed or writing" in the sense of the Act.

On the whole case I am of opinion that the Sheriff-substitute has acted incompetently, and that we must, on the ground of incompetency, set aside his decree dismissing the furthcoming, and remit the case back to him for further procedure.

The LORD JUSTICE-CLERK and LORD TRAYNER concurred.

THE COURT sustained the appeal, and remitted to the Sheriff-substitute for further procedure.

EMSLIE & GUTHRIE, S.S.C.—CARMICHAEL & MILLER, W.S.—Agents.

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[1] 5 R. 981.

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June 11, 1901.*
Jamieson v. Wilson.

WILLIAM JAMIESON, Complainer.—*Salvesen, K.C.—W. Brown.*
CHARLES WILSON (Procurator-Fiscal of Court, Aberdeen), Respondent.
—*Sol.-Gen. Dickson—A. O. M. Mackenzie, A.-D.*
AUGUSTE BOURGIN, Respondent.—*Pitman.*

Process—Adjournment of diet by unsigned deliverance—Validity.—At the trial of a summary complaint on 7th January the Sheriff adjourned the diet, but the interlocutor appointing a day for the next diet was not signed. The accused appeared on the day named by the unsigned interlocutor, and, after evidence, was convicted.

In a suspension, *held* that as the diet of 7th January had not been validly adjourned, subsequent proceedings were incompetent, and conviction *quashed*.

Jurisdiction—Review—Civil or Criminal—Damages for contravention of Sea Fisheries Act, 1883—*Sea Fisheries (Scotland) Amendment Act*, 1885 (48 *and* 49 *Vict.* c. 70), *secs.* 7 *and* 8.—The Sea Fisheries (Scotland) Amendment Act, 1885, provides that in proceedings by way of summary complaint for contravention of the Act, the Sheriff may be called on at the trial to dispose of the question of damage to property by the contravention, and that where such damage as found by the Sheriff exceeds £12, appeal against such award "shall be competent as in ordinary cases before the Sheriff Court."

In a suspension of a conviction and award of damages exceeding £12, under the Act, the Court *quashed* the conviction on the ground of irregularity in the proceedings, but *held* that it had no jurisdiction to consider the validity of the award of damages.

HIGH COURT. Lord Justice-Clerk. Lord Trayner. Ld. Moncreiff.

WILLIAM JAMIESON, master of the steam-trawler "St Clement," of Aberdeen, the owner of which was Thomas Walker, fish-salesman, Aberdeen, was charged in the Sheriff Court at Aberdeen on a complaint under the Summary Jurisdiction Acts, 1864 and 1861, and the Criminal Procedure Act, 1887, at the instance of the Procurator-fiscal, which charged him with having recklessly steered his vessel through the drift-nets and gear accessory thereto belonging to the fishing-boat "Surcouf," of Boulogne, France, the master of which was Auguste Bourgin, whereby 216 of the nets were destroyed, causing damage to the extent of £648, contrary to the Sea Fisheries Act, 1883, section 4 (*a*), and article 19 of the schedule referred to therein, thereby rendering himself liable to a fine not exceeding £50, or to imprisonment for not more than three months.

Jamieson pleaded not guilty on 7th January 1901, and by interlocutor of the same date, the Sheriff-substitute (Burnett) adjourned the diet to 7th February 1901, but this interlocutor was never signed.

Subsequent to the diet of 7th January 1901, a notice, signed by the owner of the nets and other gear referred to in the complaint, was served upon the Sheriff-clerk, and upon the complainer, in the following terms:—"I hereby give you notice that at the trial of the offence complained of the Sheriff will be called upon to consider and dispose of the question of the damages done to the nets and other gear of the fishing-boat 'Surcouf,' No. 2485, of Boulogne, France, mentioned in the complaint.

"This notice is given in pursuance of section 8 of the Sea Fisheries (Scotland) Amendment Act, 1885."†

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* Decided June 8, 1901.

† The Sea Fisheries (Scotland) Amendment Act, 1885 (48 and 49 Vict.

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On 7th February the case went to trial and evidence was led. The Sheriff-substitute (Robertson) thereafter adjourned the diet till 14th February, on which date, in respect of the evidence led, he convicted Jamieson of the contravention charged and fined him £25, with imprisonment for thirty days in default of payment. On the same date he pronounced a separate interlocutor, which, after narrating the conviction of Jamieson as aforesaid, and after certain findings in fact as to the loss of the nets and gear mentioned in the complaint, proceeded: "Finds that Auguste Bourgin, as owner of the nets and gear so lost, is entitled to compensation therefor, and assesses the amount of said compensation at £648 sterling, for which sum decerns and grants warrant for recovery of said sum of £648 by distress or poinding and sale of the said sea-fishing boat 'St Clement' and her tackle, apparel, and furniture, and any property on board thereof or belonging thereto, or any part thereof, in terms of section 20 (2) of the Sea Fisheries Act, 1883, and section 8 of the Sea Fisheries (Scotland) Amendment Act, 1885."

Jamieson brought a suspension both of the sentence and of the

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cap. 70), enacts as follows:—Section 7—"Every case under the Sea Fisheries Acts may be prosecuted in any Sheriff Court which the Fishery Board may declare by a notice under the hand of the Secretary to the Board to the Procurator-fiscal of such Sheriff Court to be the Court nearest to the spot where the offence was committed, or otherwise the most convenient for the trial of the case. Where an offence has been committed by any person belonging to a British sea-fishing boat in Scotland, or in any part of the sea adjoining Scotland, against the Sea Fisheries Acts, whereby any injury is done by one sea-fishing boat to another, or the nets, lines, and gear thereof, or any of the apparatus used in fishing by the said boat, it shall be lawful for any sea-fishery officer to whom complaint is made by the party injured, verbally or in writing, . . . to prepare and sign a report to the Fishery Board setting forth succinctly the facts of the case and the amount of the damage done . . . and it shall be competent for either party in any legal proceedings that may be raised for the recovery of the damages or any part thereof, to call upon the Fishery Board to transmit such report to the Clerk of the Court in which such case is to be tried . . . and in any case in which the damage as found by the Sheriff before whom the case comes for trial shall exceed twelve pounds, appeal shall be competent as in ordinary cases before the Sheriff Court."

Section 8—"Subsection 1 of section 15 of the Sea Fisheries Act, 1883, is hereby repealed. Where any offence is committed as set forth in section 7 hereof it shall be competent for the person whose property has been injured to give notice in writing to the person committing such offence, and to the Sheriff-clerk, that at the trial of said offence the Sheriff will be called upon to consider and dispose of the question of damages, and in such case the evidence led at said trial shall be evidence for the consideration of the Sheriff on the question of damages, and the Sheriff, at the conclusion of the said trial, shall proceed to consider and dispose of the question of compensation to the injured party, and if a report of a sea-fishery officer has been produced as set forth in section 7 hereof, the Sheriff shall not allow any additional evidence to be heard unless he shall consider it to be necessary in order to do justice in the case; and if he shall allow additional evidence, the accused person shall be allowed to be examined as a witness on the question of the amount of damages, and shall, if oral evidence is to be taken on the question of damages, allow the accused person to be examined as a witness on the question of damages, and shall, after hearing parties, give decree as in an ordinary action before the Sheriff Court."

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decree awarding damages, and pleaded, *inter alia*,—(1) The trial of the accused not having been adjourned to a fixed date on said 7th January 1901, the proceedings thereupon fell, and the sentence or conviction and interlocutor or decree complained of are illegal and invalid, and ought to be suspended. (2) In any event the said sentence or conviction falls to be suspended.

Argued for the complainer;—The interlocutor adjourning the diet of 7th January not having been signed, there was no valid adjournment of that diet to a fixed date, and the subsequent proceedings were incompetent.[1] The conviction must therefore be quashed. The procedure for awarding compensation was purely statutory, and any award depended on conviction. If the conviction was null so was the award, and the Court of Justiciary might competently declare that it was so.[2]

Argued for the respondent Wilson;—It was conceded that the conviction could not stand. But the Court of Justiciary could not deal with the award of damages, which was declared by statute to be subject, not to suspension, but to appeal as in an ordinary action in the Sheriff Court. That and the fact that no imprisonment could follow failure to pay the amount awarded, excluded the jurisdiction of the High Court.

Argued for the respondent Bourgin;—The civil and criminal proceedings were separable. Although the Court might review the criminal proceedings, it had no jurisdiction to deal with the award of damages.

LORD JUSTICE-CLERK.—The fact that the interlocutor of 7th January 1901 purporting to adjourn the diet to 7th February 1901 is not signed is a sufficient reason for quashing this conviction. I do not think that, in view of the provisions of the Fisheries Acts, we in this Court can competently deal with the question whether the decree for damages pronounced by the Sheriff-substitute is valid. I propose that we pass the bill to the extent of quashing the conviction and sentence, and *quoad ultra* refuse the bill.

LORD TRAYNER.—The complainer was charged, at the instance of the respondent Wilson, with a contravention of the Sea Fisheries Act. Pending the complaint so brought against him, a notice was given to the complainer (in terms of a statutory provision) that at the trial of the offence with which he was charged the Sheriff would be asked to consider and dispose of a question of damages arising out of the alleged offence. The trial took place, and the complainer was convicted and fined £25, or in default of payment sentenced to imprisonment for thirty days. The Sheriff-substitute further, but in a separate interlocutor, found the complainer liable to the respondent Bourgin in the sum of £648 sterling as the compensation due to the latter for the damage sustained by him through the complainer's alleged offence. Warrant was granted for recovery of this

[1] M'Lean v. Falconer, June 28, 1895, 22 R. (Just. Cases) 39, 1 Adam, 564; MacArthur v. Campbell, March 18, 1896, 23 R. (Just. Cases) 81, 2 Adam, 151; Lord Advocate v. Fraser, June 1, 1852, 1 Irv. 1; Craig v. Tarras, July 16, 1897, 24 R. (Just. Cases) 88, 2 Adam, 344.

[2] Combe v. Renton, June 5, 1886, 13 R. (Just. Cases) 67, 1 White, 150.

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sum by distress or poinding and sale of the sea-fishing boat "St Clement," of which the complainer was the master. This suspension is brought for the purpose of setting aside not only the conviction but also the decree for damages.

It is conceded by the respondent Wilson that the conviction cannot stand, for the reason assigned in the suspension, and to which your Lordship has adverted. I agree that the conviction must be quashed. But in my opinion it is not competent to this Court to hear or dispose of any objection to the validity of the decree for damages. By statutory enactment that decree is declared practically to be the same as a decree pronounced in an ordinary cause before the Sheriff, and is subject to appeal as if it had been pronounced in "an ordinary action before the Sheriff Court" (Act of 1885, secs. 7 and 8). I think that these enactments exclude review by the Justiciary Court of any such decree, and provide for such review being had in the ordinary Courts of law. Further, it will be observed that no sentence of imprisonment can be or has been pronounced in the event of the complainer failing to make payment of the damages decerned for. The only authorised mode of recovering the damages is by diligence as on a decree—the ordinary mode of recovering a civil debt. It is quite true that the claim and consequent decree for damages are by statute intimately connected with the complaint founded on the alleged offence, and it may be that the invalidity of the conviction involves invalidity in the decree. But on that I offer no opinion, for any such question, I think, must be determined by the Court before which the validity of the decree is challenged, on an appeal against it, or by suspension of any diligence threatened or proceeding upon it.

LORD MONCREIFF.—I at first thought that we could competently suspend not merely the conviction and sentence but the decree for compensation pronounced by the Sheriff of even date with the conviction. It seemed to me desirable that we should do so if it was competent, so as to save the parties the trouble and expense of going to the Civil Court in order to get rid of what is really a nullity.

The procedure under which the respondent Auguste Bourgin obtained decree of compensation from the Sheriff is purely statutory. It depends entirely upon the conviction, and stands or falls with it. It is so intimately connected with the conviction that under the provisions of the 8th section of the Sea Fisheries Amendment Act, 1885, the Sheriff who tries the criminal case may at its close be called upon to dispose of the question of damages, and in such a case must treat the evidence led at the criminal trial as evidence led on the question of damages, and if a report of a sea-fishery officer has been produced as to the amount of damages sustained, "the Sheriff shall not allow any additional evidence to be heard unless he shall consider it to be necessary in order to do justice in the case."

Now, as far as I can see this procedure is entirely dependent upon proof of an offence having been committed. But in the present case we have held that the whole proceedings came to a conclusion on 7th January 1901, and all the procedure which took place after that date, including the evidence which was led, and upon the strength of which in part the award of

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damages was made, was absolutely incompetent. Therefore as to the invalidity of the award of damages, I confess that at present I do not entertain much doubt.

But the question of jurisdiction is raised. It is said that under the 7th and 8th sections of the amending statute an appeal is competent "as in ordinary causes before the Sheriff Court," which points apparently to civil jurisdiction.

Now, I thought at first that it might be maintained that while there might be an appeal to the Civil Court as to the amount of damages if the conviction stood, it did not follow that if the conviction on which the award of damages depended was quashed, it would be necessary or competent to invoke the Civil Court. The conviction having fallen, the award of damages would be a nullity, and might be so declared by the High Court of Justiciary.

But on consideration I am not disposed to differ from the view which your Lordships have taken. Comparing the provisions of the 15th section, subsection (1), of the Sea Fisheries Act, 1883, with the 7th and 8th sections of the Act of 1885, there are grounds for holding that the effect of the later statute was to substitute a civil for a criminal or quasi-criminal process as regarded damages. Under the Act of 1883 compensation was to be adjudged and recovered as a fine, while under the later Act the process was to be treated in the same manner as an ordinary cause in the Sheriff Court, with a right of appeal in certain cases. I may also observe that the claim for compensation might have been made under the 7th section in the shape of a separate application, and damages might have been awarded without the Sheriff proceeding upon the evidence adduced in the criminal case.

Therefore although it would simply cause unnecessary expense to proceed further in regard to the award of damages, I think that logically your Lordships are right, and in this Court we have no jurisdiction to deal with that part of the prayer of the bill of suspension.

THE COURT quashed the conviction and sentence, and *quoad ultra* refused the bill, finding the complainer entitled to his expenses in both Courts against the respondent Wilson, and Bourgin entitled in the High Court to expenses against the complainer.

ALEX. MORISON & Co., W.S.—W. J. DUNDAS, C.S., Crown Agent—Agents.

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June 11, 1901.* Bryson v. Phyn.

MATTHEW BRYSON AND OTHERS, Appellants.—*Kennedy*—*W. Thomson.*

CHARLES STEWART PHYN (Procurator-Fiscal, Dumfries), Respondent.—*Dundas, K.C.*—*A. S. D. Thomson.*

Salmon-Fishing—Fishing Offence—Solway—Annan Fisheries Act, 1841 (4 *Vict. cap. xviii.*), *secs.* 33 *and* 46.—The Annan Fisheries Act, 1841, enacts,—Sec. 33—"If any person, not being the owner or occupier of any fishery in the river Annan, or in any stream or water running into the same, or on the shores or sea-coast adjacent to the mouth or entrance of the said river, shall at any time take, fish for, or attempt to take, or assist in taking, fishing for, or attempting to take, in or from the said river Annan, or any stream or

* Decided November 5, 1900.

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water . . . which runs into or otherwise communicates with the said river Annan, or in the shores or sea-coast adjacent to the mouth or entrance of the said river, any salmon, grilse, sea-trout, bull-trout, whitling, herling, or other fish of the salmon kind . . . every such person shall, for every such offence," be liable in a penalty.

Sec. 46—"For the purposes of this Act the limits of the shore or sea-coast adjacent to the mouth or entrance of the said river Annan shall be deemed to extend, and shall extend, from the west bank or side of the water of Sark on the east to the east bank or side of the water of Lochar on the west, including the whole sea coast within these limits from the land on the Scotch side at high-water mark of spring tides into the sea at low-water mark of spring tides."

Certain persons, being neither owners nor occupiers of salmon-fishings, and having no permission from any owner or occupier of salmon-fishings to fish for salmon within the limits of the Annan Fisheries Act, were convicted of a contravention of section 33 of that Act. They appealed. The case stated:—The accused had fished for salmon at a spot a short distance westward of Torduff Point, between the Sark and the Lochar. They had fished up to an hour and a quarter before low water. The sea had then receded several miles to the south-west of the spot in question, leaving the estuary of the Solway nearly all dry except for a channel of brackish water, which flowed down to the sea, and contained the water of various English rivers. The spot at which the accused were fishing was within this channel and on the Scotch side both of the *medium filum* of the channel and of the *medium filum* of the estuary of the Solway.

The Court *dismissed* the appeal, holding that the spot at which the appellants had been fishing was within the limits of the Annan Fisheries Act as defined by sec. 46 of the Act.

HIGH COURT. Lord Justice-General. Lord Adam. Lord M'Laren. Lord Kinnear. Lord Trayner. Ld. Moncreiff. Lord Kincairney.

ON 27th September 1899 Matthew Bryson, labourer, Lowtherton, Dumfriesshire, and six other persons, were charged in the Sheriff Court at Dumfries, on a summary complaint at the instance of the procurator-fiscal, setting forth that the accused, "not being the owners or occupiers of any fishery in the river Annan, or in any stream or water running into the same, or on the shores or sea-coast adjacent to the mouth or entrance of the said river, did, on 15th August 1899, in the said shores or sea coast, and at that part thereof at Torduff Point, Gretna parish, Dumfriesshire, being within the limits of the Annan Fisheries Act,* by means of halve-nets fish for, or attempt to take, or assist in fishing for or attempting to take, salmon, or other fish of the salmon kind; or did, time and place aforesaid, trespass in or upon said water with intent to take or kill salmon or fish of the salmon kind, contrary to section 33 of the said Annan Fisheries Act; whereby the said" accused were each liable in a penalty specified.

The accused pleaded not guilty, but after evidence had been led the Sheriff-substitute (Campion) convicted them, and fined them 2s. 6d. each, with the alternative of three days' imprisonment.

They obtained a case for appeal.

The case stated:—"The facts proved in evidence were,—1. That, on the date libelled, the tide was at high water at 5.15 A.M., and at low water at 2.45 P.M.; 2. That the appellants were neither owners nor occupiers of salmon-fishings, nor had permission from any owner or occupier of salmon-fishings to fish for salmon within the limits of the Annan Act; 3. That the appellants were fishing for salmon by means of halve-nets from 11.30 A.M. to 1.30 P.M. on the date libelled

* See Rubric.

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at or about the spot marked A on a plan or sketched produced, with which both parties are satisfied, as correctly shewing the district and the *locus*; 4. That the channel in which the appellants were fishing is at high water (O.S.T.) about 1¾ miles broad, and at low water (O.S.T.) about 260 yards, and not more than 3 feet in depth; 5. That the said channel, from the period of high water to the end of the ebb tide, grows gradually narrower, and that the water in it is, owing to the tidal action, and to the current of the fresh water stream in it, always in motion; 6. That the water in which the appellants were fishing was brackish, and consisted of the conjoined rivers Esk and Eden and their tributaries, and also partly of salt water, being the drainage from the sands, and from hollows or inequalities of the ground which had been covered by the preceding tide; and 7. That, at the time when the appellants were fishing, the tide had receded some 10 miles or thereby to the west of the *locus*, viz.—to about the line CD shewn on the said plan."

The spot marked A on the plan produced was situated close to Torduff Point, between the Lochar and the Sark. The spot marked was on the Scottish side of the *medium filum* of the estuary of the Solway. In a minute of admissions lodged in the appeal, the parties concurred in stating that the spot A was situated within the permanent channel, and that it was on the Scottish side of the *medium filum* of the permanent channel. The point C was at Carsetburn, in the stewartry, and the point D was at Skinburness, in Cumberland.

The following questions of law were, *inter alia*, stated:—"2. Whether, on the evidence adduced, the appellants were rightly convicted of the contravention libelled in the substantive charge, or whether, in the circumstances proved, the appellants were entitled to acquittal on the ground that they were fishing between low-water mark and the mid-channel of the Solway Firth, and outwith the limits of the Annan Act, on a just interpretation of the description thereof in section 46 of the Act? 3. Whether, the channel in question consisting of the combined waters of the rivers Esk and Eden and their tributaries, and also partly of salt water as stated, the appellants were rightly convicted of a contravention of section 33 of the Annan Act?"

After a hearing on 4th June 1900 (before the Lord Justice-Clerk, Lord M'Laren, and Lord Kincairney), the appeal was put out for hearing before a full bench.

At advising,—

LORD JUSTICE-GENERAL.—We know that the physical conditions of the Solway and its tributaries are in some respects different from those which generally obtain in Scottish estuaries and rivers, and possibly also from those which usually exist in English estuaries and rivers, and that they have consequently been made the subject of special legislation. The first of the two statutes with which we are concerned is what has been called the Solway Act of 1804, and the second is the Annan Act of 1841. The Annan Act carved out of the district affected by the Solway Act a certain area, and applied special, and in some respects different, provisions to it. The question which we have to consider is, whether these special provisions of the Annan Act, and in particular sections 33 and 46, apply to the place at which the fishing complained of was being carried on, and if so, what is their true construction and effect. The Sheriff has found the material facts very

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shortly and very clearly. He says that the place at which the fishing was being practised on the occasion libelled is marked A upon the plan, very near the Scottish coast at Torduff Point. At the time when the appellants were fishing there the tide was ebbing, and had reached within about an hour and a quarter of low water. Low water would be at 2.45 P.M., and the halve-nets were being used up to 1.30 P.M., so that the fishing was going on within an hour and a quarter of low water. It appears that there was at that time in which this was being done a run of water coming from the rivers Esk and Eden and their tributaries, although the water was made to some extent brackish by pools of salt water having been left at places on the flats, and also by the sand having been saturated with salt water when the tide was in. There was, as I understand, no salt water there in body at the time, the tide having receded southward to the line marked C D on the map. We have then to consider as to the application of sections 33 and 46 of the Annan Act of 1841 to these facts. Section 33 creates certain offences, and the one with which we are concerned is that certain persons—the appellants—not being owners or occupiers of any fishery in the river Annan or any stream or on the shores adjacent, did take, fish for, or attempt to take, or assist in taking, and so on, in or from the shores and coast adjacent to the mouth or entrance of the river Annan, salmon, grilse, and sea trout. The words "shores or sea coast adjacent to the mouth or entrance of the river Annan" might have given rise to much discussion. They are very large, and are open to different interpretations. It might have been asked, What is adjacent? and so on. The Legislature very naturally thought that this should be cleared by definition, and accordingly by section 46 enacted that "for the purposes of this Act the limits of the shore or sea coast adjacent to the mouth or entrance of the said river Annan shall be deemed to extend and shall extend from the west bank or side of the water of Sark on the east to the east bank or side of the water of Lochar on the west, including the whole sea coast within these limits from the land on the Scotch side at high-water mark of spring tides into the sea at low-water mark of spring tides." What may be called the northern boundary of this area is defined by two rivers—the Sark on the one side and the Lochar on the other—and when we look at the map we see that the coast line between these two rivers is really the northern boundary of the area. The only other boundary mentioned is the sea at low-water mark of spring tides, which we see from the map is practically the southern boundary. The definition does not, by expression at all events, take cognisance of any shore opposite to the Scotch shore. A very sharp question of fact is raised as to the condition of the place at which the fishing was being carried on at the time. Where was the sea then? It is admitted as a fact that the sea had gone back to a line between C and D, and that it had still to ebb for an hour and a quarter, so that it had not yet reached the low-water mark of spring tides, and consequently the fishing was being practised between the northern and only specified southern as well as between the eastern and western boundaries specified in section 46. It is stated in the case that the water of the two rivers was running down at that place, and it would have a considerable distance to run before it could reach the sea or the low-water mark. Upon these facts it seems to me that the Sheriff-

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substitute was right in finding as matter of fact that the place at which this fishing was going on was within the limits of the shore or sea coast adjacent to the mouth or entrance of the river Annan as defined by section 46, and accordingly that the conviction is right. It is true that this may leave open various questions which may arise, and which we do not require to consider. One of these is, whether the Annan Act applies to the shore or frontage of the English coast opposite to the northern boundary between the Sark and the Lochar. One can see that there might be difficulties in regard to the jurisdiction of the Scotch Courts to entertain a complaint for an offence alleged to have been committed on the English coasts, and we have not seen the whole Acts of 1804 and 1841, but only the sections excerpted from them by the parties. It seems to me that what I have said is sufficient for the disposal of this case without going into any question of *medium filum* either of the upper part of the Solway Firth between the northern boundary above mentioned and the English shore or the stream of river water running down to the sea when the tide is out. But I may observe that the place at which the fishing was going on was on the Annan shore even in a much more limited sense than that of the definition in section 46, because it is to the north not only of the *medium filum* of the upper part of the Solway Firth, but also to the north of the *medium filum* of the stream of fresh water which was running down to the sea at the time. For these reasons it seems to me that the view taken by the Sheriff-substitute is right.

LORD ADAM.—I am of the same opinion. The conviction here is one of trespassing on or in the shores or sea coast adjacent to the mouth or entrance of the river Annan, and the question is, what are the shores or coast adjacent to the mouth of the Annan? Section 46 defines that, and it states also that for the purpose of the Act the limits of the sea coast "adjacent to the mouth or entrance of the river Annan shall be deemed to extend and shall extend from the west bank or side of the water of Sark on the east to the east bank or side of the water of Lochar on the west." There is no dubiety about the east or west boundary; and the section proceeds—"including the whole sea coast within these limits from the land on the Scottish side at high-water mark of spring tides into the sea at low-water mark of spring tides." That is where you are to draw the line. It is to be drawn into the sea at low-water mark of spring tides at any part within these limits until you meet the sea at low-water mark, and that gives, as I think, the boundary or limits. If there was always sea *ex adverso* of these limits —if the sea was always there—I do not see that there would be any difficulty, because you could draw the line, and as soon as it meets the sea there is your sea-shore. But it so happens in this case that the Solway retreats a very great distance into the sea, with the result that on this particular occasion it had retired some miles below the spot where this fishing was taking place. Accordingly, at certain times of the tide there is no southern boundary defined here, and the question is, what is to be taken as the southern boundary in that sense? Two views have been suggested. One is, that in drawing the line, if there is no sea to meet it, you go on into the English coast where you first meet with any obstruction, and that would include the whole area down to C D. The other view, and the one which

CASES

DECIDED IN THE

COURT OF SESSION, &c.

FIFTH SERIES.—VOL. III.

COURT OF SESSION,
July 20, 1900, *to July* 20, 1901.

COURT OF JUSTICIARY,
July 20, 1900, *to July* 20, 1901.

HOUSE OF LORDS,
July 20, 1900, *to July* 29, 1901.

Cut here.

NOTICE TO BINDER.

Collect "Cases decided in the House of Lords," sigs. *a* and *b*, Part XX., and *c* (8 pages) from Part XXI.

Also "Cases decided in the Court of Justiciary," sigs. a, b, c, and d from Part X., e from Part XIX., f from Part XX., and g (4 pages) printed herewith.

Bind them in the above order at the beginning of the volume, immediately following the Index of Names.

Cancel pages 597 and 598, and substitute those printed herewith, marked with an asterisk.

A part of this page as marked should be left attached to the cancel pages in order that they may be bound in.

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Mar. 1, 1901.
Hunter v. Russell.

lowing terms?—"*Constable*, for the defender, stated to the Court, that if any expressions used by the defender concerning the pursuer could be construed as reflecting in any way upon the pursuer, his character or conduct, the defender unreservedly withdraws the same, there being no ground therefor, and expresses his regret for the occurrence."

On 21st February the pursuer lodged a minute of acceptance of the foregoing tender.

The case was then enrolled for disposal of the question of expenses.

The pursuer moved for expenses, and argued;—The apology which had been offered and accepted was equivalent to a verdict of the jury in favour of the pursuer, and consequently entitled him to expenses.[1]

Argued for defender;—The Court should find that no expenses were due to or by either party. The defender's minute was not equivalent to a verdict of the jury in favour of the pursuer; it contained no admission that the defender had used the words complained of. The defender's minute, and the pursuer's minute of acceptance, came to nothing more than a settlement of the action.

LORD JUSTICE-CLERK.—In this case the pursuer has succeeded in getting rid of a serious imputation upon his character, and I am of opinion that he is entitled to expenses.

LORD YOUNG.—I have some difficulty in this case, but in the circumstances I am not sorry to think—from what I know to be your Lordships' views—that it is not to be acted upon. My difficulty is this, that the pursuer does not by this minute establish the case which he must have established to the satisfaction of a jury before he could get a verdict, viz., that the words complained of were used calumniously and falsely by the defender, meaning thereby to represent that the pursuer had dishonestly appropriated £4. If the jury had found that the defender used the words complained of, but that these words did not mean that the pursuer had dishonestly appropriated £4, that would have meant a verdict for the defender, and there is nothing in this minute which negatives that possible finding by the jury, and so establishes the case which the pursuer must have established in order to get a verdict. But it is not necessary to do more than indicate my difficulty. I should have been disposed to give expenses to neither party.

LORD TRAYNER.—I cannot say that I participate in the doubts which Lord Young has just expressed. I do not know that I have ever seen or heard of a tender which really amounted to an admission of the slander on which the action was laid. In my own experience actions of damages for slander have been settled very much on the lines on which the action here has been settled. The broad question raised in this case was this—The pursuer avers that the defender had slandered him, and he came into Court in order to clear his character of that slander—a matter of importance to anybody, but especially of importance to the pursuer, looking to the nature of the slander and to the position and office which he occupies. Now, what is the result? The result has been to vindicate the pursuer entirely from the charge made against him. What the defender says comes to this—"I do not know that I used the language attributed to me, but if I did, and if it is

[1] Faulks v. Park, Dec. 22, 1854, 17 D. 247, 27 Scot. Jur. 102; Mitchells v. Nicoll, May 24, 1890, 17 R. 795.

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June 11, 1901. Jamieson v. Wilson.

decree awarding damages, and pleaded, *inter alia*,—(1) The trial of the accused not having been adjourned to a fixed date on said 7th January 1901, the proceedings thereupon fell, and the sentence or conviction and interlocutor or decree complained of are illegal and invalid, and ought to be suspended. (2) In any event the said sentence or conviction falls to be suspended.

Argued for the complainer;—The interlocutor adjourning the diet of 7th January not having been signed, there was no valid adjournment of that diet to a fixed date, and the subsequent proceedings were incompetent.[1] The conviction must therefore be quashed. The procedure for awarding compensation was purely statutory, and any award depended on conviction. If the conviction was null so was the award, and the Court of Justiciary might competently declare that it was so.[2]

Argued for the respondent Wilson;—It was conceded that the conviction could not stand. But the Court of Justiciary could not deal with the award of damages, which was declared by statute to be subject, not to suspension, but to appeal as in an ordinary action in the Sheriff Court. That and the fact that no imprisonment could follow failure to pay the amount awarded, excluded the jurisdiction of the High Court.

Argued for the respondent Bourgin;—The civil and criminal proceedings were separable. Although the Court might review the criminal proceedings, it had no jurisdiction to deal with the award of damages.

LORD JUSTICE-CLERK.—The fact that the interlocutor of 7th January 1901 purporting to adjourn the diet to 7th February 1901 is not signed is a sufficient reason for quashing this conviction. I do not think that, in view of the provisions of the Fisheries Acts, we in this Court can competently deal with the question whether the decree for damages pronounced by the Sheriff-substitute is valid. I propose that we pass the bill to the extent of quashing the conviction and sentence, and *quoad ultra* refuse the bill.

LORD TRAYNER.—The complainer was charged, at the instance of the respondent Wilson, with a contravention of the Sea Fisheries Act. Pending the complaint so brought against him, a notice was given to the complainer (in terms of a statutory provision) that at the trial of the offence with which he was charged the Sheriff would be asked to consider and dispose of a question of damages arising out of the alleged offence. The trial took place, and the complainer was convicted and fined £25, or in default of payment sentenced to imprisonment for thirty days. The Sheriff-substitute further, but in a separate interlocutor, found the complainer liable to the respondent Bourgin in the sum of £648 sterling as the compensation due to the latter for the damage sustained by him through the complainer's alleged offence. Warrant was granted for recovery of this

[1] M'Lean v. Falconer, June 28, 1895, 22 R. (Just. Cases) 39, 1 Adam, 564; MacArthur v. Campbell, March 18, 1896, 23 R. (Just. Cases) 81, 2 Adam, 151; Lord Advocate v. Fraser, June 1, 1852, 1 Irv. 1; Craig v. Tarras, July 16, 1897, 24 R. (Just. Cases) 88, 2 Adam, 344.

[2] Combe v. Renton, June 5, 1886, 13 R. (Just. Cases) 67, 1 White, 150.

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sum by distress or poinding and sale of the sea-fishing boat "St Clement," of which the complainer was the master. This suspension is brought for the purpose of setting aside not only the conviction but also the decree for damages.

It is conceded by the respondent Wilson that the conviction cannot stand, for the reason assigned in the suspension, and to which your Lordship has adverted. I agree that the conviction must be quashed. But in my opinion it is not competent to this Court to hear or dispose of any objection to the validity of the decree for damages. By statutory enactment that decree is declared practically to be the same as a decree pronounced in an ordinary cause before the Sheriff, and is subject to appeal as if it had been pronounced in "an ordinary action before the Sheriff Court" (Act of 1885, secs. 7 and 8). I think that these enactments exclude review by the Justiciary Court of any such decree, and provide for such review being had in the ordinary Courts of law. Further, it will be observed that no sentence of imprisonment can be or has been pronounced in the event of the complainer failing to make payment of the damages decerned for. The only authorised mode of recovering the damages is by diligence as on a decree—the ordinary mode of recovering a civil debt. It is quite true that the claim and consequent decree for damages are by statute intimately connected with the complaint founded on the alleged offence, and it may be that the invalidity of the conviction involves invalidity in the decree. But on that I offer no opinion, for any such question, I think, must be determined by the Court before which the validity of the decree is challenged, on an appeal against it, or by suspension of any diligence threatened or proceeding upon it.

LORD MONCREIFF.—I at first thought that we could competently suspend not merely the conviction and sentence but the decree for compensation pronounced by the Sheriff of even date with the conviction. It seemed to me desirable that we should do so if it was competent, so as to save the parties the trouble and expense of going to the Civil Court in order to get rid of what is really a nullity.

The procedure under which the respondent Auguste Bourgin obtained decree of compensation from the Sheriff is purely statutory. It depends entirely upon the conviction, and stands or falls with it. It is so intimately connected with the conviction that under the provisions of the 8th section of the Sea Fisheries Amendment Act, 1885, the Sheriff who tries the criminal case may at its close be called upon to dispose of the question of damages, and in such a case must treat the evidence led at the criminal trial as evidence led on the question of damages, and if a report of a sea-fishery officer has been produced as to the amount of damages sustained, "the Sheriff shall not allow any additional evidence to be heard unless he shall consider it to be necessary in order to do justice in the case."

Now, as far as I can see this procedure is entirely dependent upon proof of an offence having been committed. But in the present case we have held that the whole proceedings came to a conclusion on 7th January 1901, and all the procedure which took place after that date, including the evidence which was led, and upon the strength of which in part the award of

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damages was made, was absolutely incompetent. Therefore as to the invalidity of the award of damages, I confess that at present I do not entertain much doubt.

But the question of jurisdiction is raised. It is said that under the 7th and 8th sections of the amending statute an appeal is competent "as in ordinary causes before the Sheriff Court," which points apparently to civil jurisdiction.

Now, I thought at first that it might be maintained that while there might be an appeal to the Civil Court as to the amount of damages if the conviction stood, it did not follow that if the conviction on which the award of damages depended was quashed, it would be necessary or competent to invoke the Civil Court. The conviction having fallen, the award of damages would be a nullity, and might be so declared by the High Court of Justiciary.

But on consideration I am not disposed to differ from the view which your Lordships have taken. Comparing the provisions of the 15th section, subsection (1), of the Sea Fisheries Act, 1883, with the 7th and 8th sections of the Act of 1885, there are grounds for holding that the effect of the later statute was to substitute a civil for a criminal or quasi-criminal process as regarded damages. Under the Act of 1883 compensation was to be adjudged and recovered as a fine, while under the later Act the process was to be treated in the same manner as an ordinary cause in the Sheriff Court, with a right of appeal in certain cases. I may also observe that the claim for compensation might have been made under the 7th section in the shape of a separate application, and damages might have been awarded without the Sheriff proceeding upon the evidence adduced in the criminal case.

Therefore although it would simply cause unnecessary expense to proceed further in regard to the award of damages, I think that logically your Lordships are right, and in this Court we have no jurisdiction to deal with that part of the prayer of the bill of suspension.

THE COURT quashed the conviction and sentence, and *quoad ultra* refused the bill, finding the complainer entitled to his expenses in both Courts against the respondent Wilson, and Bourgin entitled in the High Court to expenses against the complainer.

ALEX. MORISON & Co., W.S.—W. J. DUNDAS, C.S., Crown Agent—Agents.

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June 11, 1901.*
Bryson v. Phyn.

MATTHEW BRYSON AND OTHERS, Appellants.—*Kennedy*—*W. Thomson.*

CHARLES STEWART PHYN (Procurator-Fiscal, Dumfries), Respondent.—*Dundas, K.C.*—*A. S. D. Thomson.*

Salmon-Fishing—Fishing Offence—Solway—Annan Fisheries Act, 1841 (4 *Vict. cap. xviii.*), *secs.* 33 *and* 46.—The Annan Fisheries Act, 1841, enacts, —Sec. 33—"If any person, not being the owner or occupier of any fishery in the river Annan, or in any stream or water running into the same, or on the shores or sea-coast adjacent to the mouth or entrance of the said river, shall at any time take, fish for, or attempt to take, or assist in taking, fishing for, or attempting to take, in or from the said river Annan, or any stream or

* Decided November 5, 1900.

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water . . . which runs into or otherwise communicates with the said river Annan, or in the shores or sea-coast adjacent to the mouth or entrance of the said river, any salmon, grilse, sea-trout, bull-trout, whitling, herling, or other fish of the salmon kind . . . every such person shall, for every such offence," be liable in a penalty.

Sec. 46—"For the purposes of this Act the limits of the shore or sea-coast adjacent to the mouth or entrance of the said river Annan shall be deemed to extend, and shall extend, from the west bank or side of the water of Sark on the east to the east bank or side of the water of Lochar on the west, including the whole sea coast within these limits from the land on the Scotch side at high-water mark of spring tides into the sea at low-water mark of spring tides."

Certain persons, being neither owners nor occupiers of salmon-fishings, and having no permission from any owner or occupier of salmon-fishings to fish for salmon within the limits of the Annan Fisheries Act, were convicted of a contravention of section 33 of that Act. They appealed. The case stated:—The accused had fished for salmon at a spot a short distance westward of Torduff Point, between the Sark and the Lochar. They had fished up to an hour and a quarter before low water. The sea had then receded several miles to the south-west of the spot in question, leaving the estuary of the Solway nearly all dry except for a channel of brackish water, which flowed down to the sea, and contained the water of various English rivers. The spot at which the accused were fishing was within this channel and on the Scotch side both of the *medium filum* of the channel and of the *medium filum* of the estuary of the Solway.

The Court *dismissed* the appeal, holding that the spot at which the appellants had been fishing was within the limits of the Annan Fisheries Act as defined by sec. 46 of the Act.

HIGH COURT.

Lord Justice-General.
Lord Adam.
Lord M'Laren.
Lord Kinnear.
Lord Trayner.
Ld. Moncreiff.
Lord Kincairney.

ON 27th September 1899 Matthew Bryson, labourer, Lowtherton, Dumfriesshire, and six other persons, were charged in the Sheriff Court at Dumfries, on a summary complaint at the instance of the procurator-fiscal, setting forth that the accused, "not being the owners or occupiers of any fishery in the river Annan, or in any stream or water running into the same, or on the shores or sea-coast adjacent to the mouth or entrance of the said river, did, on 15th August 1899, in the said shores or sea coast, and at that part thereof at Torduff Point, Gretna parish, Dumfriesshire, being within the limits of the Annan Fisheries Act,* by means of halve-nets fish for, or attempt to take, or assist in fishing for or attempting to take, salmon, or other fish of the salmon kind; or did, time and place aforesaid, trespass in or upon said water with intent to take or kill salmon or fish of the salmon kind, contrary to section 33 of the said Annan Fisheries Act; whereby the said" accused were each liable in a penalty specified.

The accused pleaded not guilty, but after evidence had been led the Sheriff-substitute (Campion) convicted them, and fined them 2s. 6d. each, with the alternative of three days' imprisonment.

They obtained a case for appeal.

The case stated:—"The facts proved in evidence were,—1. That, on the date libelled, the tide was at high water at 5.15 A.M., and at low water at 2.45 P.M.; 2. That the appellants were neither owners nor occupiers of salmon-fishings, nor had permission from any owner or occupier of salmon-fishings to fish for salmon within the limits of the Annan Act; 3. That the appellants were fishing for salmon by means of halve-nets from 11.30 A.M. to 1.30 P.M. on the date libelled

* See Rubric.

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Oct. 18, 1900.
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pronounced an interlocutor allowing a proof, and assigning the 3d of December following as a diet of proof.

On 30th August the pursuer noted an appeal (under section 40 of the Judicature Act, 1825) to the First Division of the Court of Session, and the process was received by the Clerk of Court on 4th of September 1900. The prints of the note of appeal, record, and interlocutors were not deposited with the Clerk of Court till the 22d September. The prints were duly boxed to the Judges on the 27th September, the box-day next following the 4th September.

On the case appearing in the Single Bills on 18th October, counsel for the defender objected to the competency of the appeal, on the ground that the appellant had failed to deposit the prints within fourteen days after the 4th September as required by the Act of Sederunt of 10th March 1870, section 3 (2).[1]

The appellant's counsel stated that the omission was due to inadvertence on the part of the agent. He argued that the Court had power to dispense with strict observance of this provision, and had done so in the cases of *Young* v. *Brown*[2] and *Boyd, Gilmour, & Company* v. *Glasgow and South-Western Railway Company*.[3] These cases were decisions on this section, and in the latter the circumstances were precisely the same as in this case. The case of *Boyd, Gilmour, & Company*[3] was decided by the Second Division after consultation with the Judges of the First Division, and must be taken as conclusive on the point of practice. The ground upon which the Court went in that case was not that there was any "good cause" shewn for the omission, but simply that no prejudice was caused thereby to the respondent. In this case it could not be said that a delay of four days in vacation in depositing prints at the Register House could cause prejudice or inconvenience. The Court had relaxed in other similar cases strict observance of Acts of Sederunt, for instance, as to printing and boxing papers which had been printed and boxed in a previous appeal in the same case.[4]

Lord President.—The question argued depends upon the construction of section 3 of A. S. 10th March 1870. That Act of Sederunt was made under the authority of 31 and 32 Vict. cap. 100, section 106, which gave power to the Court to make alterations in the statutory procedure, so that the provisions of the Act of Sederunt have very much the same imperative character as if they had occurred in the statute itself. The second subsection of section 3 contains an imperative direction in the following terms:—(His Lordship quoted the subsection).

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on the box-day or sederunt-day next thereafter, he shall be held to have abandoned his appeal, and shall not be entitled to insist therein, except upon being reponed, as hereinafter provided.

"(3) It shall be lawful for the appellant, within eight days after the appeal has been held to be abandoned as aforesaid, to move the Court during session, or the Lord Ordinary officiating on the Bills during vacation, to repone him to the effect of entitling him to insist in the appeal; which motion shall not be granted by the Court or the Lord Ordinary except upon cause shewn, and upon such conditions as to printing, and payment of expenses to the respondent, or otherwise, as to the Court or the Lord Ordinary shall seem just."

[1] Quoted, *supra*. [2] Feb. 19, 1875, 2 R. 456. [3] Nov. 16, 1888, 16 R. 104.
[4] Dougall's Trustees v. Lornie, July 4, 1900, 2 F. 1123.

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If the Act of Sederunt had merely directed that certain things should be done within a specified time, there might have been ground for contending that the Court had power to grant some indulgence in the case of failure. But there is no room for this suggestion in the present case, because the Act of Sederunt, after directing what is to be done, specifies the consequence of failure, viz., that the appeal shall be held to be abandoned. I think that in a case where it is thus provided that an appeal shall be held to be abandoned if certain things are not done, there is no power in this Court to dispense with the doing of these things. Then subsection 3 gives a further chance to a person who has failed to comply with the requirements of subsection 2. It provides—(His Lordship read subsection 3). These provisions seem to me to reflect light upon subsection (2), confirming the view that that subsection did not leave it in the power of the Court to dispense with the observance of its provisions. The Legislature, (or the Court *in vice* of the Legislature), foresaw that cases of hardship might arise under the provisions of subsection 2, and provided a remedy, but in order to prevent laxity in practice, declared that that remedy should only be granted upon cause shewn. The Act of Sederunt carefully regulates every stage of the procedure, and I think that, in these circumstances, we have no power to dispense with the observance of its provisions.

LORD ADAM.—I am of the same opinion. It is quite true that provisions of Acts of Sederunt have not been treated so rigidly as if they formed part of an Act of Parliament. Accordingly, in certain cases dealing with Acts of Sederunt we have dispensed with strict observance, but it does not follow that these rules and regulations are to be treated as if they had no authority at all. It is only on good cause shewn that we have relieved a litigant from the consequences of non-observance of the provisions of Acts of Sederunt. Now here the section we are dealing with of the Act of Sederunt of 1870 provides that if the papers are not printed and boxed within the time specified, then, by force of the provision itself, and without the intervention of the Court, the appeal shall be held to have been abandoned. But the Act itself gives a remedy where the appellant has neglected to lodge his prints, and then the intervention of the Court comes in. He may under subsection 3 of section 3 apply within eight days to be reponed, and such application may be granted on cause shewn. It would therefore have been open to us to repone the appellant if he had made his application in time. But he is too late to apply for this remedy, and has failed to observe both the subsections. He says now that he makes no motion; he merely says that we are not to hold that the action has been abandoned. Even if the matter was in our discretion, the appellant cannot by neglecting both subsections be in a better position than if he had applied to us under subsection 3. But if he had done so we could not have granted dispensation unless upon cause shewn. Now there is no suggestion of any good cause why the prints were not lodged in time. It is no excuse that the agent for the appellant had neglected to box the prints by an oversight. All litigation is conducted by agents, and if they fail in their duty, the client who employs them must just take the consequences.

LORD M'LAREN.—I hold with your Lordships that there may be a distinction

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between the effect of a provision of an Act of Parliament and of a provision in an Act of Sederunt which is intended to regulate the procedure under an Act of Parliament, and is passed under the authority of the Act. But I agree that this appellant is not in a position to take benefit by the distinction. When an Act of Parliament specifies the number of reclaiming days or days for an appeal, it is held that this is a condition of the right of appeal, and that after these days have expired the party no longer has a right of appeal. But where an Act of Sederunt, treating it may be the whole subject of an action in its successive stages, deals with the element of time, it would be too rigorous a construction of its provisions to hold that in the event of failure to comply with any one of them the party must lose his case. Accordingly in certain cases the Court has allowed things to be done after the prescribed time on being satisfied that the failure arose *per incuriam*. In the present case the Act of Sederunt was passed under statutory power to amend the provisions of the Act, and the question of delay was not overlooked, because power is given to the appellant to ask, within eight days, to be reponed. There is no explanation given why this right was not exercised; and I think we cannot in this case allow the action to proceed unless we are prepared in every case to relax the prescribed conditions, and practically to nullify the Act of Sederunt.

Lord Kinnear.—I agree that the Court has exercised a wider discretion in relaxing the rules of an Act of Sederunt which has been passed by the Court itself to regulate its own procedure than would be allowable if such rules were prescribed by an Act of Parliament. I doubt very much, however, if this distinction is applicable to the particular question before us, because the clauses of the Act of Sederunt upon which the question depends are not merely regulations of procedure for carrying out the Act of Parliament, but were passed in the exercise of a specific power to alter its provisions, and to substitute new provisions for those contained in the Act itself. Accordingly, the effect of section 3 is practically to repeal that part of the 71st section of the 1868 Act which deals with the printing and boxing of appeals. The provisions of the Act of Sederunt stand in place of the provisions of that section, and are just as binding on litigants and on the Court as if they formed part of the Act of Parliament itself. If this is so, then there is an end of the question. To grant the relaxation which the appellant desires would be inconsistent with statutory provision. It is quite consistent with this view that in construing the Act of Sederunt we have put a liberal construction on its language in deference to a known practice. In the case referred to by Mr Guy (the case of *Guthrie Lornie*[1]), it seems to have been held that the direction to print and box documents might be read, with reference to practice, to include only those papers which had not been previously printed and boxed. When the Act of Sederunt is open to construction, it is reasonable to adopt a liberal construction in determining whether it has been duly observed or not. But it is a totally different thing to dispense with observance altogether. No power to dispense is given to us, and I agree that even if we had such power there

[1] Dougall's Trustees v. Lornie, July 4, 1900, 2 F. 1123.

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is nothing in the case to justify our exercising it in favour of this appellant. He simply says that he did not observe these provisions, and gives no explanation of his failure to do so, and it seems to me that we could not possibly accept this as a ground for relaxing the Act of Sederunt unless we are prepared to do away with the provision altogether.

THE COURT pronounced the following interlocutor:—"The Lords . . . having heard counsel for the parties on the defender's objection to the competency of the appeal, sustain said objection, and direct the clerk to retransmit the process to the Sheriff-Clerk in respect of the abandonment of the appeal."

CLARK & MACDONALD, S.S.C.—PATRICK & JAMES, S.S.C.—Agents.

No. 2.

Oct. 19, 1900.
Robertson v. Thomson.

ANDREW ROBERTSON, Pursuer (Respondent).—*M'Lennan.*
JAMES THOMSON, Defender (Appellant).—*Crabb Watt.*

Bill of Exchange—Proof—Payment—Bills of Exchange Act, 1882 (45 *and* 46 *Vict. cap.* 61), *sec.* 100.—The Bills of Exchange Act, 1882, sec. 100, enacts,—"In any judicial proceeding in Scotland, any fact relating to a bill of exchange, bank cheque, or promissory-note, which is relevant to any question of liability thereon, may be proved by parole evidence."

Held that this section did not make parole proof of payment of a bill competent.

Payment—Proof—Parole.—Parole proof of payment in discharge of a written obligation is incompetent, although the sum is under £100 Scots.

1ST DIVISION.
Sheriff of the Lothians and Peebles.

BY bill of exchange, dated 29th December 1896, drawn by Andrew Robertson, 429 Lawnmarket, Edinburgh, and accepted by James Thomson, hairdresser, Leith Street, the latter bound himself to pay to Robertson, three months after date, the sum of £18. There was a relative agreement as to interest in the event of the bill not being retired at maturity. On 15th January 1900 Robertson raised an action in the Edinburgh Sheriff Court for payment of the balance of principal and interest then due under the bill and relative agreement. In his defences Thomson, *inter alia*, averred that "though the pursuer seldom gave the defender any vouchers, the defender undertakes to prove that the pursuer got from him a good many sums for which the pursuer has given him no credit."

The Sheriff-substitute (Hamilton), on 30th March 1900, found this averment irrelevant, and granted decree for a sum of £20, 5s. 6d. The Sheriff (Rutherfurd), on 7th May 1900, adhered to this interlocutor.

The defender appealed to the First Division of the Court of Session, and in terms of an interlocutor of 30th June 1900, lodged a minute duly specifying the additional payments to account alleged to have been made, by their amounts and dates. The largest payment set forth in the minute was 15s., and the aggregate amount of the payments £3.

The appellant having moved for a proof of these payments, the respondent maintained that the proof should be limited to writ or oath.

Argued for the respondent;—The general rule that writ or oath is required to prove payment of an obligation constituted by writing

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applied, although the sum was within £100 Scots.[1] Section 100 of the Bills of Exchange Act, 1882,* was not intended to relax the general law of evidence as to limitations of the mode of proof; it was only intended to affect the rules peculiar to bills of exchange. Its scope was thus limited to questions between the parties to a bill—*e.g.* to questions as to onerosity and accommodation—and did not extend to the further question whether the liability, once determined, had been liquidated by payment.[2]

Argued for the appellant;—The alleged payments were "relevant to the question of liability" on the bill, and section 100 applied in terms. The cases cited did not apply, because they related to the constitution of the obligation. The agreements there alleged were contradictory of the writing, an objection which did not apply where the proof asked was of the discharge of the obligation. The section was intended to modify the general rule as to the proof of discharge of written obligations in the case of bills of exchange.

LORD ADAM.—At this stage in the case the first question is whether, in ascertaining the balance due, certain payments set forth in the answers, and alleged to have been made, are to be admitted to proof. According to the argument before us these payments are not vouched by any writ, but it is maintained, in the first place, that as the payments in question are each of them under £100 Scots, or £8, 6s. 8d., they may be proved by parole. In answer to this, Mr M'Lennan maintained that according to the law of Scotland payments of an obligation constituted by writing can only be proved by writ or oath, no matter how small the payments may be, and for this he cited authorities. In this I think that Mr M'Lennan is right. But then the other side maintains that even if that be true in the ordinary case, in this case, where the obligation is founded on a bill of exchange, the rule is modified by section 100 of the Bills of Exchange Act, 1882. In my opinion it was not the intention of that section to alter the rules of the law of Scotland as to the modes in which payment of a debt may be proved. By the ordinary rule of the law of Scotland payment of a debt constituted in writing cannot be proved by parole, and I do not think that section 100 was intended to alter that rule.

LORD M'LAREN.—I concur with Lord Adam. I should have preferred not to give an opinion in a case of this kind on the construction of section 100 of the Bills of Exchange Act, 1882, a section which has already given rise to difficulties, and which may come before us again for construction. This much I may say, that a defence of payment would not usually or properly be described as a "fact relating to a bill of exchange" relevant to a question of liability thereon. If that is so, I think section 100 does not apply to the

[1] Dickson on Evidence, sec. 610; Ersk. iv. 2, 21; Romano v. Nisbet, 1609, M. 12,355; M'Gill v. Forrest, 1622, M. 12,357; Nisbet v. Short, 1624, M. 12,358.

* Section 100 provides:—"In any judicial proceedings in Scotland, any fact relating to a bill of exchange, bank cheque, or promissory-note, which is relevant to any question of liability thereon, may be proved by parole evidence."

[2] National Bank of Australia v. Turnbull & Co., March 5, 1891, 18 R. 629; Gibson's Trustees v. Galloway, Jan. 22, 1896, 23 R. 414.

present case. I agree as to the necessity of enforcing the rule that, subject to known exceptions, payment in pursuance of a written obligation must be proved by the writ or oath of the creditor. No. 2. Oct. 19, 1900. Robertson v. Thomson.

The LORD PRESIDENT and LORD KINNEAR concurred.

In view of this judgment, counsel for the parties agreed that decree should be given against the defender for £19, 1s. 8d.

THE COURT accordingly (on 31st October 1900) pronounced this interlocutor:—"Sustain the appeal: Recall the interlocutors of the Sheriff-substitute of 30th March 1900, and of the Sheriff of 7th May 1900: Decern against the defender for payment to the pursuer of the sum of £19, 1s. 8d., with interest," &c.

ROBERT BROATCH, Solicitor—J. B. W. LEE, S.S.C.—Agents.

WILLIAM FISKEN, Pursuer (Reclaimer).—*Salvesen, Q.C.*—*A. S. D. Thomson.*
ISABELLA TREASURER OR FISKEN, Defender (Respondent).—*Tait.* No. 3. Oct. 20, 1900. Fisken v. Fisken.

Process—Reclaiming Note—Competency—Authentication of Record—Failure to print Interlocutor closing Record—Judicature Act, 1825 (6 *Geo. IV. c.* 120), *secs.* 10 *and* 18—*A. S.*, 11*th July* 1828, *sec.* 77—*Court of Session Act*, 1850 (13 *and* 14 *Vict. c.* 36), *sec.* 5.—*Held* that a reclaiming note was not rendered incompetent by the omission to print the interlocutor of the Lord Ordinary closing the record.

IN this action, at the instance of William Fisken, Glasgow, against his wife, the Lord Ordinary (Kyllachy) pronounced an interlocutor closing the record, and sending the case to the Procedure-roll on 20th June 1900. 2D DIVISION. Ld. Kyllachy.

Thereafter, by interlocutor, dated 4th July 1900, the Lord Ordinary allowed the record to be opened up, certain amendments to be made, and of new closed the record, and sent the case to proof.

After proof the Lord Ordinary assoilzied the defender on 28th August 1900.

The pursuer reclaimed, and boxed along with his reclaiming note a copy of the record as finally amended, and closed on 4th July, having printed thereon all the interlocutors in the case, with the exception of that of July 4th. On the reclaiming note appearing in the Single Bills counsel for the defender objected to it as incompetent, on account of this omission.*

* The Court of Session Act, 1825 (6 Geo. IV. c. 120) (Judicature Act), sec. 10, enacts,—" . . . Before any order shall be pronounced or judgment delivered as to the disposal of the cause, the record of the pleadings, as adjusted, shall be authenticated by the Lord Ordinary by his signature."

Sec. 18, enacts,—"When any interlocutor shall have been pronounced by the Lord Ordinary, either of the parties dissatisfied therewith shall be entitled to apply for a review of it to the Inner-House. . . . Provided that such party shall, within twenty-one days from the date of the interlocutor, print and put into the boxes appointed for receiving the papers to be perused by the Judges a note reciting the Lord Ordinary's interlocutor, and praying the Court to alter the same in whole or in part . . . and if the interlocutor has been pronounced without cases, the party so applying shall, along with his note as above directed, put into the boxes printed

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Oct. 20, 1900. Fisken v. Fisken.

Argued for the defender;—The provisions of the Act of Parliament and of the Act of Sederunt were imperative. The proper authentication of a record, according to modern practice, was the interlocutor closing it. Such interlocutor was invariably in practice printed and boxed with the reclaiming note. Here the first interlocutor closing the record was printed, but the record had been thereafter opened up and amendments put on, and the interlocutor finally closing the record was not printed, and accordingly there were before the Court amendments which, so far as the prints shewed, were unauthenticated. The reclaiming note accordingly fell to be refused as incompetent.[1]

Argued for the pursuer;—The reclaiming note was competent. The provisions of the statutes were merely directory. In any case, there was no direction that all the interlocutors should be printed, but only that the record, in the state in which it had been authenticated, should be printed, which had been done here. There was no case of a reclaiming note having been refused on account of the interlocutor closing the record not having been printed. In *Williamson*[1] it was not the authenticated record which was printed. The authentication required by the statute was the signature of the Lord Ordinary, a practice long fallen into desuetude.

Lord Trayner.—The competency of this reclaiming note is objected to on the ground that it does not comply with the requirements of the Judicature Act. That statute (sec. 10) requires the record to be authenticated by the Lord Ordinary, and also (sec. 18) that the record "authenticated as before," shall be boxed to the Judges with any reclaiming note. The record, according to modern practice, is authenticated by the interlocutor of the Lord Ordinary closing the record, and it is the record so closed (and authenticated) that must be boxed with the reclaiming note. That record has been duly boxed in the present case. It is not suggested that the record boxed with the present reclaiming note is not, or differs in any respect from, the record as closed (and authenticated) by the Lord Ordinary. But the interlocutor by the Lord Ordinary closing the record was not printed and boxed with the reclaiming note, and it is said, therefore, that the record as placed before us is not authenticated. I think the objection is not a sound one. It fails to distinguish between the thing authenticated and proof of authentication. The record authenticated by the Lord Ordinary has, as I have said, been duly boxed, and there is no dispute about that. The proof of the authentication has not been printed and boxed, but we have it before us on the interlocutor sheet. The Judicature Act does not require the interlocutor to be printed. It is usually

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copies of the record authenticated as before [*i.e.*, by the signature of the Lord Ordinary, sec. 10].

The Act of Sederunt, 11th July 1828, sec. 77, enacts that reclaiming notes "if reclaiming against an Outer-House interlocutor, shall not be received unless there be appended thereto copies . . . of the papers authenticated as the record in terms of the statute, if the record has been closed . . ."

Section 5 of the Court of Session Act, 1850 (13 and 14 Vict. cap. 36), provides that the "record shall be closed by interlocutor of the Lord Ordinary before whom the process depends."

[1] Williamson v. Howard, May 18, 1899, 1 F. 864.

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printed, and it is convenient that it should be, but it is not required by statute. The reclaiming note before us appears to me to be in accordance with statutory requirements, and the objection to its competency should, I think, be repelled.

LORD MONCREIFF.—In this case the reclaimer has failed to print and box with his reclaiming note the Lord Ordinary's interlocutor of 4th July 1900, by which he allowed the record to be opened up and amended, of new closed the record, and allowed a proof. The question is, whether in respect of this omission we are bound to refuse to receive this reclaiming note. This depends upon the provisions of the Judicature Act, 1825, in particular sections 10 and 18, and the relative Act of Sederunt of 11th July 1828, section 77. Under the statute it is provided that the party reclaiming shall box printed "copies of the record authenticated as before"—that is, by the signature of the Lord Ordinary; and by the Act of Sederunt it is provided that reclaiming notes shall not be received "unless there be appended thereto copies of the papers authenticated as part of the record in terms of the statute if the record has been closed."

It is no longer the practice for the Lord Ordinary to authenticate the record by his signature on the paper. But under section 5 of 13 and 14 Vict. c. 36, the record is closed by interlocutor signed by the Lord Ordinary.

If a very strict view were taken of these enactments, I think that it might be contended with some force that even after the alteration in the form by which the closed record was authenticated, it was necessary that there should be boxed to the Court, not merely copies of the record, but also copies of the interlocutor by which it was authenticated, otherwise the papers lodged would not disclose, as had hitherto been done, that the record had been duly authenticated.

However, I am not disposed to press this view. It is not desirable to extend further than their terms absolutely compel us the scope of these old enactments, which, if violated carry with them such penal consequences to the party. They admit of the construction which your Lordships are prepared to put upon them, and therefore, while I think it is right and proper that with every reclaiming note there should be lodged copies of the earlier interlocutors, and in particular of the important interlocutor closing the record and allowing a proof, I am not prepared to hold that the failure to lodge copies of such interlocutor involves the refusal of the reclaiming note, whatever other penalty may be imposed upon the party.

LORD JUSTICE-CLERK.—I concur in the opinion of Lord Trayner.

LORD YOUNG was absent.

THE COURT put the case to the roll.

JOHN VEITCH, Solicitor—ANDREW H. HOGG, S.S.C.—Agents.

No. 4.

Oct. 23, 1900.
Hunter v. Darngavil Coal Co.

WILLIAM HUNTER, Pursuer (Respondent).—*Salvesen, Q.C.*—*David Anderson.*

DARNGAVIL COAL COMPANY, LIMITED, Defenders (Reclaimers).—*Campbell, Q.C.*—*Hunter.*

Process—Proof—Separate proof as to preliminary defence—Reparation—Master and Servant—Personal Objection—Election—Workmen's Compensation Act, 1897 (60 *and* 61 *Vict. cap.* 37).—In an action raised by a workman against his employers at common law for damages for injuries alleged to have been received through their fault, the defenders, besides denying fault, averred that the pursuer had given written notice that he claimed compensation under the Workmen's Compensation Act, and that subsequently they had paid him compensation, and pleaded that in respect thereof the pursuer was barred from suing the action. In answer, the pursuer averred that he was induced to sign the notice shortly after the accident by false representations on the part of the defenders, at a time when, through illness, he could not and did not understand its import.

The Lord Ordinary (Kincairney) ordered issues for the trial of the whole case, including the question whether the pursuer had elected to take compensation under the Workmen's Compensation Act.

Held (*rev.* this judgment) that this question should be determined by proof *primo loco.*

2D DIVISION. Lord Kincairney.

IN April 1900 William Hunter, miner, brought an action in the Court of Session against the Darngavil Coal Company, Limited, for damages at common law on account of injuries sustained by him on 31st January 1900 when in the defenders' employment.

The defenders, in their answers to the pursuer's condescendence, denied fault, and in a separate statement of facts they further averred;—(Stat. 1) "Upon 15th February 1899 the pursuer sent to the defenders a notice signed by him in these terms:—'I hereby give notice that, on the 31st day of January 1899, I was injured in the course of my employment in your West Longrigg Colliery through winding-rope slipping off drum, and that I claim compensation therefor under the Workmen's Compensation Act, 1897.'" (Stat. 2) "Following upon said notice, the defenders adjusted with the pursuer the average wage which he was earning prior to the accident to be £1, 13s. per week, and that the compensation payable to him was therefore 16s. 6d. per week. The defenders have paid compensation to the pursuer at this rate during 33 weeks after the first fortnight, the amount so paid being £27, 4s. 6d."

The defenders produced receipts for the said payments, signed principally by the pursuer, and in one or two instances by his wife. These receipts did not bear to be for payments under the Workmen's Compensation Act.

The defenders pleaded, *inter alia*;—(2) The pursuer having applied for and received compensation under the Workmen's Compensation Act, is barred from suing the present action.

The pursuer (Ans. 1 and 2) admitted signing the notice and receiving the payments, but averred that he had signed the notice under essential error, induced by the misrepresentations of the defenders, at a time when he was unable to understand the transaction. The payments were made without any notice to him that they were under the Workmen's Compensation Act, and on the representation that they would not prejudice his claims.

On 13th July 1900 the Lord Ordinary (Kincairney) pronounced

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this interlocutor:—"The Lord Ordinary having considered the cause, appoints the pursuer to lodge the issues proposed by him for the trial of the cause; and appoints the defenders to lodge issues for the trial of their defence, embodied in their second plea in law." *

The defenders reclaimed, and argued;—This was an action at common law, and was barred by the election of the pursuer to take compensation under the Workmen's Compensation Act. The plea in bar should therefore be disposed of *primo loco*.[1] The case of *Campbell*,[2] followed by the Lord Ordinary, was decided on its own specialties.

Argued for the pursuer;—There were no averments relevant to support the plea in bar,[3] but further, if there were, the course followed by the Lord Ordinary was proper, and an exercise of his discretion with which the Court would not readily interfere. The circumstances here were exactly similar to those in *Campbell*.[2]

LORD JUSTICE-CLERK.—I am unable to concur with the decision of the Lord Ordinary. Where, as here, there are distinct averments that the claim made by this workman, and the payments made by the defenders, were made under the Workmen's Compensation Act, and where these averments are disputed, the proper course is to determine this matter first. If it turns out that there was no such arrangement as is averred, then the case is still open; but if it is proved that such an arrangement was made, then the case is at an end. By this course the pursuer cannot possibly suffer any prejudice, but both parties might suffer prejudice if the case were to go to jury trial, and it turned out that the pursuer had no ground of action in consequence of his having accepted compensation under the Workmen's Compensation Act.

LORD TRAYNER.—I agree. In the ordinary case I would not be disposed to interfere with the discretion of the Lord Ordinary in determining the

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* "OPINION.—In this action of damages by a workman for injury through the fault of the defenders, they have pleaded,—'The pursuer having applied for and received compensation under the Workmen's Compensation Act, is barred from suing the present action.' The defenders' averments in support of this plea seem to me to be relevant, and such as cannot be disregarded without inquiry. Neither can they, in my opinion, be accepted without inquiry, and I think the pursuer's explanations in answer to the defenders' averments are also relevant. There must therefore be proof as to this plea of bar. The question is how the inquiry is to be made. There are two ways of making it. Either the defenders must be allowed a proof of their averments, and the trial of the pursuer's action must be postponed until a judgment is pronounced on that proof; or else issues must be adjusted for the trial both of the main case and of the defence of bar. There are inconveniences attending either course, and it is not easy to say on which side they predominate. In these circumstances I think the safest course is to follow the precedent of *Campbell* v. *Caledonian Railway Company*, 6th June 1899, 1 F. 887, where the latter course was adopted by the First Division. I do not regard that case as a decision which I am bound to accept, but as an example which I am safe to follow."

[1] Docherty v. M'Alpine & Sons, Nov. 21, 1899, 2 F. 128; Little v. MacLellan, Jan. 16, 1900, 2 F. 387.

[2] Campbell v. Caledonian Railway Co., June 6, 1899, 1 F. 887.

[3] Bennett v. Wordie & Co., May 16, 1899, 1 F. 855; Rendall v. Hill's Dry Docks Company, Limited, L. R., 1900, 2 Q. B. 245.

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manner in which the proof is to be taken. I think that that is a matter very much within his discretion. But this is not a question of the mode, but of the time at which, and the matter concerning which the inquiry should be made. I think that where, as here, there is a plea in bar, that is the first question to be determined. If well founded, it excludes all inquiry as to the merits.

LORD MONCREIFF.—I agree with your Lordships. If there is a plea in bar founded upon an alleged discharge or settlement of the subject-matter of the action, and the statements in support of it present a sufficiently strong *prima facie* case, the proper course is to send the case to trial upon that question *primo loco*. In the defenders' averments here there is a strong *prima facie* case that the pursuer's claim has been settled, and I think, therefore, that that question ought to be disposed of first.

LORD YOUNG was absent.

THE COURT recalled the interlocutor of the Lord Ordinary, and remitted the case for proof upon the averments in support of the defenders' second plea in law and the pursuer's answers thereto.

ADAMSON, GULLAND, & STUART, S.S.C. —W. B. RANKIN, W.S.—Agents.

No. 5.

Oct. 24, 1900. Burrell & Son v. Russell & Co.

BURRELL & SON, Pursuers.—*Salvesen, Q.C.—Clyde.*
RUSSELL & COMPANY, Defenders.—*Ure, Q.C.—Younger.*

Expenses—Fees to counsel—Proof—Hearing in Inner-House.—In a case in which the proof lasted twelve days, and the hearing in the Inner-House nine days, the successful party objected to a reduction by the Auditor of the fees allowed for each day of the proof and hearing respectively to senior counsel from thirty and twenty guineas to twenty and fifteen guineas, and to junior counsel from twenty and fifteen guineas to fifteen and ten guineas. The Court *repelled* the objection, and *approved* of the Auditor's report.

Expenses—Fee to witness.—In a case in which a certified skilled witness was paid £214, 10s. for work which, according to his account, occupied fifty-nine days, the Court *approved* of the Auditor's report fixing his fee at £67, 7s. 6d.

1ST DIVISION. IN this action, reported 2 F. (H. L.) 81, the House of Lords, on 26th March 1900, reversing the judgment of the First Division, found the pursuers entitled to £16,000 of damages. The pursuers were also found entitled to expenses.

The Auditor having taxed the pursuers' account of expenses at £2554, 8s. 3d., the pursuers lodged objections to his report in so far as he had disallowed (1) certain fees to counsel, and (2) a fee to a certified skilled witness.

The proof and hearing on evidence in the case lasted twelve days, and the hearing on a reclaiming note in the Inner-House lasted nine days.

The fees charged in the account for each day of the proof and hearing on evidence were for senior counsel thirty guineas, and for junior counsel twenty guineas; and for each day of the hearing in the Inner-House, senior counsel twenty guineas, and junior counsel fifteen guineas, and the Auditor had allowed twenty and fifteen guineas to senior counsel, and fifteen and ten guineas to junior counsel.

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Oct. 24, 1900.
Burrell & Son v. Russell & Co.

The witness whose fee was in question was Mr W. H. Campbell, naval architect, Glasgow, who had rendered and been paid an account of £214, 10s. "for professional services rendered to Messrs Burrell & Son in their action against Messrs Russell & Company." According to the account the time for which Mr Campbell was actually engaged was fifty-nine days, and the work consisted of making calculations, supervising the making of and making models, plans, and sections, displacement scales, preparing precognition, consultations, and attendance (two days) at the proof. The Auditor allowed £67, 7s. 6d.

Argued for the pursuers;—(1) In view of the unusual magnitude and complexity of the case double maximum fees should have been allowed.[1] The Auditor had, however, treated the account as if the case had been in no way exceptional. The principle on which fees fell to be fixed was that the services of counsel of standing could be obtained for the amount allowed. Applying that principle, and looking to the practice in analogous cases, the fees charged were not too large.[2] *Parnell* v. *Walter*,[3] though dealing with the remuneration of expert witnesses, illustrated the extent to which the Court proceeded in fixing fees on the magnitude of the case in hand. There was no intelligible distinction in the matter of fees between a proof and a jury trial. (2) The fee allowed by the Auditor for Mr Campbell was out of all proportion to the services rendered, and was, moreover, far below what was usually allowed to an expert who had devoted so much time and skill as Mr Campbell had.[4]

Argued for the defenders;—There was no reason for interfering with the Auditor's exercise of his discretion. (1) The case was distinguished from the authorities cited by the pursuers, in respect that there was here a proof, and not a jury trial, and that the proof here lasted much longer than the trials in the other cases (except, perhaps, in the Esk Pollution case). A higher rate of fees to counsel was allowed in jury trials.[5] The duration of a proof was always a most important consideration, for undoubtedly the labour and strain was less from day to day as the case proceeded. The case, moreover, was decided not on scientific grounds, but was treated merely as an ordinary question of contract and credibility. (2) Mr Campbell's account was greatly exaggerated. It was impossible that a whole day was necessary for many of the items of work for which a whole day was reckoned. He was not the leading expert witness. Indeed, he was really a servant in the employment of the pursuers, and much of his work was done in preparation for the contract, and not for use at the trial.

Lord President.—We have had the advantage of a very full argument, but I must say that, having regard to the known practice, and to the autho-

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[1] Tannet, Walker, & Co. v. Hannay & Sons, Jan. 31, 1874, 1 R. 440.

[2] Duke of Buccleuch v. Cowan, July 17, 1867, 5 Macph. 1054, 39 Scot. Jur. 591; Neilson v. Barclay, July 19, 1870, 8 Macph. 1011, 42 Scot. Jur. 624.

[3] Parnell v. Walter, March 5, 1890, 17 R. 552.

[4] Duke of Buccleuch v. Cowan, 5 Macph. 1054; Gillespie v. Russell, March 2, 1855, 17 D. 532, 27 Scot. Jur. 227.

[5] Wilson v. North British Railway Co., Dec. 13, 1873, 1 R. 304, Auditor's report at p. 305; Campbell v. Ord & Maddison, Nov. 5, 1873, 1 R. 149.

No. 5.

Oct. 24, 1900.
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rities cited, I see no ground for disturbing the result arrived at by the Auditor. The fees allowed are somewhat higher than those allowed generally, or at all, for proofs, and the fees sanctioned in cases of trial by jury are hardly analogous; but even if they were, they would not sustain or justify an interference with the decision of the Auditor.

I suppose that among other things the Auditor considered that when a counsel has once prepared himself in a case to which he is to give exclusive attention, his duties are somewhat lighter than if he had to prepare in a number of fresh cases every day. We must keep in view that the Auditor is a man of experience, and that he is well acquainted with the practice and the decisions of the Court. It seems to me that it would be a serious thing to increase the fees allowed by the Auditor, as by so doing we might be understood to fix a minimum, or at all events an ordinary standard of fees.

The same remarks apply to Mr Campbell's account. The way in which it is made out is unusual, full time being charged for things which do not look as if they would occupy whole days. But there are really no materials before us which would enable us to consider that question.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

THE COURT approved of the Auditor's report, and decerned.

WEBSTER, WILL, & Co., S.S.C.—J. & J. ROSS, W.S—Agents.

No. 6.

Oct. 25, 1900.
Hargrave's Trustees v. Schofield.

JOSEPH HARDISTY AND OTHERS (Hargrave's Trustees), First Parties.—*D. Anderson.*

LOCKHART ALEXANDER SCHOFIELD AND OTHERS, Second Parties.—*Chree.*

Succession—Trust—Direction to trustees to retain estate after it had vested in beneficiaries—Repugnancy.—A testator, after directing his trustees to divide his estate, on the expiry of certain liferents, among certain nephews and nieces *nominatim* equally, further directed that the trustees should retain the capital of the shares belonging to the nephews and nieces so long as their father should be alive, and pay to them the revenues thereof only.

The liferents having expired, *held* (*diss.* Lord Young) that the capital of the shares having vested in the nephews and nieces *a morte testatoris*, they were entitled to call on the trustees to denude in their favour, notwithstanding that their father was still alive.

Miller's Trustees v. *Miller*, Dec. 19, 1890, 18 R. 301, *followed.*

2D DIVISION.

BY his will, dated in July 1893, the late Joseph James Hargrave, formerly of Montreal, and latterly of Edinburgh, who died in February 1894, directed his trustees to "invest all the said residue of my said estate in interest-bearing securities, and to pay the revenues thereof to my stepmother Margaret Alcock Hargrave of Rutland Square, in Edinburgh aforesaid, and my uncle Lockhart Mactavish, of Otago, in New Zealand, during their joint lives, share and share alike, and from and after the death of either to pay the whole of said revenues to the survivor during his or her life. Upon the death of the survivor of my said stepmother and uncle, my said trustees shall divide my said estate equally between my nephews and nieces hereinafter named, to wit, Lockhart Alexander Schofield, James Schofield,

Frederick Joseph Schofield, Margaret Florence Schofield, Letitia Schofield, and Mary Schofield, children of Frederick Schofield, late of Brockville, Ontario, or their lawful issue, share and share alike, by roots, the share of any predeceasing me to accrue to the survivors. But I direct that during the lifetime of the said Frederick Schofield my said trustees shall retain in their hands the capital of the shares belonging to the said Lockhart Alexander Schofield, James Schofield, Frederick Joseph Schofield, Margaret Florence Schofield, Letitia Schofield, and Mary Schofield, and shall pay to them the revenues thereof only."

On the deaths of Lockhart Mactavish and Mrs Hargrave, which took place in February and June 1899 respectively, and Frederick Schofield being still alive, the present special case was brought by the trustees of the first part, and the children of Frederick Schofield of the second part, to determine the question whether the second parties were entitled to immediate payment of the capital of their shares during the lifetime of their father Frederick Schofield.

The first parties contended that they were not entitled to hand over the capital to the second parties until the death of Frederick Schofield. The second parties contended that the shares destined to them had vested, and that as postponement of payment was not required in order to protect or provide for any present or ulterior interest or trust purpose, the provision postponing during the lifetime of Frederick Schofield payment of the shares of capital destined to them was merely a restraint on their enjoyment of a fully vested right of fee in their respective shares, and as such fell to be disregarded as repugnant to, and inconsistent with, a right of fee.

The questions of law for the opinion and judgment of the Court were these:—"(1) Are the second parties entitled, during the lifetime of the said Frederick Schofield, to payment of the capital of the shares destined to his children named in the said will? or (2) Must the capital of said shares be retained in the hands of the first parties or their successors during the lifetime of the said Frederick Schofield, as provided in the said will?"

Argued for the first parties;—The condition that the trustees were to retain during the lifetime of Frederick Schofield was clearly and unambiguously the intention of the testator; it was a lawful condition, and must be given effect to It was prefaced by the word "but," and came subsequent to and qualified the original division.

Argued for the second parties;—Unless there is some ulterior interest to protect, a clause in restraint of a vested fee would not be given effect to. This condition could not be given effect to without overruling *Miller's Trustees*, and the cases following thereon.[1]

LORD JUSTICE-CLERK.—I am unable to distinguish the question raised by this case from the question which was decided in *Miller's Trustees*,[1] and the series of decisions following on that case. I think we must give effect

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The questions of law for the opinion and judgment of the Court were these :—" (1) Are the second parties entitled, during the lifetime of the said Frederick Schofield, to payment of the capital of the shares destined to his children named in the said will ? or (2) Must the capital of said shares be retained in the hands of the first parties or their successors during the lifetime of the said Frederick Schofield, as provided in the said will ? "

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Argued for the second parties ;—Unless there is some ulterior interest to protect, a clause in restraint of a vested fee would not be given effect to. This condition could not be given effect to without overruling *Miller's Trustees*, and the cases following thereon.[1]

LORD JUSTICE-CLERK.—I am unable to distinguish the question raised by this case from the question which was decided in *Miller's Trustees*,[1] and the series of decisions following on that case. I think we must give effect

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to these decisions, and that therefore the first question should be answered in the affirmative, and the second in the negative.

LORD YOUNG.—I think otherwise. I expressed my opinion at some length, adverse to the judgment of the majority of the Court, in the case of *Miller*.[1] I repeated that opinion in the case of *Stewart*.[2] I adhere to these views, and I think that the law, established long before the case of *Miller*,[1] and as it now exists, is contrary to the judgment in that case. I am not, and never have been, of opinion that Judges ought to follow what they consider to be an erroneous exposition of law. We are bound, I think, to give what we believe to be a true view of the law, and I think it is always legitimate to reconsider any matter without putting the parties to the expense of sending it to the whole Court, or to seven Judges. Indeed that has been the course taken in this Court, and I need only cite as an instance the great variety of views taken by Judges on these very questions of vesting. In construing a testamentary trust-deed, what is to be looked at first is the will and intention of the truster. If his intention is lawful, and the expression of it leaves no doubt in the mind of the Court as to what it is, there is law, both upon unanimous decisions and in text writers of the highest authority, that that intention is to be given effect to. If there is anything to the contrary in the case of *Miller*,[1] I prefer the old-established doctrine to which I have referred. I think there is here a distinct expression of intention that the capital of the shares destined to the second parties is not to be paid to them till the death of their father. That being a lawful intention, and distinctly expressed, I think there is authority for our giving effect to it, and that there is nothing in the case of *Miller* [1] that inclines me to be of a different opinion.

LORD TRAYNER.—I agree that in construing testamentary writings the first thing to which regard should be had is the intention of the testator; and if I were reading the will now before us without reference to the decided cases, I should have thought that the intention of the testator was here clearly and definitely expressed to the effect that the second parties were only to get the revenue of their respective shares during their father's life, and the capital of such shares only after his death.

But the fee of these shares having (according to well-established rules) vested in the second parties *a morte*, the question is whether the testator could legitimately or effectually limit or restrict that vested fee to a liferent during the period of the father's life. My own opinion is that he could; but it was otherwise decided in the case of *Miller's Trustees*,[1] and subsequent cases. I dissented from the decision in *Miller's* case,[1] and have not seen reason to change the opinion I then held. I am bound, however, to regard the question as at present authoritatively determined contrary to my opinion, and applying the rule so determined to the present case, must hold that the contention of the second party is right, and should prevail.

I do not share the opinion that a Judge may disregard an authoritative decision, simply because he does not concur in it. If each Judge, or each Court proceeded upon that principle, our rules of law would become uncertain

[1] 18 R. 301. [2] 25 R. 302.

and confused. *Stare decisis* is a safer principle so long as the precedent stands unreversed. I accordingly in this case give effect to the law as it stands upon the decided cases, and out of deference to their authority. No. 6. Oct. 25, 1900. Hargrave's Trustees v. Schofield.

LORD MONCREIFF.—I think we are bound to follow the case of *Miller's Trustees*.[1] This is a simple example of the kind of case which is ruled by that decision. There is no doubt that the residue was vested in the second parties, and the only question is whether a restriction of this kind on a vested right of fee, where there are no ulterior interests to be protected, can receive effect. Without expressing any opinion on the case of *Miller's Trustees*,[1] I think we are bound to follow it. It was a decision of a Court of seven Judges which has been followed in many cases, and if it is to be reconsidered it must be by the whole Court.

THE COURT answered the first question in the affirmative, and the second in the negative.

SKENE, EDWARDS, & GARSON, W.S.—W. K. AIKMAN, W.S.—Agents.

W. J. MENZIES AND J. H. ROBERTSON (Henderson's Marriage-Contract Trustees), Pursuers (Respondents).—*Ure, Q.C.—Macphail.*
ALEXANDER HENDERSON, Defender (Reclaimer).—*Lees—W. Berry.* No. 7. Oct. 25, 1900.* Henderson's Trustees v. Henderson.

Marriage-Contract—Provisions to children—Obligation by husband to convey specific funds in security of provisions payable at his death—Implement.—A husband in his antenuptial marriage-contract bound himself to convey to the marriage-contract trustees his share of his father's succession in security of a provision of £3000, payable at his death to the children of the marriage who should then be alive.

In an action by the trustees to recover part of this fund retained by the husband, *held* that the defender's obligation was not discharged (1) by an offer of payment of the balance required to bring the fund in the trustees' hands up to £3000, or (2) by the assignation of policies of insurance upon his life (with premiums paid up or secured) of a value as at his death greater than the part of the fund retained.

ON 3d October 1855 Alexander Henderson, Montreal, Canada, entered into an antenuptial marriage-contract, by which he bound himself, *inter alia*, to pay at his death, to the children of the marriage then alive, a sum of £3000. The deed contained a provision for his wife, which did not take effect owing to her predecease, and further provided, —"And for the more effectually securing the said provisions, the said Alexander Henderson hereby assigns, dispones, and conveys to" the trustees "All and whole the balance of his share of the succession of his said father unpaid at this date, which he is entitled to take and draw by the will of his said father, subject to the provisions of said will, in order that they may lay out the same on good securities, heritable or moveable, Government funds, debentures, or purchases of stocks taken to themselves as trustees foresaid, and may make payment of the interest thereof to the said Alexander Henderson during his life, and that after his death they may apply the said balance and the proceeds thereof for payment of the provisions hereinbefore contained, and that if any residue thereof shall remain after these purposes are provided for, that they may make payment of the said 1ST DIVISION. Lord Pearson.

[1] 18 R. 301.

* Decided Oct. 20, 1900.

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residue to the said Alexander Henderson and his heirs and assignees whatsoever."

In 1897 W. J. Menzies, W.S., and J. H. Robertson, stockbroker, Edinburgh, the then surviving and acting trustees under the marriage-contract, raised an action against Mr Henderson for payment of a sum of £961, 9s. 9d., with interest, being part of the balance of his share in his father's succession assigned to the trustees. At the date of this action Mrs Henderson was dead, while there were five children of the marriage surviving, all of whom had reached majority.

In his defences Mr Henderson stated,—(Stat. 2) "In or about the year 1862 the sum of £961, 9s. 9d. became payable to the defender out of the balance of his share of the succession of his father. . . . This sum, on discharge signed by the defender on 13th August 1862, was by mutual inadvertence paid over to him by the testamentary trustees of his father."

He also averred that the marriage-contract trustees had agreed to allow him to retain this sum from 1862 until the present action was raised in consideration of his assigning certain policies of insurance upon his life, of the aggregate value as at his death of £1159, 3s., to the trustees. The policies were assigned to the trustees in 1881. The premiums on these policies were either paid up or amply secured. He also averred that he had already paid £2850, 10s. 9d. of the funds acquired from his father's estate to the trustees, and that he was willing to pay up in cash the balance of £149, 9s. 3d. required to bring up the sum to £3000, the actual amount of the provision in security of which the fund was assigned.

The pursuers admitted that they had received the sum of £2756, 4s. 7d. in implement of the defender's obligation, and that the policies in question had been assigned to them. They explained that through diminution in the value of, or loss incurred in the investments of the said sum of £2756, 4s. 7d., the whole sum of £961, 9s. 9d., with a large part of the interest thereon, was required to make up the full sum of £3000, payable to the children of the marriage on Mr Henderson's death.

The pursuers pleaded;—(2) The defender Alexander Henderson, having obtained payment of the sum sued for in contravention of the assignation granted by him in favour of the pursuers, and contained in the said contract of marriage, is liable to make good the amount to the pursuers, with interest, as concluded for. (3) The whole sum sued for being required for the due securing of the obligations undertaken by the said Alexander Henderson in his contract of marriage, the pursuers are entitled to decree as concluded for.

The defender pleaded;—(2) The pursuers are barred by taciturnity and *mora*, and by acquiescence, from insisting in the present action. (3) The pursuers have no interest to have the fund contributed by the defender in security of his obligations under his marriage-contract kept up beyond the sum of £3000, and as they hold funds and securities of the defender's to a greater amount, the present action should be dismissed, with expenses. (5) In respect of the agreement come to by parties in 1881, and of the actings of parties then and since, the present action is incompetent.

On 2d December 1898 the Lord Ordinary (Pearson) granted decree for the sum sued for, but without interest prior to the date of the interlocutor.*

* "OPINION.—The defender maintains, in the first place, that the

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The defender reclaimed, and argued;—The assignation by the defender in the marriage-contract was for a limited purpose only. Whatever the trustees got beyond what was required to provide the £3000 was directed to be paid to the defender.[1] The trustees said that the sum sued for was needed to make up losses incurred in the trust investments. There had been no loss, because in another action[2] the trustees had been obliged to make it good. Now, the trustees had actually received (and so far as lost had replaced) £2850, 10s. 9d. in cash, and held policies (upon which the premiums were either paid up or secured) to the value as at the defender's death of £1159, 3s., so that there was a margin of more than £1000

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purposes, so far as extant, are already amply provided for by the trust funds in hand, and that if the trustees recovered the money, their first duty would be to pay it back to him, in terms of the marriage-contract.

"I cannot read the contract as imposing any such duty. It may be that where a sum assigned in security of provisions turns out to be out of all proportion larger than the provisions to be secured, the Court will set free a part for distribution. The explanations given do not suggest that this is a case of that class; and in one possible view of the case, it cannot be said that the children's provision is even covered by the securities held by the trustees.

"If a provision has vested, no doubt all concerned, being *sui juris*, can combine for immediate distribution, except in the case of alimentary trusts.

"But in the present case it is at least not certain that the fee of the provision has vested; and even if it had, the children are not here.

"But secondly, the defender alleges that certain arrangements were made relative to the fund in question which, followed by the actings of parties, exclude the present claim by the trustees. (His Lordship here summarised the defender's averments.)

"It does not appear to me that this is a relevant answer to the trustees' claim.

"At the highest, the averments do not amount to an allegation that the original assignation contained in the marriage-contract has received effect, or that the implied obligation to assign has been expressly discharged. The theory of the defender's case seems to be that the policies of assurance have been accepted by the trustees, not as security for implement of the defender's obligation to make good the £961, but as security for the provision to children, which is quite a different thing.

"I do not think the defender's averments amount to more than this,—that on the error being discovered, after he had put the money into his business, his father's trustees, and afterwards his marriage trustees, refrained from pressing him for repayment on getting the policies in security for such repayment.

"It would require much more pointed averments to support the case now suggested, namely, that the original obligation has merged in the security arrangement, that it has been extinguished, and the security arrangement accepted in lieu of it.

"In my opinion, therefore, the defences are irrelevant, so far as directed against repayment of the capital sum. With regard to the claim for interest, I think this may be held to be extinguished by the provision that the income of the trust funds is payable to the defender. No special case is made for restitution of profits on the ground that the money has been at risk, and has earned more than the normal rate. I do not think the trustees should be better off on receiving payment than if they had received it in 1862 and put it in a safe investment."

[1] More Gordon v. Gordon's Trustees, Nov. 6, 1868, 41 Scot. Jur. 43.

[2] Henderson v. Henderson's Trustees, July 20, 1900, 2 F. 1295.

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beyond what was required to meet the provision of £3000. The policies afforded as sound a security as any the trustees could get if they received the actual cash, and had to invest it. In any case, the trustees were barred from insisting in the action, as they had agreed to take the policies in lieu of payment. The defender was now willing, and had offered on record, to make up the sum received in cash by the trustees to the actual amount of the provision, viz., £3000, if the Court were of opinion that the policies did not afford a sufficient equivalent security.

Counsel for the pursuers were not called upon.

LORD PRESIDENT.—It appears to me that the judgment of the Lord Ordinary is clearly right. By antenuptial marriage-contract, dated 3d October 1855, the defender bound himself to pay certain provisions to his widow and children, and in security of these provisions he assigned to the trustees under the marriage-contract "all and whole the balance of his share of the succession of his said father unpaid at this date . . . in order that they may lay out the same on good securities, heritable or moveable, Government funds, debentures, or purchases of stocks, taken to themselves as trustees foresaid, and may make payment of the interest thereof to the" defender during his life, and that after his death they may apply the said balance and the proceeds thereof for payment of the provisions already mentioned.

This is a perfectly unequivocal conveyance, and it does not appear that anyone ever had the least doubt as to its meaning, not even the defender, for in his statement on record he says,—"This sum, on discharge signed by the defender on 13th August 1862, was by mutual inadvertence paid over to him by the testamentary trustees of his father." So that he admits, and indeed alleges, that the payment to him was a mutual error—one of the kinds of error against which redress is most readily given.

This, then, is an admission that in August 1862 this sum should have been paid to the trustees, and it has not been paid, and the trustees demand that it shall be paid now. *Prima facie*, it is very difficult to make any answer to this demand. There has been no discharge, if indeed there are any persons in a position to grant a discharge. The obligation is in favour of the children, who are not parties to the case. They have given no discharge, and there is nothing which would disentitle them from claiming the money from the trustees. It seems to me that if the money was not paid, and the defender died without sufficient estate to pay it, the trustees would have no answer to a claim by the children, on account of their failure to get in what is admitted to be part of the trust-estate, which by mutual error was not got in in 1862.

The defence is that the conveyance was for certain purposes, of which the only one not now satisfied (the defender's wife having died) is making good the provision of £3000 to his issue (or their issue) alive at his death. It is quite true that the defender's wife is dead, and that consequently the provision made for her has lapsed, but the obligation in favour of the children is not yet satisfied, and there are not trust funds to satisfy it. Even assuming the policies to be good, the taking of such policies in lieu of the shares of his father's estate assigned by the defender is not trust administration.

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But the policies may not be good. And it seems to me no answer to this claim that the trustees have even paid-up policies of insurance, for the companies may be unable to pay when the time comes.

But the defender further says that his sole remaining obligation is to provide £3000, and if he provides this amount no more can be asked of him. Stated so broadly, I cannot assent to this proposition. It is true that there is now only an obligation to provide £3000 to the children; but it does not follow that, by retaining what appears to be £3000 in value of present investments, the sum of £3000 will be forthcoming when the money falls to be paid. Even the best investments fluctuate. If the defender was in a position to shew that the sum he is called on to pay was greatly in excess of the obligation to be secured, the Court might consider whether the amount of security might be modified, but that would be in a proceeding very different from this. Such a question could only arise properly after the money had been paid over to the trustees. The defender's first duty is to hand over to the trustees the sum which ought to have been, but by mutual inadvertence was not, placed in their hands thirty-eight years ago.

LORD ADAM.—I am of the same opinion. It appears to me that if this trust had been administered in terms of the trust-deed the result would have been that at this moment the marriage-contract trustees would have been in possession of the whole trust-estate left by Mr Henderson's father, and their duty would have been to have kept that trust-estate invested for payment of certain provisions set forth in the marriage-contract, and after all these provisions were satisfied, then, and then only, could they hand over any residue that might be left to Mr Henderson or his heirs, as the case might be. That would have been the normal condition of matters if they had acted in terms of the deed. But what happened was this, that Mr Thomas Henderson's testamentary trustees paid over the sum of £961 to Mr Henderson, the defender, which sum should have been paid to the marriage-contract trustees. That was an error that was committed in the administration of the estate. Now, after the lapse of a great number of years the marriage-contract trustees say,—"You, Mr Henderson, should never have been in possession of this portion of your father's estate, which in truth was assigned to us by your marriage-contract, and you must repay that to us, and as trustees it is our duty to recover that portion of Mr Henderson's estate which is already in your possession." There is no question about that. It came into his possession by what is set forth on record as "mutual inadvertence." It was a mistake altogether that Mr Henderson had this £961, and the clear duty of the trustees is to recover that £961 from Mr Henderson in order that they may hold it in terms of the provisions of their own trust. I think that is the case, and I do not understand that Mr Henderson's counsel disputed that altogether.

Now, Mr Lees contended that all that the marriage-contract trustees had right to require is that they should have the sum of £3000, neither more nor less, placed in their hands by Mr Henderson, and that, if that is done, they have no further claim on him to repay the portion which is still in his possession, because after the obligation was fulfilled to pay £3000 to the children

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out of the residue of the estate, the thing is at an end, and he says it is idle to ask Mr Henderson to give back the whole sum because it may—not that it must, but that it may—come back to him in the shape of residue. Now, I think that is entirely a mistake on the part of Mr Henderson. The obligation is not, and the trustees are not directed, to set aside out of the trust-estate left in their hands a sum of £3000 to be paid to the children. If that had been so, I daresay Mr Lees' contention would have been perfectly right. If there had been, as in *More Gordon's* case,[1] a direction at a particular date to appropriate and set aside a sum of £3000 for that purpose of the trust, then the contention would have been right. But then it follows that if there had been any profit or loss on the £3000, it would have accrued to the children, and would not have had to be paid back; they would have been entitled to £4000 if it increased to that, or only to £2000 if it diminished to that extent. That would have been the position. But that is not the position of this trust. The obligation imposed upon the trustees here is to retain the whole of the trust-estate, and only pay over the residue of the funds after the purposes of the trust have been fulfilled—that is to say, only when the trustees have paid over to the children the sum of £3000, neither more nor less. This is the duty of the trustees under the marriage-contract, and what they wish to be in a position to do. Now, as was pointed out, if they are to have left in their hands £3000, and nothing else, and if they have nothing in bank beyond the £3000, how are they to provide £3000 to the children in the event of that £3000 becoming by the date of payment, not £3000, but only £2000 or £2500? That would not be implement of the obligation under their trust-deed. Their duty is, when the event occurs, to be in a position to produce £3000, and I do not see how they can do that except by doing what the marriage-contract says they should do, retain in their own hands the whole trust-estate until all the provisions are sufficiently secured. In my opinion merely to leave them with £3000 in their hands is not sufficient security for payment of these provisions, and I understand Mr Lees to admit that if that view of the case is not taken, he cannot say that the money in the hands of the trustees, or the whole security—for that is the position of it—would leave more than a margin as a security to meet the obligations of the trustees in future—to pay the £3000. That is my view of the case, and I agree with your Lordship.

Lord M'Laren.—The children of the defender Mr Henderson are entitled under their father's marriage-contract to a provision of £3000 payable at his death. That is the extent of the father's obligation. They are further entitled during his lifetime, in security of these provisions, to have conveyed to the trustees the surplus remaining of their father's interest under his father's trust-settlement. The obligation to give security was not fulfilled, through circumstances to which I need not further refer, and this action is instituted by the marriage-contract trustees for the purpose of enforcing the obligation to give security. The defence is that although the stipulated

[1] 41 Scot. Jur. 43.

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security has not been given, yet the defender had given equivalent security to the satisfaction of the trustees when the demand was made. It may be that it was sound trust administration where the defender, in the opinion of the trustees, was unable at the time to restore the money, to take from him the best security that could be got, and no doubt the trustees were entitled to do this in their own interest, because, in the event of his policies of insurance not being paid from any cause, the trustees would be liable for their omission to get in the security fund. But then I am afraid that now, when the defender is believed to be in more prosperous circumstances and an action is brought against him for fulfilment of the marriage-contract obligation, it is no defence to say that by an arrangement between him and the trustees he had substituted something different from what his children were entitled to have. I agree with your Lordship in the chair that the determining consideration here is that the children have never discharged their right to the security—have never done anything to relax or impair the obligation in their favour contained in the marriage-contract. In that state of circumstances the trustees, I think, are within their rights in taking steps to enforce the obligation.

Of course, if the money is paid, it follows that those policies of insurance which were substituted for the prescribed security must be restored to Mr Henderson.

LORD KINNEAR concurred.

THE COURT recalled the Lord Ordinary's interlocutor, of new repelled the defences, and found that the defender was bound to make payment to the pursuers of the sum of £961, 9s. 9d. sterling, as concluded for, and, with certain findings as to interest, continued the cause.

MENZIES, BLACK, & MENZIES, W.S.—HAGART & BURN MURDOCH, W.S.—Agents.

No. 8.

Oct. 27, 1900. Bell's Trustees v. The Holmes Oil Co.

JOHN DALRYMPLE BELL AND OTHERS (Bell's Trustees), Petitioners.—*Jameson, Q.C.—R. S. Horne.*

THE HOLMES OIL COMPANY, LIMITED, Respondents.—*Younger.*

JOHN WOOD, LIMITED, AND OTHERS, Respondents.—*Salvesen, Q.C.—Clyde.*

Company—Winding-up—Voluntary or Compulsory—Wishes of creditors—Cutting down of preference—Companies Act, 1862 (25 *and* 26 *Vict. c.* 89), *sees.* 79, 84, 130, 149, *and* 164.—A minority of the creditors of a company which was unable to pay its debts presented a petition for a winding-up by the Court. The petition was opposed by the company and by a majority of the creditors, who desired a voluntary liquidation under supervision of the Court, on the ground that the granting of the petition would prejudice a contemplated reconstruction of the company.

The petitioners objected to delay, as the company had within sixty days of the presenting of the petition granted a conveyance of part of its heritable property in favour of certain creditors, the right to challenge which the petitioners wished to preserve.

It was not disputed that a resolution for the voluntary winding-up of the company could not be obtained within sixty days of the date of the conveyance.

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The Court *granted* the petition, *holding* that it was for the interest of the creditors to grant a compulsory order, in respect (1) that reconstruction would not be hindered by such an order; and (2) that it was questionable if the right to challenge the conveyance would be preserved if the company were to be wound up voluntarily under a resolution to be passed by it.

JOHN DALRYMPLE BELL AND OTHERS, trustees of the late Robert Bell, on 3d October 1900, presented a petition for an order to have the Holmes Oil Company, Limited, wound up by the Court.

The petitioners averred that the company was unable to pay its debts, and that they were creditors of the company to the extent of £1268 in respect of arrears of rents and lordships. They also averred that the company was unable to keep its workings in good order, and had permitted the mines to become flooded, and that they were entitled to a further sum of £3000 as damages on that account.

On 16th October 1900 the company lodged answers averring that the necessity for winding-up was not disputed, and that a meeting of the shareholders had been called for the purpose, if so advised, of passing a special resolution for winding-up, and that the earliest date on which that meeting could be held was the 31st of October. They averred further that a meeting of creditors had been called for 16th October, and that "in the meantime it is believed that the interests of the company and its creditors generally might be seriously prejudiced if the company were forced into a judicial liquidation, as the prospects of reconstruction would be much diminished thereby, and the respondents respectfully crave that the proceedings in the present petition should be sisted until after the meetings of creditors and shareholders have been held. It is accordingly desirable that the wishes of the creditors as to the method of winding-up and as to the liquidator to be appointed should be ascertained before any order is made by the Court."

On 22d October 1900 answers were lodged for John Wood, Limited, Glasgow, and others, who averred that they were creditors of the company to the extent of £3103, 19s. 8d., being a large majority in value of the whole creditors; that at the meeting held on 16th October they had appointed a committee, and that "the committee has not had time to complete its inquiries into the position of the company and into the prospect of a successful reconstruction; but they will be in a position to report to the creditors on these matters shortly. At this meeting and at the shareholders' meeting, which has been convened for the 31st inst., the question of voluntary liquidation will also be determined."

As shewing cause why the delay asked for should not be granted, the petitioners produced a disposition by the company of a considerable part of its heritable property in favour of the Royal Bank of Scotland, one of the creditors, dated 15th and recorded 17th August 1900.

Argued for the petitioners;—It was not a mere matter of discretion whether the Court would order a winding-up where a company was unable to pay its debts. The order would be granted unless there were no assets available for payment of debts, or unless it clearly appeared that the company was in a position to retrieve itself, and that it would be for the advantage of the creditors that it should be carried on.[1] There were three sets of circumstances (generally concur-

[1] *In re* Chapel House Colliery Co., 1883, L. R., 24 Ch. Div. 259 (Bowen,

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ring) in which such petitions had been refused, none of which was present here, viz., (1) where a large majority of creditors were opposed to winding-up, (2) where the company was in a position to retrieve itself, and (3) where the petitioning creditor could take no advantage by the order. Further, if there were to be voluntary winding-up, the bank, in virtue of the conveyance produced, would obtain a preference to the prejudice of the other creditors, in respect that the resolution to wind up voluntarily, which by section 130 of the Act of 1862 was the date of the commencement of such a winding-up, could not take place within sixty days of the date of the said conveyance. On the other hand, by sec. 84 of the Act of 1862,* a winding-up by the Court dated from the presentation of the petition, and such a preference would be prevented. These provisions were not affected by anything in sec. 3 of the Act of 1886,† which related

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L. J., p. 269); Gardner & Co. v. Link, July 11, 1894, 21 R. 967; *In re* Krasnapolsky Restaurant, &c., Co., L. R. [1892], 3 Ch. 174; *In re* The General Rolling Stock Co., 1865, 13 W. R. 423.

*The Companies Act, 1862 (25 and 26 Vict. c. 89):—

"79. A company under this Act may be wound up by the Court as hereinafter defined, under the following circumstances (that is to say):—

"(4) Whenever the company is unable to pay its debts.

"84. A winding-up of a company by the Court shall be deemed to commence at the time of the presentation of the petition for the winding-up.

"130. A voluntary winding-up shall be deemed to commence at the time of the passing of the resolution authorising such winding-up.

"147. When a resolution has been passed by a company to wind up voluntarily, the Court may make an order directing that the voluntary winding-up should continue, but subject to such supervision of the Court, and with such liberty for creditors, contributories, or others, to apply to the Court, and generally upon such terms and subject to such conditions as the Court thinks just.

"149. The Court may, in determining whether a company is to be wound up altogether by the Court or subject to the supervision of the Court, in the appointment of liquidator or liquidators, and in all other matters relating to the winding-up subject to supervision, have regard to the wishes of the creditors. In the case of creditors, regard shall be had to the value of the debts due to each creditor, and in the case of contributories, to the number of votes conferred on each contributory by the regulations of the company.

"164. Any such conveyance, mortgage, delivery of goods, payment, execution, or other act relating to property as would, if made or done by or against any individual trader, be deemed in the event of his bankruptcy to have been made or done by way of undue or fraudulent preference of the creditors of such trader, shall, if made, or done by or against any company, be deemed, in the event of such company being wound up under this Act, to have been made or done by way of undue or fraudulent preference of the creditors of such company, and shall be invalid accordingly; and for the purposes of this section the presentation of a petition for winding-up a company shall in the case of a company being wound up by the Court or subject to the supervision of the Court, and a resolution for winding-up the company shall in the case of a voluntary winding-up be deemed to correspond with the act of bankruptcy in the case of an individual trader; and any conveyance or assignment made by any company formed under this Act of all its estate and effects to trustees for the benefit of all its creditors shall be void to all intents."

† The Companies Act, 1886 (49 Vict. c. 23), sec. 3.

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only to diligence. There was no reason why reconstruction should not be just as easy under compulsory as under voluntary liquidation.

Argued for the respondents;—The petitioners were not entitled to an order *ex debito justitiæ* merely because the company could not pay its debts. The Court had complete discretion.[1] Here there was a large majority of the creditors opposing a compulsory winding-up because of the expense and greater difficulty of realising and reconstructing under an official liquidator, and their wishes should be given effect to. The respondents did not ask that the petition should be refused, but merely that consideration should be delayed for a fortnight in order that they might present a note in the petition for an order for voluntary liquidation under supervision, and if this were granted it would be effectual as from the date of presenting the petition, and no new preferences could be given in the meantime.[2] The alleged preference would be further struck at by sec. 3 of the Act of 1886.[3] With regard to the damage by flooding, no further damage could ensue from delay, as the water was now at its highest. It would only cost £150 at most to pump it dry.

Lord Trayner.—This is an application for an order for the compulsory winding-up of the respondent company. The application is made by a creditor, and it is admitted that the company cannot pay its debts. In these circumstances the Companies Acts entitle the petitioning creditor to the order now asked, unless there be grounds which would induce the Court to refuse, or postpone granting it. I am of opinion that the order prayed for should be granted. The only grounds on which we were asked by the respondents (creditors) to refuse the order for compulsory winding-up were these:—(1) That the great body of the creditors desired to wind up voluntarily and under supervision of the Court; and (2) that they hoped to carry out a plan of reconstruction which would be beneficial (if effected) to all concerned. From the facts before us, it is open to reasonable doubt whether a plan of reconstruction is at all feasible, but if it is, it will not be hindered by the order for compulsory winding-up. The first ground I have referred to is one to which the Court will always attach considerable weight. But it appears to me that the interest of the creditors is more likely to be preserved than injured by the granting of the compulsory order. In saying this, I allude principally to the fact that the company have executed a conveyance in favour of one of their creditors affecting materially the value of the assets available for the general body of creditors. Now, the right to challenge that conveyance (having regard to the date on which this petition was presented), will be preserved if the order now asked is granted, whereas it is at least questionable whether that right of challenge would be preserved if the company was wound up voluntarily under resolution to that effect now or hereafter passed by the company.

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[1] Buckley on the Companies Acts (7th ed.), p. 288; *In re* Brighton Hotel Co., 1868, L. R., 6 Eq. 339; *In re* Western of Canada Oil Lands and Works Co., 1873, L. R., 17 Eq. 1.

[2] Drysdale and Gilmour v. Liquidator of International Exhibition, Nov. 13, 1890, 18 R. 98; Pattisons, Limited, v. Kinnear, Feb. 4, 1899, 1 F. 551.

[3] The Companies Act, 1886 (49 Vict. c. 23), sec. 3.

The LORD JUSTICE-CLERK and LORD MONCREIFF concurred. No. 8.

LORD YOUNG was absent.

THE COURT granted the prayer of the petition. Oct. 27, 1900. Bell's Trustees v. The Holmes Oil Co.

DRUMMOND & REID, S.S.C.—BEVERIDGE, SUTHERLAND, & SMITH, S.S.C.—DAVIDSON & SYME, W.S.—Agents.

DAVID COCHRANE, Appellant.—*Salvesen, Q.C.—Sandeman.* No. 9.
DAVID TRAILL & SONS, Respondents.—*Gleyg—W. Thomson.*

Nov. 1, 1900. Cochrane v. Traill & Sons.

Master and Servant—Workmen's Compensation Act, 1897 (60 *and* 61 *Vict. c.* 37), *Sched. II., sec.* 8—*A. S., 3d June* 1898, *sec.* 7 (*a*)—*Registration of Memorandum of Agreement—Application to Sheriff for Warrant—Stated Case—Competency.*—Where a Sheriff is applied to under Sched. II., sec. 8, of the Workmen's Compensation Act, 1897, and relative Act of Sederunt, 3d June 1898, sec. 7 (*a*), for a special warrant to register a memorandum of agreement, the genuineness of which is disputed, he is not acting as arbiter under the Act, and an appeal by stated case from any order pronounced by him in such an application is incompetent.

(SEE *Cochrane* v. *Traill & Sons*, 2 F. 794.) 1ST DIVISION.

On the 4th of January 1900, David Cochrane, lumper, Shore, Kincardine-on-Forth, sent for registration to the Sheriff-clerk at Falkirk a memorandum of agreement under Schedule II., sec. 8, of the Workmen's Compensation Act, 1897, and sec. 7 (a) of the Act of Sederunt, 3d June 1898.* The memorandum set forth that the

* The Workmen's Compensation Act, 1897 (60 and 61 Vict. cap. 37), Sched. II., sec. 8, provides as follows:—"Where the amount of compensation under this Act shall have been ascertained, or any weekly payment varied, or any other matter decided under this Act, either by a committee or by an arbitrator, or by agreement, a memorandum thereof shall be sent, in manner prescribed by rules of Court [Act of Sederunt] by the said committee or arbitrator, or by any party interested, to the registrar of the County Court [the Sheriff Clerk] for the district in which any person entitled to such compensation resides, who shall subject to such rules [Act of Sederunt], on being satisfied as to its genuineness, record such memorandum in a special register without fee, and thereupon the said memorandum shall for all purposes be enforceable as a County Court [Sheriff Court] judgment; provided that the County Court Judge [Sheriff] may at any time rectify such register."

By section 14 it is provided that in the application of this Schedule to Scotland the words indicated above in square brackets should be substituted for those in the text.

The Act of Sederunt of 3d June 1898 provides by sec. 7 (*a*) as follows:—"The memorandum as to any matter decided by a committee or by an arbitrator, other than a Sheriff, or by agreement, which is by paragraph 8 of the Second Schedule appended to the Act required to be sent to the Sheriff-clerk, shall be as nearly as may be in the form set forth in Schedule A appended hereto. Where such memorandum purports to be signed by or on behalf of all parties interested, or where it purports to be a memorandum of a decision, or award of a committee, or of an arbitrator agreed on by the parties, and to be signed in the former case by the secretary, or by at least two members of the committee, and in the latter case by the arbitrator, the Sheriff-clerk shall proceed to record it in the special register to be kept by him for the purpose without further proof of its genuineness. In all other cases, he shall before he records it send a copy (for which, unless it is supplied to him along with the

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applicant had been injured on 9th September 1898 while in the employment of Messrs David Traill & Son, stevedores, Grangemouth, that they had admitted liability, and had on or about 7th October 1898 "agreed to pay to the applicant compensation at the rate of 14s. a week from the first fortnight after the said accident until the applicant should be able to resume work and earn full wages." After communicating with Messrs David Traill & Son, the Sheriff-clerk refused to register this memorandum, on the ground that its genuineness was disputed, and Cochrane applied to the Sheriff-substitute (Russell Bell) for a special warrant for registration.

In this application the Sheriff-substitute sustained a preliminary plea against granting the application, and stated a case at the instance of Cochrane, in which the facts and procedure were set forth as follows:—

"In May 1899 the present petitioner raised an action in the Court of Session against the respondents, in which he concluded for payment of the same weekly sum in respect of the same bodily injury, and under the same conditions as contained in the present memorandum of agreement, in terms of the Workmen's Compensation Act. While that action was depending in the Inner-House the aforesaid memorandum of agreement was transmitted to the Sheriff-clerk of this Court for registration. After communicating with the respondents the Sheriff-clerk refused to register the agreement, on the ground that its genuineness was disputed. The action in the Court of Session was dismissed by the Judges of the Second Division on 16th March last, with expenses.[1]

"The respondents pleaded that the present application should not be entertained until the petitioner had paid to the respondents the taxed expenses of his unsuccessful action in the Court of Session.

"I sustained that plea.

"The question of law for the opinion of the Court is, whether it was competent for the Sheriff, as arbitrator, to make it a condition of entertaining the present application, that the expenses of the foresaid action in the Court of Session should be paid?

"This case as adjusted by the parties is stated by me."

On the case coming up for hearing, objection was taken to its competency, on the ground that the Sheriff was not acting as arbitrator in the application in question.

Argued for the appellant;—The objection to the competency ought to have been taken in the Single Bills. The case had been adjusted by the parties, and this implied a waiver of any objection to the competency. Section 1 (3) of the Act was wide enough to cover an application for a warrant to register a memorandum, because it was a

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memorandum, he shall be allowed to charge at the rate of 1s. per sheet), to the party or parties interested (other than the party from whom he received it) in a registered letter containing a request that he may be informed within a reasonable specified time whether the memorandum and award (or agreement) set forth therein are genuine; and, if within the specified time he receives no intimation that the genuineness is disputed, then he shall record the memorandum without further proof, but if the genuineness is disputed he shall send a notification of the fact to the party from whom he received the memorandum, along with an intimation that the memorandum will not be recorded without a special warrant from the Sheriff."

[1] 2 F. 794.

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"proceeding under this Act as to liability to pay compensation." It was because the enforcement of an agreement to pay compensation was regarded as a proceeding under the Act that the Court refused to entertain the previous action for enforcement of the agreement at common law.[1] To hold this appeal incompetent would therefore mean that the applicant was to be deprived of all remedies and place him at the mercy of an employer who chose to dispute the agreement as soon as the time for bringing a claim under the Act expired. In whatever capacity the Sheriff acted his decision was subject to review by the Court, and ought, therefore, to be dealt with on the merits, irrespective of the form of the appeal. On the merits, it was clear that what the Sheriff had done was wrong. The cases cited on the other side had no bearing. The case of *M'Murchy*[2] went upon the ground that the pursuer ought to have amended his record, and could be in no better position by bringing another action. The expenses in the Court of Session action was a debt quite unconnected with the application to the Sheriff, and it would be extravagant to hold that a debtor could not sue his creditor except under condition of paying up his debts.

Argued for the respondent;—Under sec. 8 of Schedule II. the duties of the Sheriff were purely ministerial. He had no jurisdiction to inquire whether there was an agreement if this was disputed. The previous case between the same parties in the other Division[1] did not decide that an action to enforce an agreement to pay compensation was incompetent at common law. It was held that the action in that case was so framed as to amount to a claim for compensation under the statute, and that an action to enforce such a claim was incompetent. But if such an inquiry was competent, the Sheriff became an arbiter or Judge, and was entitled to deal incidentally with a preliminary objection, such as was sustained by the Sheriff in this case. These expenses arose in prosecuting the same claim as that to which the memorandum related. In these circumstances, it was proper that the expenses of the unsuccessful proceedings should be paid before other proceedings were instituted.[3] In the case of *Edwards* v. *Godfrey*,[4] which arose under section 4 (1) of the Act, there were two grounds of decision—(1) that the workman was put to his election between an ordinary action and a claim for compensation, and (2) that he could not raise a second action without paying expenses in the first. It was held competent for the arbiter in that case to look at what had taken place in another Court. The case of *Irvine* v. *Kinloch*[5] shewed that a Judge had power to deal with expenses in a cognate claim.

At advising,—

LORD ADAM.—This case bears to be a case stated by the Sheriff of Stirling in the matter of an arbitration between the appellant and respondents under the Workmen's Compensation Act, 1897.

From the facts set forth in the case, it appears to be a case stated in an

[1] Cochrane v. Traill & Sons, March 16, 1900, 2 F. 794.

[2] M'Murchy v. Maclullich, May 21, 1889, 16 R. 678.

[3] Irvine v. Kinloch, Nov. 7, 1885, 13 R. 172; M'Murchy v. Maclullich, May 21, 1889, 16 R. 678; Portobello Pier Co. v. Clift, March 16, 1877, 4 R. 685.

[4] L. R. [1899], 2 Q. B. 333.

[5] 13 R. 172.

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application to the Sheriff at the instance of the pursuer (appellant) to grant warrant to record in the Special Register of Courts kept for the purpose an alleged memorandum of agreement between the pursuer and defender, sent for registration by the pursuer in terms of the said Act and relative Act of Sederunt.

It further appears that the memorandum of agreement had been sent to the Sheriff-clerk for registration, but that he, after communicating with the respondents, refused to register it on the ground that its genuineness was disputed.

It further appears that the Sheriff sustained a plea to the effect that the application should not be entertained until the appellant had paid to the respondents the taxed expenses of an action in the Court of Session relating to the same matter, in which he had been unsuccessful; and the question of law which we are asked to answer is, whether it was competent for the Sheriff, as arbiter, to make it a condition of entertaining the application that the expenses of that action should be paid?

The provisions which regulate the registration of a memorandum will be found in paragraph (8) of the second schedule of the Act, which enacts that where the amount of compensation under the Act shall have been ascertained, either by a committee or by an arbitrator or by agreement (as in this case), a memorandum thereof shall be sent, in manner prescribed by Act of Sederunt, by said committee or arbitrator, or by any party interested, to the Sheriff-clerk of the district in which the person entitled to such compensation resides, who shall, subject to the rules prescribed by Act of Sederunt, on being satisfied of its genuineness, record such memorandum in a special register.

Section 7 (*a*) of the Act of Sederunt provides that where, as is alleged in this case, the compensation has been settled by agreement, and the memorandum does not purport to be signed by or on behalf of all parties interested, the Sheriff-clerk shall communicate with the other party or parties interested; and if it shall appear that the genuineness of the memorandum is disputed, shall send a notification of the fact to the party from whom he received the memorandum, with an intimation that the memorandum will not be recorded without a special warrant of the Sheriff.

The Sheriff-clerk having ascertained that the genuineness of the memorandum was disputed, refused to register it without a special warrant of the Sheriff, hence the present application.

It appears to me to be clear that the only issue raised under such an application is the genuineness of the memorandum. It is only after the amount of compensation has been determined that the memorandum is sent for registration, and the Sheriff has no power to increase or diminish the amount, or to attach conditions to its registration. If he is satisfied of its genuineness he must grant warrant to register it.

It further appears to me that the application is in no sense an application to the Sheriff as arbitrator under the Act.

The cases in which there may be arbitration under the Act will be found in section 1 (3), where it is provided, that when any question arises as to the liability to pay compensation, or as to the amount or duration of compensation, it shall, if not settled by agreement, be settled by arbitration; in

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section 1 (*a*) (2) of the first schedule, where it is provided that, in the case of an accident resulting in death, the amount of compensation payable to persons partially dependent on the deceased shall, in the absence of agreement, be determined by arbitration; in section 5 of the same schedule, where it is provided that any question as to who is a dependant, or as to the amount payable to each dependant, shall, in the absence of agreement, be settled by arbitration; and in sections 12 and 13 of the same schedule, which provide respectively that in the case of a weekly payment being reviewed or redeemed on payment of a slump sum, the amounts payable shall, in default of agreement, be settled by arbitration.

These are the only cases, so far as I know, of arbitrations under the Act, but there are no such questions raised in this case—the only question being, whether a certain memorandum shall be registered or not.

The application is accordingly, in my view, simply an application to the Sheriff in the exercise of his ordinary common law jurisdiction, and the procedure therein must be regulated by the forms and rules appropriate to such proceedings. If it is sought to bring under review an interlocutor or judgment of the Sheriff, that must be done in the ordinary way. Under section 14 (*c*) of the second schedule it is only where an application is made to the Sheriff as arbitrator that it is competent for the parties to require him to state a case on any question of law determined by him. But, as I have already said, that is not the nature of the present application.

I am of opinion, therefore, that this stated case should be dismissed as incompetent, and therefore that we cannot entertain the question of law which we are asked to decide. Perhaps, however, what I have had occasion to say may sufficiently indicate what my answer to the question would have been if competently before us.

The LORD PRESIDENT and LORD M'LAREN concurred, the LORD PRESIDENT intimating that LORD KINNEAR (who was present at the hearing but absent at the advising) also concurred.

THE COURT dismissed the case on appeal as incompetent, and found neither party entitled to expenses.

WM. B. RAINNIE, S.S.C.—MACPHERSON & MACKAY, S.S.C.—Agents.

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LILLIAS WALLACE SMITH OR LAING, Pursuer (Respondent).—*Watt, Q.C.—Morton.*
YOUNG & LESLIE, Defenders (Appellants).—*Campbell, Q.C.—Glegg.*

Master and Servant—Workmen's Compensation Act, 1897 (60 *and* 61 *Vict. c.* 37), *sec.* 7—*Factory—Machinery on board lighter—Dock—Factory and Workshop Act*, 1895 (58 *and* 59 *Vict. c.* 37), *sec.* 23.—The Factory and Workshop Act, 1895, sec. 23, enacts that certain specified provisions of the Factory Acts, 1878 to 1895, "shall have effect as if (*a*) every dock, wharf, quay, and warehouse, and so far as relates to the process of loading or unloading therefrom or thereto, all machinery and plant used in that process . . . were included in the word 'factory' . . ."

The Workmen's Compensation Act, 1897, which provides for compensation to persons injured while employed in or about a "factory," enacts, sec.

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7, that the word "factory" "includes any dock, wharf, quay, warehouse, machinery, or plant to which any provision of the Factory Acts is applied by the Factory and Workshop Act, 1895."

A lighter and machinery thereon, the property of and worked by stevedores, was employed in raising goods from the hold to the deck of a vessel moored between the lighter and a quay, the goods being thereafter transferred to the quay, not by the stevedores, but by dock workmen.

Held (*diss.* Lord Young) that sec. 23 of the Act of 1895 did not apply either to the lighter or to the machinery thereon, and that therefore they did not constitute a "factory" in the sense of the Workmen's Compensation Act, 1897; and further, that the process which was being performed by the lighter and its machinery was not one of unloading to a quay in the sense of the Act of 1895.

2D DIVISION. Sheriff of the Lothians and Peebles.

IN an arbitration under the Workmen's Compensation Act, 1897, between Mrs Lillias Laing, Leith, and Messrs Young & Leslie, stevedores, Leith, the Sheriff-substitute (Maconochie) decerned for £234 for Mrs Laing herself and her pupil children in respect of the death of her husband John Laing.

The following case was stated by the Sheriff-substitute at the request of Messrs Young & Leslie:—

"The facts proved or admitted are as follows:—

"On 1st November 1899 Laing was in the employment of the appellants as donkey-engineman on board one of their lighters lying in the Leith Docks. He had been in their employment for three years prior to that date, and during the whole of that period he was earning wages at the rate of 30s. per week. On said 1st November Laing was in sole charge of one of the appellants' lighters, and was employed under the defenders in assisting, by means of the donkey-engine on the lighter, in unloading the ship 'Nerano,' which was lying alongside the Edinburgh Dock jetty in Leith Docks. The 'Nerano' was lying close to the jetty, and the lighter was lying outside, and alongside of her. On board the lighter there was a donkey-engine and boiler worked by the deceased, and close to the winch of the engine there was a pump for pumping out water which leaked into the lighter's hold. The lighter was made of the hull of an old fishing-boat, out of which the mast had been taken. She had no means of propelling herself through the water, and when it was wished to move her from one part of the dock to another she was dragged along by means of a rope carried to the jetty. The lighter was unable to navigate without external assistance, and as a general rule did not leave the Leith Docks, but occasionally she was towed by tugs to Granton and other ports in the Firth of Forth to be used there. She was never inspected by Her Majesty's Inspector of Factories. When assisting to discharge cargo from the 'Nerano' a chain or rope attached to the donkey-engine on the lighter was passed over a pulley on to the deck of the vessel and was led into the hold. The cargo was then raised by the engine to the level of the vessel's deck, and at that stage, the cargo being grain, it was put into bags by dock workmen, and, after being weighed on board, was conveyed by them to waggons on shore. The engine was not used in the conveyance of the bags on shore. During the said operations the donkey-engineman never left the lighter to assist on board the vessel or on shore. About 12.30 P.M., on said 1st November, there was some delay in getting forward waggons to convey away the grain unloaded from the 'Nerano,' and the donkey-engine consequently stopped working for some time. During said slack time

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the deceased being anxious to pump out the hold of the lighter, leant over the side with a bucket in his hand in order to bring up water to 'fang' the pump, *i.e.*, to make it draw. It was part of his duty to pump out the lighter twice a day, and that was frequently done on all the appellants' lighters during such slack times, though it was usually done in the morning and evening. It was necessary for the deceased to bring up water from the dock for the purpose of making the pump draw. While leaning over the side of the lighter the deceased, in some unexplained way, overbalanced himself, fell into the water, and was drowned. . . .

"On these facts I found in point of law— . . . (2) that the work in which the deceased was engaged at the time of the accident was an employment to which the Act applies; and (3) that the accident arose out of and in the course of his said employment, and accordingly I pronounced judgment on 26th February 1900, finding that the appellants were liable in compensation to the respondent in terms of said Act. . . .

"The question of law for the opinion of the Court is,—Whether the accident to the deceased arose out of and in the course of an employment within the meaning of section 7 of the Workmen's Compensation Act, 1897?"

Argued for the appellants;—There was no distinction between this case and the cases where it was held that machinery on board a ship was not a "factory" in the sense of the Act.[1] The lighter was a "ship,"[2] and formed no part of the dock. Loading from a lighter was not loading from a dock.[3] The provisions of the Factory Acts did not apply to such subjects as ships, and it was only subjects to which these provisions did apply that could be "factories" in the sense of the Workmen's Compensation Act.[4] In any event, the process of unloading here, so far as the lighter was concerned, ended with the deck of the ship.

Argued for the respondents;—The accident happened on, in, or about a dock. A dock includes the water within it,[5] and the lighter was therefore in, on, or about a dock. The stevedores, by bringing the lighter into the dock, were the occupiers of the dock. The lighter was not a ship; it was merely for dock work, and used for just the same purpose as a crane on shore. Further, this was machinery used in the process of unloading to a dock, though it was only the first part of the process. The appellants were occupiers of premises within a dock for the purpose of unloading ships to the dock by machinery. The decisions as to machinery in ships applied only to machinery which was wholly inside and part of the ships, and did not apply where the machinery used was outside.

LORD JUSTICE-CLERK.—The facts are that a vessel which was being

[1] Aberdeen Steam Trawling Company, Limited, v. Peters, March 16, 1899, 1 F. 786; Healy v. Macgregor & Ferguson, Feb. 20, 1900, 2 F. 634; Jackson v. Rodger & Co., Jan. 30, 1900, 2 F. 533.

[2] "The Mac," 1882, L. R., 7 P. D. 126.

[3] Flowers v. Chambers, L.R. [1899], 2 Q. B. 142; Hennessy v. M'Cabe, L. R. [1900], 1 Q. B. 491.

[4] Hall v. Snowden, Hubbard, & Co., L. R. [1899], 2 Q. B. 136; Abernethy & Co. v. Low, March 8, 1900, 2 F. 722.

[5] Haddock v. Humphrey, L. R. [1900], 1 Q. B. 609, and *per* Collins, L. J., in Hennessy v. M'Cabe, *supra*.

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unloaded at a quay had the services of an engine which was in a boat, and was brought alongside the vessel on the outer side from the quay, for the purpose of hoisting cargo from the hold of the vessel to the deck. After this had been done, the goods were taken charge of by persons whose duty it was to have the goods put off the vessel on to the quay, and who did so without the use of machinery. They put the material in bags, and took the bags on shore. The power of the engine and its winch was not used in the work of conveying the goods to the land. A man employed on board this boat fell overboard while taking up water in a pail for use on board the boat.

In these circumstances, the question for decision is whether the Workmen's Compensation Act applies in respect of the provision in the Factory and Workshop Act of 1895, by which the Factory Acts have effect as if "every dock, wharf, quay, and warehouse, and so far as relates to the process of loading or unloading therefrom or thereto, all machinery and plant used in that process . . . were included in the word factory." Thus, if the claim is to be successful, two things are essential—(First) there must have been a process of loading or unloading from or to a dock, wharf, quay, or warehouse, (second) there must have been such appliances used as fall under the description of "machinery and plant" used in so loading or unloading to or from a dock, &c.

I am of opinion that neither of these essentials is to be found in this case. The work in which the deceased was engaged was not the work of loading or unloading to or from a quay, and the machinery and plant being used was not being used in loading or unloading to or from a quay. I hold that work done within the ship, and not by machinery on the quay or dock, does not fall within the statute. It has been decided in more than one case quoted to us in argument that the Act does not apply where work is being done by machinery on board the ship and within the ship. I cannot hold that there is any difference here. For the ship's purposes the defenders' vessel is brought alongside, and work is done in the ship by aid of machinery in the defenders' vessel. I cannot hold that that is work of loading or unloading to or from a dock or quay. I do not see how this could be held, unless it could be held that a vessel itself could be deemed and held to be a dock under the Acts, a view which in previous decisions has been held to be untenable. Here there was no machinery or plant being used in unloading to the dock or quay, and therefore I cannot see how the Acts can be held to apply to the effect of holding that the dock or quay was at the time a factory in terms of the Acts.

I am, therefore, of opinion that the question put in this special case should be answered in the negative.

Lord Young.—I am sorry to think that there should be a difference of opinion in connection with this case, but the fact that there is such a difference shews that the question is attended with some difficulty. The Sheriff is of opinion that the case falls under the statute, the appellants being in occupation of a dock where machinery was being used for the purpose of loading and unloading. The facts stated by the Sheriff are these:—(His Lordship read extracts from the stated case). It would not

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occur to me as doubtful that the raising of the cargo from the hold to the deck was part of the process of unloading to the dock, although it was not the whole process, as after being raised the cargo had to be carried to the quay on men's backs. I therefore think that the machinery on board this lighter—which I cannot regard as in a different position whether lying on one side or other of the ship—was being used for the purpose of unloading the cargo on to the quay.

I should not think it doubtful that, if this old lighter had been placed on the quay, and the machinery in it used for the purpose of lifting the cargo from the hold of the vessel to the deck, the machinery would have been machinery used for unloading the cargo on to the quay, and used by a stevedore whose business it was to do so. Does it make any difference that for greater convenience the lighter is in the water close to the quay?

That the case falls within the obvious sense and meaning of the Act of making provision for a workman incapacitated from work, or for his widow and children if he happens to be killed—provision to enable them to keep out of the poor-house—is plain to the most elementary mind. There may be a technical question whether the process of raising the cargo from the hold to the deck is part of the process of unloading the cargo from the ship to the quay. The Sheriff thinks it is, and I concur with him.

I therefore agree with the Sheriff that the case is not only within the policy and meaning of the Act, but also free from any good technical objection.

LORD MONCREIFF.—The respondent's action depends upon her being able to establish that the lighter on which the deceased was working at the time of his death was a place, or that the engine upon it was machinery or plant, to which any provision of the Factory Acts is applied by the Factory and Workshop Act, 1895, and was thus a factory within the meaning of section 7 of the Workmen's Compensation Act, 1897.

The clause relied on is the 23d section of the Act of 1895, which makes certain provisions of the Factory Acts as to fencing machinery, inspection, rules as to dangerous employments and machines, and so forth, applicable to "(*a*) Every dock, wharf, quay, and warehouse, and so far as relates to the process of loading or unloading therefrom or thereto all machinery and plant used in that process."

I understand that the respondent's contention is either that the lighter was part of a dock or quay in the sense of the clause; or at least—and on this reliance is chiefly placed—that the donkey-engine was machinery used in the process of unloading from the ship "Nerano" to the jetty.

The matter is really concluded by authority both in this country and in England. It was decided in the case of the *Aberdeen Steam Trawling Company* v. *Peters*[1] that one of the crew of a vessel, who in the process of unloading in dock was injured by a steam-winch on board the trawler, had no claim under the statute. In the subsequent case of *Healy* v. *Macgregor & Ferguson*[2] in this Division of the Court, it was held that a stevedore had no claim under the statute in respect of injuries caused by a steam-winch on board a vessel which was being unloaded in dock.

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[1] 1 F. 786.

[2] 2 F. 634.

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In England there are the cases of *Flowers* [1] and *Hennessy* v. *M'Cabe*,[2] in which it was held that loading a cargo from a lighter was not equivalent to loading it from a dock.

If, then, this operation of raising the cargo from the hold had been conducted by a steam-winch belonging to the "Nerano," and even if the steam-winch had been used for the purpose of putting the cargo on shore, the pursuer would, on the cases, have had no claim. I confess that I can see no distinction between the steam-winch of a vessel which is being unloaded and a steam-winch or a donkey-engine on board another vessel which is lent or hired for the purpose of raising or unloading the cargo. As I read the decisions to which I have referred, machinery, in order to bring it within the scope of the Workmen's Compensation Act, must be shewn to be machinery attached to or upon the dock or quay. Now, this lighter on which the engine stood was not part of the dock, and did not belong to the Dock Commissioners. It and the engine were the property of the appellants, and although they happened to be lying in Leith Docks on the day of the accident, they might have been removed elsewhere next day.

But apart from decision I should have reached the same result. I think it is sufficient that the donkey-engine on board the appellants' lighter was not engaged in unloading the cargo of the "Nerano" to the quay. From its position outside the "Nerano" it could not have done so. In point of fact it was merely engaged in raising the grain from the hold of the vessel to the deck. Before the grain could be put on the quay, another process had to be gone through; it was put into bags, not by the appellants' workmen, but by the dock workmen, and thereafter it was taken ashore, not by means of any machinery, but by the dock workmen.

Secondly, in order to bring any of the premises or machinery mentioned in the clause quoted within the Workmen's Compensation Act, 1897, they must be shewn to be premises or machinery to which the provisions of the Factory and Workshop Acts are applied. Now, it is found as a fact in the case that the appellants' lighter was never inspected by Her Majesty's Inspector of Factories. It was, I think rightly, not regarded as falling within the scope of those Acts. The premises, works, and machinery to which (as factories) the Workmen's Compensation Act and Factory and Workshop Acts apply have all a certain degree of immobility which admits of the Factory Acts being applied to them. Notably the Factory Acts do not apply to subjects such as a ship, a sufficient reason being that it would not be practicable to apply to a ship (which might be at one place one day and a hundred miles away the next) the provisions as to inspection, &c., contained in the Factory and Workshop Acts.

On the whole matter, although I am not surprised that the Sheriff-substitute should have had difficulty in construing this perplexing statute, I am of opinion that the accident which happened to the deceased did not arise out of and in the course of an employment within the meaning of the Workmen's Compensation Act, 1897. I would therefore answer the question in the negative.

[1] [1899], 2 Q. B. 142.

[2] [1900], 1 Q. B. 491.

LORD TRAYNER was absent. No. 10.

THE COURT answered the question in the negative, and remitted the case to the Sheriff Court to be dismissed. Nov. 2, 1900. Laing v. Young & Leslie.

JOHN N. RAE, S.S.C.—ANDERSON & CHISHOLM, Solicitors—Agents.

FRANCIS DUNNETT DUNDAS, Pursuer (Respondent).—*Watt, Q.C.*—*Christie.* No. 11.
LIVINGSTONE & COMPANY AND ROBERT LUMSDEN, Defenders (Appellants).—*Salvesen, Q.C.*—*R. S. Horne.* Nov. 2, 1900. Dundas v. Livingstone & Co.

Reparation—Slander—Privilege—Malice.—In an action of damages for slander, at the instance of a commercial traveller against his former employers, the pursuer averred that he commenced his engagement with the defenders at a fixed salary and commission, and that in implement of a condition of his engagement the defenders were insured with an insurance company under a policy taken out by him against possible defalcations by him; that, subsequently, his remuneration was changed by the defenders to commission alone; that this change in his remuneration avoided, to the defenders' knowledge, the policy of insurance; that thereafter the defenders, in the knowledge that they had no claim under the policy, falsely stated to the insurance company that the pursuer had embezzled sums of money belonging to them; and that they had done so with a view to hampering the pursuer in getting other employment in which he might use his knowledge in competition with them.

The defenders, who denied that the policy was avoided by the change of remuneration, pleaded privilege, and contended that malice should be put in the issues.

Held that there was a *prima facie* case of privilege, and that malice must be inserted in the issues.

THIS was an action of damages at the instance of Francis Dunnett Dundas, commercial traveller, Leith, against Messrs Livingstone & Company, wholesale whisky merchants, Musselburgh, and Robert Lumsden, accountant, Edinburgh, the auditor for Messrs Livingstone & Company, jointly and severally, or severally. 2D DIVISION. Lord Kincairney.

The pursuer averred that in September 1898 he was engaged by the defenders Livingstone & Company to travel for them at a fixed salary, with a commission on all sales; that it was made a condition of his engagement that he should insure himself with a guarantee company for £150, and that he accordingly took out a policy for that amount in favour of the defenders, with the Life and Health Assurance Association, Limited; that in May 1899 the defenders changed his remuneration to a commission only on all sales, in place of the fixed salary and commission originally agreed on when the insurance was effected; that thereafter, in consequence of charges of embezzlement made against him by the defenders, he left their employment.

The pursuer further averred;—(Cond. 12) "On 26th September 1899, a letter was written by the defender Lumsden, on the instructions and on behalf of the other defenders, to the Life and Health Assurance Association, Limited, with which the firm had been insured against embezzlement by pursuer. Said letter intimated that there were suspicions of irregularities in connection with pursuer's accounts. Said letter inferred, and was intended and understood to infer, a charge against pursuer of having em-

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bezzled money collected by him for the defenders Livingstone & Company. At the date of said letter the defenders were no longer insured with the said company—the policy having been to the defenders' knowledge avoided by the change in the terms of pursuer's remuneration from salary and commission to commission alone, as from 8th May 1899." (Cond. 13) "On a date between the 6th and 13th October 1899, the defender Lumsden, acting on behalf of and with instructions of the other defenders, called at said insurance company's office, 41 George Street, Edinburgh, and intimated to Mr Mitchell, the cashier to the company, that pursuer had embezzled or misappropriated considerable sums of money belonging to Livingstone & Company, and that he wished to make a claim under the policy, or used words to that meaning and effect." (Cond. 14) "Following thereupon, a statement was sent on 24th October to said company of sums alleged to have been misappropriated by pursuer. Said statement and a letter by which it was accompanied represented that the pursuer had embezzled or misappropriated the sums therein specified. The said insurance company, after several interviews had taken place between their officials and pursuer, declined to recognise the claim, and the defenders have taken no steps to substantiate it. During the whole of their communications with the insurance company and its representatives the defenders were well aware that they had no claim under the policy, and had no serious expectation that they would recover anything. They were actuated in said communications by a desire to discredit the pursuer with the insurance company, and by rendering it difficult for him to be reinsured, to hamper him in obtaining other employment in which he might use his knowledge in competition with them." (Cond. 15) "The said various charges of embezzlement made against the pursuer by the defender Lumsden, acting under instructions or within the scope of his employment and authority from the other defenders, are false, malicious, and calumnious. Said charges were, moreover, made maliciously and without any probable cause. It is untrue that pursuer has misappropriated any money entrusted to or collected by him for said defenders. On the contrary, the pursuer believes and avers, on a proper statement of the accounts between him and Livingstone & Company, there is a considerable balance of commission still due to him. The defenders were well aware that a balance against the pursuer was only brought out by debiting against salary and commissions sums which he had expended in expenses duly accounted for to them, for which he was not credited, and other sums which were not under the contract between pursuer and Livingstone & Company proper charges against him. They made said charges knowing well that pursuer was not guilty of embezzlement or dishonest misappropriation, but that the whole question between him and them was merely one of accounting."

The defenders, who denied that the effect of the change of remuneration of the pursuer was to avoid the policy of insurance, pleaded, *inter alia*, privilege.

On 20th March 1900 the Lord Ordinary (Kincairney) appointed the following to be the issues for the trial of the cause:—(1) (This issue referred to a matter which it is unnecessary to report.) "(2) Whether, on a date between 6th and 13th October 1899, the defender Lumsden did, within the office of the Life and Health Assurance Association, Limited, 41 George Street, Edinburgh, in presence and

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hearing of William B. Mitchell, cashier of the said company, say of and concerning the pursuer that he had appropriated considerable sums of money belonging to Livingstone & Company, and that they desired to make a claim against the said association in respect of said sums, under a policy dated 31st January 1899, by which said defenders were insured in respect of pursuer's intromissions, or did use other words of the like meaning and effect of and concerning the pursuer, and did thereby falsely and calumniously represent that the pursuer had dishonestly appropriated money belonging to and for which he was accountable to the said defenders; or, whether, on a date between 6th and 13th October 1899, the defender Lumsden, acting on behalf and with the instructions and authority of the defenders Livingstone & Company, did," &c. (as in the first alternative of the issue). "(3) It being admitted that the letter dated 26th September 1899, and the letter dated 24th October 1899, and the statement accompanying the same, all printed at length in the schedule hereto, and numbered Nos. 1, 2, and 3 respectively, were written and sent to the said Life and Health Assurance Company, Limited, by the defender Lumsden, acting on behalf and under the instructions of the defenders Livingstone & Company; whether the same, or any, and which of them, are of and concerning the pursuer, and falsely and calumniously represent that he had dishonestly appropriated to his own uses the sums in the said statement, being money belonging to the defenders Livingstone & Company, and for which he was accountable to them."*

The defenders reclaimed, and moved that the issues be varied by the insertion of "and maliciously" after "calumniously."

Argued for the defenders;—Where, as here, there is a *prima facie* case of privilege disclosed by the pursuer's averments, malice must be put in issue.[1] It was only where no such *prima facie* case was disclosed by the pursuer's averments that the question of privilege, with the consequent necessity for proving malice, was left for determination at the trial.[2] The defenders did not know that the change of the pursuer's remuneration had any effect on the policy of insurance, and were of opinion that it had not. But whether it had any effect or not could only be determined after a claim on the policy had been made, and before a claim could be made it was necessary to make the statements complained of. The presumption of privilege thus raised could not be elided merely by averring that the defenders made the statements "falsely," or in the knowledge that the policy was void.

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* "OPINION.—The first issue was not objected to, and must, of course, be allowed. At the debate I was much disposed to disallow the other issues, on the ground that the letters complained of were privileged, and that, having regard to the special circumstances of this case, there was no relevant averment of malice; but since the debate the pursuer has amended his record, and I think that now issues cannot be denied on these letters. I am not now prepared to say that there is no relevant averment of malice. The question, therefore, is whether privilege is disclosed by the condescendence. At the discussion I thought it was; but on this point also the record has been amended, and in consequence of that amendment I think it safer to leave the question of malice to be decided at the trial; and I shall therefore approve of issues 2 and 3. The defenders took no distinction between the case of Livingstone & Company and that of Lumsden."

[1] Laidlaw v. Gunn, Jan. 31, 1890, 17 R. 394.

[2] Reid v. Moore, May 18, 1893, 20 R. 712 (*per* Lord Trayner, p. 718).

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Argued for the pursuer;—Whether the defenders made the statements complained of in knowledge or in ignorance that the policy was void was a question of proof. If it should turn out that they made them in knowledge, there could be no question of privilege, and that question and the consequent question of proving malice should be left for determination at the trial.[1]

LORD JUSTICE-CLERK.—The only question at present in dispute between the parties is, whether as regards statements made to the company with whom the defenders had insured themselves against defalcations by the pursuer, the pursuer in taking an issue of slander must not undertake to prove specific malice. I am of opinion that in this case it is right that the word "maliciously" should be inserted. There can be no doubt that if the defenders believed that their servant had been guilty of defalcation in regard to funds in his hands to which they had right, it was their right and their duty to communicate that to the insurers, who would be called on to make good their loss. I think it was their duty, but if there could be any doubt on that matter I think it was distinctly their right. On that ground, if there was nothing else in the case, the insertion of the word "maliciously" in the issue would be imperative in my opinion. But it is said that the claim of the defenders against the insurance company had fallen, and that therefore the privilege in making the statement is excluded. That is not admitted, and we cannot know how it stands until the facts are ascertained. It may have a considerable bearing on the question of malice should it turn out at the trial that the defenders had no ground for supposing that they had a claim against the insurance company. But at present I see no ground for holding that the occasion was not privileged. It is only on a question of legal objection that it can be maintained that the defenders had lost their privilege. That cannot be accepted at this stage of the case as a ground for adjusting the issues in a particular way. I am therefore in favour of varying the second and third issues by inserting the word "maliciously."

LORD YOUNG.—I agree that if there is to be an issue the occasion was privileged, and in order to succeed the pursuer must prove malice. Of that I have no doubt whatever. The most ordinary way of proving malice is for the pursuer to shew that the defenders' statements were such as he knew to be false or had no reasonable ground for thinking to be true. But I must say that I have a very strong impression that there is here no relevant case at all, because it is well established that a mere averment of malice is not sufficient; there must be some statement of facts and circumstances upon which the averment is founded. I think there is no such statement on this record. It is indeed stated that the representations were made to the insurance company by the defenders when they knew that they had no claim under the policy against the company. But this is merely a statement that the defenders were of opinion that they had no claim at law, and that is not, according to my impression, sufficient. But no argument was submitted on this point, and it is unnecessary to decide it, although I

[1] M'Callum v. M'Diarmid, Jan. 9, 1900, 2 F. 357.

have heard learned Judges express the opinion that it was the duty of the Court, if they thought a case not relevant, to take objection to its being proceeded with.

LORD TRAYNER.—With regard to the second and third issues, the defenders move that the word "maliciously" should be inserted. This the Lord Ordinary, in adjusting the issues, refused to do, on the ground that if it appeared at the trial of the cause that the defenders were entitled to plead privilege, the pursuer would then be required to prove malice in order to succeed, and that therefore there was no necessity for putting malice in issue antecedently to the trial. In the ordinary case—that is, the most usual case—this course would be the proper one to adopt. But I think our practice on this matter is now fairly well settled, and the rule seems to be, that where upon the pursuer's record there is disclosed a *prima facie* case of privilege, malice should be put in the issue, and otherwise not. In the present case I think the record does disclose a *prima facie* case of privilege. Statements, otherwise slanderous, are considered privileged if the statement is made either in the performance of a duty or in the exercise of a right. Now, here the statements made by the defenders, and to which the second and third issues have reference, were made to an insurance company by whom the pursuer's honesty had been guaranteed, and were necessary to support the defenders' claim under the policy of insurance or guarantee. The defenders were, *prima facie*, entitled to make the statements complained of in support of the claim they were making under the policy, and were therefore privileged in making them. That being so, it follows, on the rule I have referred to, that malice should be put in issue. It is said by the pursuer that the defenders knew when they made these statements that the policy was void, and that no claim under it could be maintained, and that the statements were made, not in support of any claim, but to damage the pursuer's reputation. If this be established it may prove the malice which the pursuer avers, and entitle him to a verdict. But on this part of the case I think the pursuer must prove malice in order to succeed, and must, as I have said, take an issue that the statements complained of were made maliciously. I entertain no doubt that the pursuer has relevantly averred malice. In my view, therefore, the issues, as adjusted by the Lord Ordinary, should be varied as proposed by the defenders.

LORD MONCREIFF.—In judging whether a pursuer's averments disclose a case of privilege, it is necessary to discriminate between averments which merely imply malice and those which are sufficient *prima facie* to negative privilege. Stated broadly, the distinction to be taken is between the circumstances and occasion in and on which the words complained of were uttered, and the motives which induced the defender to use them. The relations between the pursuer and the defenders, the nature of the words used, the occasion on which and circumstances in which they were uttered—all these matters are relevant to the question whether the occasion was privileged. But the privilege of the occasion is not necessarily affected by averments as to the motives which led to the words being used

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or allegations of the defenders' dishonesty in using them. These are very material in deciding whether the words were used maliciously as well as falsely, but that is another matter. The whole question, indeed, is one of *onus*. If the word "maliciously" is inserted in the issue the pursuer may still succeed, but he must prove malice. If, on the other hand, "maliciously" is not inserted, the defenders may still succeed if they are able to shew at the trial that the occasion was privileged, and the pursuer is unable to establish malice.

Now, in the present case, I think that taking a broad view of the pursuer's averments, *prima facie* a case of privilege is disclosed. Under the policy in which the defenders were interested they were bound, under penalty of forfeiture, to intimate at once to the insurance company if they entertained any suspicions of their traveller's honesty, and this they did in the letters, which seem to me to be couched in temperate language. It is said that these statements were not made honestly, and that the defenders' sole motive in making them was not to preserve their rights under the policy, which (it is said) were already lost, but to discredit the pursuer. If this is proved it may be very good evidence of malice on the part of the defenders, but it appears to me to be extrinsic to the question whether the communication was privileged or not.

I therefore think that the second and third issues should be altered to the effect of inserting the word "maliciously."

THE COURT recalled the interlocutor reclaimed against, varied the second and third issues for the pursuer in terms of the defenders' notice, and the variations having been made, approved of the pursuer's issues as so amended, and remitted to the Lord Ordinary to proceed in the cause.

ROBERT H. PATERSON, Solicitor—H. B. & F. J. DEWAR, W.S.—Agents.

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Nov. 2, 1900.
Liverpool Victoria Legal Friendly Society v. Houston.

LIVERPOOL VICTORIA LEGAL FRIENDLY SOCIETY AND OTHERS, Pursuers (Respondents).—*Salvesen, Q.C.—T. B. Morison.*
SAMUEL HOUSTON, Defender (Reclaimer).—*F. T. Cooper—A. M. Hamilton.*

Master and Servant—Use by servant after leaving service of information obtained during service—Implied Contract—Confidentiality.—Evidence on a consideration of which it was *held* (*aff.* judgment of Lord Pearson, *diss.* Lord Young) that a person who had been the agent of a friendly society was not entitled, after he had left the society's service, to give written lists of the members of the society to the officials of a rival society.

2D DIVISION. Lord Pearson.

THE LIVERPOOL VICTORIA LEGAL FRIENDLY SOCIETY was a friendly society established in 1843, and incorporated under the Friendly Societies Acts. The society had a large business throughout Great Britain; its invested funds being over £1,000,000, and its membership about 1,500,000. Its main business was to enable the members, by means of weekly or monthly subscriptions, to ensure a payment on the death of a member or a member's child, or an endowment upon either attaining a certain age. It conducted and promoted its busi-

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ness by means of local collectors, each of whom had a separate list of members in his collecting-book, and collected on a separate round weekly or fortnightly. Each group of collectors was under the supervision of a sub-agent, who checked their collecting-books, tested the business, and made reports to the district manager.

Samuel Houston entered the service of the society in 1894, when he became a sub-agent in the Border District. In March 1896 he was appointed to a sub-agency in Fife, which included Alloa, Dunfermline, and Kirkcaldy, and the parts adjoining. This he held until February 1898, when Kirkcaldy and its neighbourhood were withdrawn from his sub-agency. His salary was £2 a-week, and his engagement was terminable on a week's notice. It was in fact terminated as on 30th March 1898 by letter from the district manager, dated 23d March 1898.

On 28th December 1898 the Society, and three persons as its trustees, raised an action against Houston, concluding for decree ordaining the defender "to deliver to the pursuers all letters, documents, or copies of documents having reference to the business of the pursuers, including all lists of members of the pursuers' society, and all extracts, excerpts, or copies made from the books, registers, or cards used in connection with the pursuers' business, and to which the defender had access while in the pursuers' employment as a sub-agent, between on or about 18th October 1894 and 30th March 1898." And in particular for decree ordaining the defender "to deliver to the pursuers all lists at present in his possession, containing the names of the members of pursuers' society who reside in Kirkcaldy, Dysart, Gallatown, Pathhead, Methil, or Leven, all in the county of Fife, and also in Alloa, in the county of Clackmannan": And further, for interdict against the defender "communicating to third parties, without the pursuers' consent or to their prejudice, any information relating to the business or affairs of the pursuers, obtained by him while acting in the employment of the pursuers": And in particular for interdict against the defender "delivering lists of the pursuers' members to the agents of the Royal Liver Friendly Society, or to any other third party"; and for £50 as damages.

The pursuers averred;—(Cond. 4) " . . . In consequence of his dismissal from the pursuers' employment, the defender conceived a violent animus against the society, and he endeavoured in various ways to injure the society's business. . . . While acting as sub-agent in Fifeshire, the defender had full access to all the books and documents belonging to the society, and he thereby obtained information on private and confidential matters connected with the society's business. . . ." (Cond. 5) "In breach of his duty and in violation of the rights of the pursuers, the defender made copies or extracts from the books and documents relating to the Fifeshire business, and in particular he made a list of the society's members in Fifeshire and in the Alloa district, which he secretly retained when his duties as sub-agent terminated. This he did for the purpose of using said lists to injure the society's business. . . ." (Cond. 6) In April 1898 the defender "called on Mr William Hawthorn Queen, Dunfermline, who is the district manager there of the Royal Liver Friendly Society, and furnished him with a list of the pursuers' members in Fifeshire. . . . The defender disclosed the said private and confidential information for the said purpose of injuring the pursuers' business. In consequence of said disclosure of

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information and names by the defender a large number of pursuers' members have been canvassed by the agents of other societies for the purpose of inducing them to leave the pursuers' society, and a considerable quantity of business has been lost to the pursuers. The defender still retains lists of the pursuers' subscribers in the Dunfermline and Kirkcaldy district, and also in the Alloa district, and the defender has frequently threatened to the society's officials to do further damage, by means of the use of said lists, to the society's business."

The defender denied these averments.

The pursuers pleaded, *inter alia*;—(1) The defender being illegally in possession of documents or copies of documents which are the property of the pursuers, and which contain private information relative to the business of the pursuers, they are entitled to decree for delivery of the same, in terms of the conclusions of the summons. (2) The defender having improperly and illegally disclosed confidential information relative to the affairs of the society to third parties, and having thereby caused loss, injury, and damage to the pursuers, they are entitled to decree of interdict, as craved.

The defender pleaded, *inter alia*;—(3) The defender having no property in his possession or under his control belonging to the pursuers, is entitled to be assoilzied, with expenses. (4) The defender not having done, and not intending to do, any of the things against pursuers for which interdict is sought, the conclusions for interdict should be refused.

There were also pleas applicable to the conclusion for damages.

On 12th April 1900 the Lord Ordinary (Pearson) after a proof, the nature of which sufficiently appears from his Lordship's opinion, pronounced this interlocutor:—"Finds that the document No. 146 of process, which is in the handwriting of the defender, contains confidential information regarding the business of the pursuers' society, which was acquired by the defender in the course of his employment as their sub-agent; and that he handed the said document to a third party in the expectation of obtaining pecuniary gain by and through the same being used adversely to the interest of the pursuers: Finds that although it is not proved that other similar documents are in the possession of the defender, the pursuers were and are in the reasonable belief and apprehension, founded on the defender's own words and acts, that he is possessed of such documents, and intends to make an improper and illegal use of them: Therefore interdicts, prohibits, and discharges the defender in terms of the conclusions of the summons: Ordains the defender to make payment to the pursuers of the sum of £5 sterling in name of damages: *Quoad ultra* dismisses the action, and decerns: Finds the pursuers entitled to expenses," &c.*

* "OPINION.—(After explaining the nature and objects of the society, and the circumstances of the defender's connection with it)—The defender's dismissal was followed in three weeks by the abrupt resignation of the two chief collectors of the district—William Brown and Robert Best. Their letters of resignation were dated 20th April; and on the following day they were appointed collectors in the same district for a rival society in the same line of business—the Royal Liver Friendly Society. This was done under an arrangement with the defender by which he recommended them to the Royal Liver officials for the appointment, and was to participate in the commission earned by them for new business, to the extent of one-third share. . . . In point of fact, he drew sums from Brown and

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The defender reclaimed, and argued;—It no doubt was the law that if a servant surreptitiously copied a list of names and addresses of customers from his master's books with the intention of using it for the purpose of obtaining orders after he left the service, he might be interdicted from so using it, or found liable in damages if he used it. But it had not been proved that the defender had copied anything from the pursuers' books. The list No. 146 of process was not a copy of any list in the books, and the result of the evidence was that the defender had compiled it from memory after he had left the pursuers' service. If that was so, the action failed. Unless he had entered into a special agreement to the contrary, a man was entitled to solicit orders from his former master's customers, if he trusted to his memory only for their names, or to hand over a list of their names to another person, if such a list was compiled from memory only. It would impose an unreasonable restraint on the freedom of trade to hold otherwise.[1]

Argued for the pursuers;—It had been proved that the defender

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Best on this head amounting to £10 or £11. Of course business diverted to the Royal Liver from the pursuers' society was 'new business' for the Royal Liver; and it is obvious that it was mainly in this direction that success was expected and was achieved. This went on for some weeks, during which the pursuers' collections in that district suffered materially; and the pursuers were put to considerable expense and trouble in sending down Mr Peel, Mr Foster, and other officials to counteract the movement.

"The defender had not since leaving the pursuers' employment entered the service of the Royal Liver, or of any other society. He took part with Brown and Best in canvassing and bringing over the pursuers' members partly for the sake of the commission I have just mentioned, and partly, I fear, to be even with the pursuers. They had brought his employment to an end on a week's notice; and they had further refused to meet a money claim which had stood over for two years, and for which, or part of which, he sued them in a Sheriff Court action, raised on 9th April. It is plain, and, in fact, the defender admits, that he thought himself badly used; and I hold it to be clearly proved by the testimony of credible witnesses, and in spite of the defender's denials, that he gave vent on several occasions in pretty strong language to threats of what he would do to the detriment of the pursuers, and the injury of their business in Fife.

"Down to this point, however, the pursuers' case discloses no good ground of action. I am not to criticise the motive of acts which are not in themselves illegal, or to decide questions of good taste, or of insurance etiquette. And the pleadings do not charge the defender either with seducing Brown and Best to break any contract with the pursuers or with diverting business from the pursuers' society by means of false representation as to the pursuers' conduct or position.

"The pursuers' case is rather this—That the defender, when he quitted the pursuers' service, was in illegal possession of confidential documents which are the property of the pursuers, and that he has since illegally disclosed their contents to third parties, to the pursuers' loss and damage. Their averment is,—that the defender having in the course of his service become intimately acquainted with the society's business, wrongfully and contrary to his duty, compiled lists of the members within his district, and kept them secretly in his possession, that he might use them afterwards for

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[1] Irish v. Irish, 1888, L. R., 40 Ch. Div. 49; British Workmen's and General Assurance Co., Limited, v. Wilkinson, June 16, 1900, 8 S. L. T., No. 60.

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had compiled the list while he was still in the pursuers' service. Even if that had not been proved, the Lord Ordinary's interlocutor was well founded for the reasons given in his opinion, and was in accordance with the authorities mentioned by the Lord Ordinary.

At advising,—

LORD JUSTICE-CLERK.—The defender in this case, who was formerly sub-agent of the pursuers' society, having while in their employment the means of seeing the lists of persons insured with the pursuers, the allegation is that he copied these lists, and after ceasing to be in their employment made use of these lists in aid of the canvassing of another friendly society to obtain the transfer of their insurers to the other company, he getting a commission on the effecting of the insurances. The defender had not in the course of his duties as sub-agent any duty requiring him to be in possession of such lists. They were the collectors' books, and, although he might see them in the course of his duties, no part of his duty required him

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his own purposes; and further, that he did so use them, with a view to his own pecuniary gain, after he had ceased to be in the pursuers' service. The pursuers further say—(though they contend that it is not necessary to their case)—that he did this at a time when he was not in the service of any rival society, and had no legitimate occasion or motive for doing it.

"It is clear that he had ample opportunity for making such lists, and also that the contents of the collecting-books are strictly confidential. Moreover (if it be necessary to add this), the collecting-books themselves are, and remain, the property of the society; and there can, in my opinion, be no question that this property extends not merely to the boards and paper, but also to the contents. It is further proved (1) that a sub-agent has not in the course of his duty any legitimate occasion for making copies of the whole or any section of a collecting-book; (2) that such copies, if made, are highly dangerous to the interests of the society. (His Lordship then referred to the conclusions of the summons.)

"The pursuers have had no large measure of success in tracing documents of a confidential character to the defender's possession. As I understand the evidence, there are no missing collecting-books; and so far as actual recoveries are concerned, their case rests on the document or list (No. 146 of process), which is in fact a list in the defender's handwriting of the surnames and addresses of a large number of the pursuers' members in Kirkcaldy and district. The defender, when examined as a haver, deponed that he never had a list of the society's members in the Kirkcaldy district or in the Alloa or Dunfermline districts. And he gives, partly in evidence and partly through his counsel, an explanation and justification of No. 146 of process, which, if it were well founded, would go far to support his main contention.

"I may here say that I am afraid I can give but little weight to the defender's testimony. He seems to me to be discredited as a witness by the mass of contradictions which his evidence presents when compared with that of several other witnesses, and notably Messrs Peel, Foster, Queen, Wilson, and Brown. These gentlemen, all of whom seemed to me credible witnesses, are contradicted by the defender at many points, and in diverse matters; and the defender, who had heard their evidence, sums up the matter thus—'They have given narrations of conversations with me, the bulk of which I now declare emphatically on oath to be absolutely untrue.' This, with the observations made upon it that the pursuers' witnesses are paid officials of the society, would point to a conspiracy against the defender, of which I can find no trace, and in the existence of

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to have possession of them or copies of them. These lists were the property of the purchasers, and in the regular possession of their canvassers. I am satisfied on the evidence that the defender did make copies of the lists, and did so with a view to put them to his own uses. Only one of these copies of lists has been recovered, No. 146 of process, which is a list of members of the pursuers' society. The Lord Ordinary has expressed his opinion that the evidence of the defender on this and cognate matters is not trustworthy, and a perusal of the evidence leads one to agree in that view. I think it is established that the defender gave the use of this list to the agent of another society, intending it to be used in the interests of that society, and necessarily against the interests of the pursuers' society. I agree with the Lord Ordinary that this was illegal. This list has been recovered by the pursuers, and therefore no order in regard to it is required. But it is a question whether they are not entitled to protection from other similar lists being used by the defender. It is clear on the evidence that the defender admitted to numerous witnesses that he had such lists. This

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which I do not believe; and I see no escape from the alternative view. I arrive at this result after giving full weight to what was urged for the defender as to the effect of the testimony of Mrs Reid and the Nobles.

"Accepting, as I do in the main, the account given by the pursuers' witnesses, I find the facts established as to the list No. 146 of process are as follows: It was handed by the defender on 21st April to Mr Queen (then agent for the Royal Liver Society), as a list of the pursuers' members in the Kirkcaldy district, in order to be used for diverting members from the one office to the other, the defender adding that he would expect one-third of the usual 'procuration fee' for the new business thence arising. Mr Queen took it with some misgiving, and shortly afterwards (Cuthbert says 'in the beginning of May') passed it on to Cuthbert and Holburn, the Royal Liver officials in Kirkcaldy. They used the list with the object of getting over members, but met with little or no success. And thus it came about that the defender (through no fault of his own) made no gain by the transaction. The discovery of this list by the pursuers was in a sense accidental. (His Lordship then explained how the list No. 146 came into the possession of the pursuers.)

"The justification of this list, and of his conduct with regard to it, offered on the part of the defender, really amounts to this—(1) That it was compiled by him, entirely from memory, about 20th May 1898, after he had left the pursuers' service; and (2) that it is not really a list of the pursuers' members, but a list of families, some members of which were insured with the pursuers, and the other members of which furnished material for canvassing on behalf of another society. (1) On the first point, nice distinctions may no doubt be suggested as to the limits within which a person who has acquired confidential information in the course of his service is entitled after quitting the service to use his memory to the disadvantage of his late master's business. If he enters the service of a rival employer, he may be entitled to use his memory, even of confidential matters, in furthering the business of his new master, and to this limited purpose he may possibly be entitled to commit what he remembers to writing. For anything I decide in this case, that may be quite a legal thing to do. But this leaves unaffected the principle which is at the bottom of the pursuers' case, namely, that where a servant acquires confidential information in the course of his service, the law implies a contract that the information shall not then or afterwards be ultroneously disclosed to a third party. To constitute a breach of this contract, it is not necessary

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he now denies, but the Lord Ordinary would not believe him, and therefore granted interdict. On the question of damages, the Lord Ordinary has awarded only £5, and I would not propose to interfere with his decision. On the whole matter, I see no reason to differ from the judgment of the Lord Ordinary, and would move your Lordships to adhere.

LORD YOUNG.—The Lord Ordinary's interlocutor begins with this finding:—"Finds that the document No. 146 of process, which is in the handwriting of the defender, contains confidential information regarding the business of the pursuers' society, which was acquired by the defender in the course of his employment as their sub-agent." Now I am unable to assent to that. The document No. 146 of process contains, in my opinion, no confidential information regarding the business of the pursuers' society. It contains no information of any kind whatever, except information which the defender had acquired and become possessed of, as a canvasser and collector of the pursuers' society, regarding the

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that the confidential information should be published to the world, nor that the information is communicated gratuitously. It is enough that the information so acquired is supplied to a third person without any just or legitimate occasion for supplying it. It was urged for the defender that the list was made up after he had left the service of the pursuers. I do not think that this is so in fact; but even if it was, I think it would be an unsound distinction which should make the use of such a list legal or not according as it was made up the day after or the day before the employment ended.

"(2) As to the return of the list itself it may, to a certain extent, answer the description put upon it by the defender. It is a list of family names, and not of individuals. But that is a barren and artificial distinction. The substance of the matter is that the list was furnished by the defender as and for a list of the Kirkcaldy membership, that it was capable of being so used by anyone following the names and addresses, and that it was in fact so used by Cuthbert and Holburn. The defender attempted to justify, or to palliate his use of the contents of the collecting-books, by opening the question whether the collector has not a qualified interest in the contents. The contention is, that an outgoing collector can 'sell his book' to his successor, the successor being willing to pay for this facility; and that this custom is well known to, and recognised by, the officials, subject only to the society's power of vetoing the nominee of the outgoing collector. The proof shews that the practice has been carried to considerable lengths; and it is obviously capable of gross abuse, and well worthy the immediate attention of the societies, if they desire to be served by the best men they can get, and not merely by the highest bidder. But I do not see how the existence of the practice benefits the case of the defender, who was neither an outging nor an incoming collector, and who, as a sub-agent, had no legitimate occasion to compile any lists. Accordingly, I hold this list No. 146 of process ought to be in the possession of the pursuers, and that the use made of it by the defender was illegal. As the pursuers were in the lawful possession of it when the action was raised, there is no need for giving them decree for the delivery of it.

"The question under the first conclusion of the summons, therefore, turns on whether other documents containing confidential information have been traced to the possession of the defender. The view I take of the evidence is, that the pursuers have failed to make this out as matter of fact. That they were justified in making their allegations, and in insisting upon an inquiry as to this matter, is, I think, clear. I hold it to be established that

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people whom he canvassed, and from whom he collected; and information so acquired is not, in my opinion, confidential information, but is information which the person who has acquired it may communicate to anyone whom he pleases. The Lord Ordinary goes on to find "that he," that is, the defender, "handed the said document to a third party in the expectation of obtaining pecuniary gain by and through the same being used adversely to the interest of the pursuers." Of course, anyone is at liberty to use to his own advantage information which he has acquired so long as that information is not private and confidential, which, as I have said, I do not think the information here is. If a solicitor or a director has legitimately acquired information which is not confidential in the course of the business under his charge, he is at liberty to use it in any way that he may think to his advantage. He may be acting in a manner which one may not be able to approve on other grounds, as not being in accordance with what is fitting in a moral sense, but anything of that sort lies outside the region with which we in this Court are concerned. The Lord Ordinary goes on: "Finds that although it is not proved that other similar documents are in the possession of the defender, the pursuers were and are in the reasonable belief and apprehension, founded on the defender's own words and acts, that he is possessed of such documents, and intends to make an improper and illegal use of them." I am unable to assent to that as a finding which is supported by the evidence. I do not

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on various occasions, and to various persons, and in particular to Peel, Brown, and Queen, the defender represented that he had other lists of the pursuers' members in his possession (specially a list of the Alloa district) which he was ready to use ultroneously against the pursuers. He now says he has none; and it appears that the active canvass which was carried on by Brown, Best, and the defender in the Dunfermline district, was done without lists, the collectors being familiar with the rounds. I am not at all satisfied that the defender has not in his possession copy collecting-books and lists of members, though his assertions on the subject may quite well have been empty boasts. But in the absence of definite information, I am of opinion that decree for delivery in terms of the first conclusion would be inappropriate, as it would be impossible to say when the decree was implemented. I therefore dismiss that conclusion. I think the interest of the pursuers will be sufficiently protected by an interdict.

"As to the conclusion for damages, the items claimed were all incurred in relation to the attack made by the defender on the pursuers' Dunfermline connection. They consisted of the expense incurred in sending inspectors to counteract the defender's scheme, and of the loss of premiums through the transfer of business, together with a sum for general damage. If the Dunfermline canvas had proceeded upon lists furnished by the defender, and not (as I hold) upon the mere memory of Brown and Best, I should have found the pursuers entitled to the full sum claimed. But the illegal communication affected only the Kirkcaldy district, where the canvassing proved a failure. There being, therefore, no specific damage resulting therefrom, I think the justice of the case will be met by an award of £5 in name of general damage for breach of the implied contract.

"On the question of law involved in the case, I was referred to the following authorities:—Brown's Trustees v. Hay, July 12, 1898, 25 R. 1112; Robb v. Green, L. R. [1895], 2 Q. B. 315; Lamb v. Evans, L. R. [1893], 1 Ch. 218; Merryweather v. Moore, L. R. [1892], 2 Ch. 518; and also to Trego v. Hunt, L. R [1896], App. Cas. 7."

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think that it is proved that the defender was possessed of any such documents. On the whole matter, therefore, my opinion is that the findings of the Lord Ordinary are not supported by the evidence, and I therefore think that his interlocutor ought to be recalled, and the defender assoilzied.

LORD TRAYNER.—I have no difficulty in agreeing with the Lord Ordinary.

LORD MONCREIFF was absent.

THE COURT adhered.

ROBERT WRIGHT, Solicitor—F. LAMOND LOWSON, Solicitor—Agents.

No. 13.

Nov. 6, 1900. Caledonian Railway Co. v. Somerville.

THE CALEDONIAN RAILWAY COMPANY, Appellants.—*Dundas, Q.C.—Clyde.*

GEORGE SOMERVILLE (Procurator-Fiscal, Edinburgh Dean of Guild Court), Respondent.—*Salvesen, Q.C.—John Wilson.*

Burgh—Dean of Guild—Jurisdiction—Railway—Railway bridge over public street—"Building"—Edinburgh Municipal and Police Act, 1891 (54 *and* 55 *Vict. cap. cxxxvi.*), *secs.* 48 *and* 59—*The Edinburgh Improvement and Tramways Act*, 1896 (59 *and* 60 *Vict. cap. ccxxiv.*), *sec.* 74.—*Held* (1) (*diss.* Lord Young) that a girder bridge supported by stone piers abutting on a public street, was a building within the meaning of section 59 of the Edinburgh Municipal and Police Act, 1891, and required a warrant from the Dean of Guild Court for its erection, and (2) that the Edinburgh Improvement and Tramways Act, 1896, did not exempt railway buildings from the jurisdiction of the Dean of Guild Court.

Burgh—Dean of Guild Court—Warrant to erect building—Procedure where warrant not applied for till building erected.—Held (*diss.* Lord Young) that an order by the Dean of Guild Court to lodge an application for a warrant and relative plans was competent, although the buildings to which the warrant referred were already erected.

2D DIVISION. Dean of Guild Court, Edinburgh.

IN pursuance of an agreement with the Corporation of Edinburgh, the Caledonian Railway Company, in 1899, began operations for the removal of a stone arch bridge which carried their Leith and Granton branch railway over the Corstorphine Road, Murrayfield, at a point within the municipal boundaries of Edinburgh, and for the erection in lieu thereof, first, of a temporary wooden bridge, and ultimately of a new girder bridge on the site of the original bridge, but of greater height and greater span. No warrant for these operations was applied for, or obtained, from the Dean of Guild Court. By the agreement with the Corporation, dated 9th and 17th May 1899, the bridge was to be reconstructed with the view of widening and improving the roadway, in accordance with plans approved of by the Corporation. The new bridge was to have a span of 54 feet with 16 feet 6 inches of headway for its entire span, in place of a span of 35 feet with 14 feet 9 inches of headway in the centre, the latter being the dimensions of the original bridge. It was provided that the work of removing and reconstructing the bridge should be carried out by the Caledonian Railway Company, and the whole cost borne by the Corporation, with the exception of a sum of £1000 to be contributed by the railway company.

On 29th December 1899 George Somerville, the procurator-fiscal of the Edinburgh Dean of Guild Court, presented a petition to the Dean of Guild Court against the company, on the ground that the

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operations in question required a warrant from that Court, and were, in the absence of such warrant, a contravention of the Edinburgh Municipal and Police Act, 1891.* At the date of the petition the original bridge had been removed, the temporary wooden bridge erected, and the new bridge was in the course of construction. The petitioner craved the Court (1) to interdict the operations in question till a warrant was obtained; (2) to impose a penalty for proceeding with the operations without a warrant; and (3) to remove if, and in so far as, required by the Court, the works executed.

The Caledonian Railway maintained that they "were not bound to submit the plans of the reconstructed or renewed bridge for the approval of the Dean of Guild Court, or to obtain warrant of the Dean of Guild Court authorising the reconstruction of the said bridge." They stated,—(Stat. 6) "Section 59 of the Edinburgh Municipal and Police Amendment Act, 1891, which the petitioner alleges to have been contravened, does not apply to the reconstruction or renewal of the bridge in question, and the said bridge is not a house or building in the meaning of the Act; and in the Edinburgh Improvement and Tramways Act, 1896,† which extends the powers of the Dean of Guild

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* The Edinburgh Municipal and Police Act, 1891 (54 and 55 Vict. cap. cxxxvi.), enacts as follows:—

Section 48. "Every person who proposes to erect any house or building, or to alter the structure of any existing house or building . . . shall lodge with the clerk of the Dean of Guild Court a petition for warrant to do so. . . ."

Section 59. "Every person who shall erect or begin to erect any house or building . . . without a warrant or otherwise than in conformity with a warrant of the Dean of Guild Court, and every person who shall in the erection or alteration of any house or building, the erection or alteration of which has been sanctioned by the Dean of Guild Court, deviate from the plan or plans, and section or sections, elevation or elevations, and detailed drawings so sanctioned, or shall in the erection or alteration of any house or building in any way contravene the building rules of this Act, shall be liable to a penalty not exceeding £25, besides being bound, if and in so far as required by the Dean of Guild Court, to take down and remove the said house or building, or to restore it to the state it was in previous to the alterations thereon, or to alter it in such a way as the Dean of Guild Court shall direct so as to make it in conformity with the warrant of the Dean of Guild Court."

Section 3. "In this Act, and for the purposes of this Act, unless there be something in the subject or context inconsistent with or repugnant to such construction, the several words and expressions to which meanings are assigned by the Acts of 1879 to 1890 have the same respective meanings."

"'House' means a dwelling-house and every part thereof."

The Edinburgh Municipal and Police Act, 1879 (42 and 43 Vict. cap. cxxxii.), by section 5 declares that "the word 'building' shall extend to and comprise all buildings and erections of what kind and nature soever, and every part of such buildings, excepting dwelling-houses."

† The Edinburgh Improvement and Tramways Act, 1896 (59 and 60 Vict. cap. ccxxiv.), enacts, Part V. sec. 57,—"In addition to the requirements of section 48 of the Act of 1891 and section 35 of the Act of 1893, a warrant of the Dean of Guild Court shall, from and after the passing of this Act, be required for excavations intended to be made for and in connection with houses or buildings intended to be erected, and no such excavations shall be made by any person without obtaining a warrant of the said Court, and all penalties prescribed by the Act of 1891 and the Act

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Court, it is provided by section 74 that the provisions of Part V. of that Act should not apply to railways or stations of any railway company, or the buildings connected therewith."

The Railway Company pleaded;—(2) No jurisdiction. (4) The works and operations of the respondents (the Railway Company) having been approved of by the Corporation of Edinburgh, the respondents are not bound to submit plans to the Dean of Guild Court.

On 22d February 1900 the Dean of Guild Court pronounced the following interlocutor:—"Finds that the respondents, the Caledonian Railway Company, without any warrant of Court, and in contravention of the Edinburgh Municipal and Police (Amendment) Act, 1891, section 59, have removed the bridge in question, and are presently erecting a new permanent bridge on the site thereof, as set forth in the petition: Finds that there is nothing in section 74 of the Edinburgh Improvement and Tramways Act, 1896, to exclude from the jurisdiction of the Dean of Guild Court buildings to be erected by railway companies, and that a warrant of Court is necessary for the operations in connection with the bridge in question: Therefore, in the meantime, ordains the respondents forthwith to lodge an application for warrant, with relative plans, and continues the cause."

The Caledonian Railway Company appealed to the Court of Session. When the case came up for hearing the new bridge had been completed, and had been approved by the Board of Trade.

Argued for the appellants;—The question was whether an offence had been committed under the Act of 1891, and in particular under sections 48 and 59. That Act contained a complete code of procedure, and virtually repealed the code in the Act of 1879, and the definition of "buildings" in the Act of 1879 was therefore inapplicable. The construction of the term "house or building" in the Act of 1891 must therefore be found in that Act itself, which contained a definition of "house," but not of "building," and on the well-established principles of construction "building" must be held to include only what was *ejusdem generis* with "house." In particular, the expression could not include railways and buildings in connection with railways.[1] The case of *Edinburgh and Glasgow Railway Company* v. *Dymock*[2] did not proceed on the view that the company must first obtain the warrant of the Dean of Guild Court; all that it decided was that where railway operations involved danger to the public the Dean of Guild Court could interfere as representing—at the date of that decision—the street authority in order to see that the operations were conducted safely. Even if it were held that this was a "building," the jurisdiction of the Dean of Guild Court did not extend to

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of 1893 with respect to any breach of the provisions of these Acts or either of them shall apply to such excavations as if the provisions herein contained were contained in the Act of 1891 and in the Act of 1893, or in either of these Acts."

Section 74. "The provisions of Part V. of this Act (except sections 70 to 73, both inclusive) shall not apply to the railways or stations of any railway company, or the buildings connected therewith (other than dwelling-houses), or to any street or road belonging to any railway company."

[1] Reg. v. Overseers of Neath, 1871, L. R., 6 Q. B. 707; Rex v. Manchester and Salford Water-works Co., 1823, 1 Barn. and Cres. 630; East London Water-works Co. v. Trustees for Mile-End Old Town, 1851, 17 Add. and Ellis, 512.

[2] Nov. 27, 1847, 10 D. 158.

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"buildings" erected by railway companies. Section 57 of the Act of 1896 re-enacted the provisions of the earlier Acts as to applications for warrants to the Dean of Guild Court, with the addition that excavations should not be begun before the warrant was obtained. Section 74, which provided that the provisions of Part V. of the statute (including sec. 57) should not apply to railway companies, would be grossly anomalous if it did not mean the exemption to apply to the whole matter of application for warrants to the Dean of Guild, not merely to the additional provision introduced by the Act of 1896.

Argued for the respondent;—If the definition in the Act of 1879 applied then there was an end of the question, because the bridge was clearly an "erection of what kind and nature soever." In *North British Railway Company* v. *Moore*[1] a ventilating shaft, and in *M'Millan* v. *Bennett*[2] a wall, had been held to be a building. The Dean of Guild Court had clearly jurisdiction over railway companies, as over other incorporated companies, unless that jurisdiction was excluded by statute.[3] There was nothing in Part V. of the Act of 1896 which affected the jurisdiction of the Dean of Guild, and therefore the exemption from the provisions of Part V. of railway companies did not exempt them from complying with the provisions of the Act of 1891. The inspection by the Board of Trade had no reference to safety of passengers and vehicles on the road, but only to traffic on the railway. It was thus necessary that the Dean of Guild Court should be responsible for the safety of passengers in the street.[4] The only question of substance in the case was the question of jurisdiction. The plans would be passed as a matter of course.

LORD JUSTICE-CLERK.—It is not disputed that the appellants built the stonework of a bridge crossing a street of the city of Edinburgh without having applied for and received the authority of the Dean of Guild Court to execute the works. The questions in this case are (1) whether the sanction of the Dean of Guild Court was necessary to the legality of the proceeding with the work, and (2) if it was, whether the procurator-fiscal of that Court has asked for the proper remedy for this irregularity.

I have no doubt that, according to the statutes under which the Dean of Guild has power, the Railway Company were not entitled to do the work which they did until they had warrant from the Dean of Guild Court. The appellants do not deny the jurisdiction of that Court generally, but they plead first that railway works are exempt from it, and secondly that even if they are not, that the work they executed did not fall within the scope of the statutes, it not being a "building" in the sense of these Acts.

In support of the first of these contentions the appellants found on the recent Edinburgh Police Act of 1896. They maintain that, as section 74 of that Act exempts from the operation of Part V. of that Act railways or stations of a railway company, or the buildings connected therewith, the jurisdiction of the Dean of Guild is ousted as regards such subjects. Now,

[1] July 1, 1891, 18 R. 1021.
[2] Feb. 2, 1895, 22 R. (Just. Cases) 23, 1 Adam, 526.
[3] Edinburgh and Glasgow Railway Co. v. Dymock, 10 D. 158; More v. Bradford, Nov. 22, 1873, 1 R. 208; Johnston v. Edinburgh Gaslight Co., May 27, 1885, 12 R. 974.
[4] Eglinton Chemical Co. v. M'Jannet, Oct. 30, 1890, 18 R. 34.

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Part V. does not, so far as I can see, touch or trench upon the powers of the Dean of Guild Court. Some detail matters connected with procedure in the Court are touched upon, but neither directly nor indirectly do any of the enacting words in any way deal with the jurisdiction of the Court. And whatever may be the effect of the General Police Act of 1892 upon such questions, that Act is not applicable to Edinburgh, which in these matters is governed by its own private statutes.

But then it is contended that the work executed was not a "building." To this I think it is a sufficient answer to quote the words of the interpretation clause of the Edinburgh Act of 1879, which certainly is not repealed, and which declares that "building" "shall extend to and comprise all buildings and erections of what kind and nature soever" (dwelling-houses are dealt with separately). That certainly is broad enough to cover the abutments and retaining walls of a bridge placed on either side of a public street, which are in every sense of the words "buildings," or "erections"—permanent structures of a substantial kind, in stone and lime, carrying a bridge over the street.

It only remains to consider whether the prayer of the Dean of Guild's procurator-fiscal is a proper and competent prayer in such a case. Can this be doubted, if the Railway Company laid itself open to a complaint for failure to obtain the necessary authority, and having proceeded without it? Whatever may be expedient to be done, the complainer was entitled in form to demand what he has demanded. His case is that a building erected without authority may be ordered to be taken down, and can only be erected after plans, &c., have been laid before the Court. The Court may have a discretion in the matter, but the time for the exercise of a discretion is when the Court is placed in the position of being able to exercise its powers. And the petition places the Court in that position, and is in that respect competent and regular. The prayer for imposition of a fine for the breach of law already committed is also competent and regular.

The whole case just comes to this: Although the appellants were acting with the approval of, and indeed for, the Corporation of Edinburgh, that did not relieve them from the duty of invoking the authority of a statutory Court entitled to oversee and regulate the erection of buildings. Although the burgh authorities are favourable to a work being executed, that cannot either exonerate a Court from failure to do its duty, nor enable a citizen to pass by its jurisdiction. And the matter being one, as I think, within its jurisdiction, and committed to its charge, the appellants, who failed to apply to it for authority, and carried out the works without its sanction, are amenable to its corrective jurisdiction for having done so. Accordingly, I would move your Lordships to refuse the appeal, and to remit the case back to the Dean of Guild Court.

Lord Young.—This is an appeal from an interlocutor of the Dean of Guild Court of Edinburgh pronounced upon a complaint by the Procurator-fiscal of that Court (the respondent in this appeal) against the Caledonian Railway Company (the appellants). The complaint is in substance that the appellants did, without a warrant of the Dean of Guild Court, and there-

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fore in contravention of the Edinburgh Municipal and Police Amendment Act, 1891, section 59, remove a stone arch bridge which carried a branch of their line over the Corstorphine Road, erect in lieu thereof a temporary wooden bridge, and had begun to erect a new permanent bridge on and near the site of the old stone bridge. The prayer is to interdict the appellants from proceeding further with the operations until a warrant of Court be obtained therefor, to find the appellants liable in a penalty, and if and so far as required by the Court to take down and remove the buildings.

The appellants admit that they removed the old bridge and erected the new without a warrant of the Dean of Guild Court, explaining that they did so in execution of the agreement with the Magistrates and Council of the City of Edinburgh, and maintaining that on a sound construction of the statute a warrant of the Dean of Guild Court was not required for the work thus agreed upon and executed. This agreement is, or may be, an important feature of the case. It was stated to us that the purpose of it was the improvement of the Corstorphine Road (one of the public streets of Edinburgh) where it is crossed by the appellants' railway, by increasing its width by 19 feet (that is from 35 to 54 feet), and elevating the headway under the crossing-bridge to 16 feet 6 inches. It is very intelligible why the Magistrates and Council judged these improvements to be proper in the public interest with which they were charged, and therefore resolved that they should be made, if possible, as it was, with the consent and aid of the appellants, but not otherwise. The land required for widening the road was the property of the appellants, and the improved height of headway could only be effected by substituting for the stone-arch bridge—with a headway of 14 feet 9 inches, and that only at the centre of the arch,—a girder-bridge so placed as to give a straight headway of 16 feet 6 inches. By the agreement, the work, as might be expected, was to be executed by the appellants, but (with a limitation which I shall notice) at the expense of the Magistrates and Council, and to be paid for of course with municipal funds at their disposal for such a purpose. The limitation was that the appellants should contribute £1000, being, as was explained to us, the estimated worth to them of the superiority of the new bridge over the old. The appellants had obviously no other interest in the subject of the agreement, the import of which is simply that they should aid the Magistrates and Council in effecting the street improvements which they desired in the interest of the citizens, and at the city's expense, giving the land which was requisite for the widening of the street, and submitting to considerable temporary inconvenience for the consideration—and there was no other—of getting a new and better bridge at the cost to them of only £1000. The work which the appellants contracted to execute is specified in the agreement, and a plan of it there given so far as a plan was possible, for I suppose a plan for the removal of the old bridge, or for the erection and removal of the temporary wooden bridge was not required, or indeed reasonably possible.

On the Magistrates and Council there is by statute the duty imposed and the power conferred of improving the public roads and streets within the city, both carriageways and foot-pavements, as they may from time to time judge proper in the interest of the public, with whose safety and convenience in using the city thoroughfares they are charged, and to that end to

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cause them to be widened, and to acquire such adjoining land as they think necessary. See sections 31, 34, 35, 40, and 67 of the Act of 1891, on which this complaint is founded, also the *fasciculus* of clauses applicable to streets in the Edinburgh Municipal and Police Act, 1879, and particularly sections 133-6, and sections 146 and 148. The importance of this on the question immediately under consideration is the suggestion which it carries that in construing the general words "any house or building" as used in section 59 of the Act of 1891, on which the respondent's complaint is founded, we ought to avoid, if reasonably possible, attaching to them a meaning which would negative or interfere with the duty imposed on the Magistrates and Council of exercising their judgment in the matters to which I have been referring as distinctly committed to them exclusively, or the right of the public to have that judgment formed and acted on in their interest as the statute meant it should be. With respect to the duties and powers of the Magistrates and Council it may be useful also to notice section 46 of the Act of 1879.

Ground required for the purpose of being added to a street so as to widen it must of course be brought (whether by elevation or depression) to the level of the street, anything upon it inconsistent with the use to be made of it being removed. Here the ground which was thus acquired had been artificially elevated—had a railway upon it—I might say built upon it—the appellants' line both north and south of the Corstorphine Road being laid on an artificially elevated *solum*, although, I may observe, that it would not, in my opinion, signify if the elevation were natural with the road cut through it. The road, prior to the agreement and the operations executed under it, was at the part where it was crossed by the railway 35 feet wide, and was the boundary of the appellants' property, which adjoined it on both sides. The greater part of the ground acquired from them and added to the street (or road) was, I believe, on the south side, and for convenience of expression I shall assume that all of it was. It had, as I have said, a railway on it, the railway which crossed the road running on it till it reached the bridge which carried it across, and the height or elevation (whether natural or artificial does not signify) was about 20 feet above the level of the street to be widened. The removal of rails and reduction of elevation were the operations under the agreement on the acquired ground. There were no others. Every bit of that ground is now public street, having been made fit and suitable for vehicles, tramcars, &c., by operations directed by the Magistrates and Council with which the appellants had no concern or interest.

The question of the necessity or not of a Dean of Guild warrant for these operations is, so far as I see, not affected by the fact of a girder-bridge being put up. This question would, I think, have been just the same had there never been a crossing-bridge either before or after the adjoining land was acquired, and the operations on it which I have mentioned were executed. But the question of the necessity or not of such warrant for the erection of the bridge must also, of course, be considered, and being, as I think it is, the same, and depending on the same considerations as the other, I will take them together in expressing and explaining my opinion as to the import and meaning of the statutory provision on which the complaint is founded.

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The clause of the Act founded on subjects to a penalty every person "who shall erect or begin to erect any house or building without a warrant, . . . or otherwise than in conformity with a warrant of the Dean of Guild Court." The proposition of the respondent necessarily is, that the appellants when under the agreement or contract with the magistrates and council they removed rails from the ground which had been acquired to be added to the street, and by the removal of earth reduced the level thereof to that of the street, did in the sense of the Act "erect or begin to erect any house or building." I reject this proposition for reasons which I regard as too obvious to require expression.

With respect to the girder bridge, the respondent's proposition, of course, is that it is a "house or building" in the sense in which these words are used in the Act. The word we have to construe is "building," and in doing so we must take account of the word "house," with which it is always associated, not only in section 59 of the Act, but in every clause relating to the jurisdiction and duties of the Dean of Guild Court. The invariable combination is "any house or building." Having regard to this and the purpose and tenor of all the provisions in which the expression occurs, I am of opinion that the word "building" cannot reasonably and legitimately be taken as altogether separated and dissociated from its constant companion "house," and held to include everything, every operation or structure, which may be called a "building," or said to be built or erected. The language used suggests to my mind that the meaning intended is any house or any building of that kind and character—not merely any dwelling-house, but any building for the shelter and accommodation of human beings, for trade or business, education, worship, or amusement, or meetings of any description. This seems to me to be an intelligible and reasonable limitation of the meaning and import of the term "building" as used in the enactments which we have to construe. No other occurs to me, or, so far as my memory serves, has been suggested. The choice therefore seems to be between accepting the limitation which I have indicated and taking the word as including without limitation everything capable of being called "building." With respect to locality or site there is certainly no limitation other than this, that it must be within the burgh boundaries. Nor is there any limitation with respect to material—stone, brick, metal, wood, glass—or with respect to dimensions. The girder bridge now in question is of considerable dimensions, is made of metal, and, in the judgment of the proper statutory Government authority (the Board of Trade), is strong enough to carry safely a part of the Caledonian Railway. But if the term "building," as used in section 59 of the Edinburgh Police Act, 1891, includes this bridge, is there any stateable limitation of its meaning as used in the Act which will exclude any girder bridge within burgh without regard to size, material, or use?

We were referred to the Edinburgh Municipal and Police Act, 1879, for the meaning assigned in the interpretation clause (section 5) to the word "building," which being adopted by section 3 of the Act of 1891, "unless there be something in the subject or context inconsistent with or repugnant to such construction," certainly merits attention. The language of interpretation there employed is very general and comprehensive, and for that reason, were there no other, may require limitation and qualification in any

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particular application of it, as, for example, in the application of it to the word in question, as used in section 59 and also section 48 of the Act of 1891. All "erections of what kind and nature soever." These words taken without qualification or limitation would include a green-house, hot-house, or orchid-house of glass, a verandah or sunshade of iron or wood, a gardener's tool-house, a sundial, a flagstaff. These are erections of a "kind and nature" which may be, and frequently are, erected in fruit, vegetable, and flower gardens within burgh, not only in private grounds, but also in public grounds in the sense of being open to the public, such as West Princes Gardens, the Botanic Gardens, and the Arboretum. Further, common street lamps, Post-Office pillar letter-boxes, poles carrying telegraph wires, and the milestones, of which there are several within burgh, are, I should say, "erections of what kind and nature soever," if these words are taken absolutely and applied without regard to result or consequence. Very striking and certainly numerous and grave illustrations of the result or consequence to which the respondent's contention rested on this interpretation clause would lead may be seen and appreciated on a visit to any churchyard or cemetery within the bounds of the burgh, these being all of them crowded with erections of a "kind and nature" suited to the place. The word "building," and also the word "erection," taken without limitation, will apply to every structure I have referred to—lamp-posts, milestones, churchyard monuments. Either word (so taken) will apply to a garden wall or to a common stone dyke or fence-wall dividing fields, and that without regard to height, and it would follow that to substitute therefor, in whole or in part, a wooden paling or metal railing or a wire fence would, in the sense of section 48 of the Act, be "to alter the structure of an" (any) "existing house or building."

Many, I think most, if not all, the streets in Edinburgh—I mean, of course, not the houses, but the thoroughfares, carriage-ways, and foot-pavements of streets—have been originally constructed and thereafter kept up, and from time to time improved, by "building," often extensive and costly, not merely for drains and cesspools, &c., but for altering the levels and making them as ways more passable. The whole of Princes Street is the built-up embankment of the Nor' Loch, and not many years ago was widened by carrying this building-up a good many feet further south and into the ground (latterly garden) which sloped steeply down to the loch before it was drained out. Railways, which are ways or roads just as streets are, cannot, in this country at least, be constructed without frequent building, found necessary to maintain the normal elevation and level of the line in passing over uneven ground, or level ground too swampy and soft to be *solum* for sleepers and rails without building, frequently in the form of girder bridges of greater or less length and height, or of mounds of earth such as that which carried and still carries the Caledonian Railway up to the girder bridge now in question, by which it is continued across the Corstorphine Road. In constructing railroads as well as common roads and streets, difficulties occasioned by inequalities in the earth's surface or by the natural quality of the *solum*, which may be such that it requires artificial solidifying or strengthening before it can safely carry a street or railroad, must be overcome; generally this can only be done by building up or cutting down,

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which commonly requires the building up of the sides of the cutting. And I would remark that this building up of the sides of a cutting is really building up, and therefore "erection," however deep the foundation—all building being "up" from the foundation. Now, in my opinion, the Edinburgh Police Act founded on by the respondent does not commit to the Dean of Guild Court any authority or duty with respect to the original construction or subsequent improvement of either streets or railroads. It is perhaps superfluous to repeat that I mean only as ways roads and thoroughfares for passage. With regard to streets (so taken), the authority and duty committed, as I have pointed out, to the Magistrates and Council include the protection of the public against any unauthorised, dangerous, or inconvenient structure being made over any street.—See the Act of 1879, sec. 151. With regard to railways I have not been referred to anything, or myself found anything, which even suggests the idea that the Dean of Guild Court has any concern with their construction. Every proprietary interest is protected within the burgh of Edinburgh exactly as it is elsewhere. Every public interest, where a street is crossed by a railway bridge, is, so far as regards those using the street, protected by the Magistrates and Council, who are the guardians of their interest, and, so far as regards those using the railway, is protected by the Board of Trade, who must be satisfied with it before it can be used as part of the railway. That it is part of the railway and really nothing else is, I think, plain.

The Dean of Guild, by the interlocutor under appeal, finds that the appellants, without warrant, and in contravention of the Edinburgh Municipal and Police Amendment Act, 1891, sec. 59, "have removed the bridge in question, and are presently erecting a new permanent bridge on the site thereof . . . that a warrant of Court is necessary for the operations in connection with the bridge in question," and "therefore in the meantime ordains the respondents" (the appellants here) "forthwith to lodge an application for warrant, with relative plans, and continues the cause." In his note the Dean of Guild cites the case of the *Edinburgh and Glasgow Railway Company* v. *Dymock*,[1] as an authority in point and supporting his findings and order. It is not, in my opinion, in point. The prayer of the petition to the Dean of Guild in that case desired the Dean of Guild "to visit the premises—to issue from time to time such incidental orders as the circumstances of the case may require and the security and interest of the public may demand." The details are immaterial beyond this, that the Dean of Guild did no more than sustain the right of the fiscal "to apply, and for his Court to entertain the application where the allegation is that the safety of the lieges is in danger from the manner in which the operations are carried on," and that this Court on appeal did no more. In the appeal it was distinctly stated that the respondent (the Dean of Guild fiscal) did not require the advocators to apply for a warrant from the Dean of Guild. Lord Moncreiff in giving judgment observes,—"The want of the warrant is not the point here. The advocators are not asked to procure one, and I give no opinion on the question whether they are bound to do so if required. It is on the allegation of danger that the question arises."

[1] 10 D. 158.

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Lord Cockburn, in expressing his assent to the Dean of Guild's judgment, points out that "all that the Dean of Guild says is, 'I am entitled to visit you and see that you do not expose either the public or your own workmen to any unnecessary danger.'" In point of fact no warrant was ever granted or applied for.

I am not sure that I quite understand what the Dean of Guild in his judgment here means by "the operations in connection with the bridge in question," for which he finds "that a warrant of Court is necessary." He cannot, I should think, mean that to remove the old bridge was to "erect or begin to erect any house or building," and therefore an operation for which a warrant was necessary. Neither can I suppose it probable that he had in his mind the idea that the temporary wooden bridge which (as we were informed at the hearing) was removed, having served its purpose, before 22d February, the date of the interlocutor, should be restored with a view to an order being granted for its removal as having been erected without warrant. Leaving out of view then the old bridge and the temporary wooden bridge as both gone for ever, and also the rails (no doubt also sleepers) which along with the no longer needed mound of earth which stood on the 19 feet of ground, which is now part of the street called Corstorphine Road, were removed, and so also are gone for ever, I conclude that the girder-bridge is the only thing in existence the use of which could in this process be interdicted or the removal ordered.

Does the Dean of Guild desire to see a plan of it? There is one in process of admitted accuracy, but I should think this or any plan superfluous now that the bridge itself exists, standing quite open to the inspection of the Dean of Guild or anyone he may desire to examine it. A plan of such a bridge would manifestly be just as superfluous and useless as would be a plan of the railing running on the garden side of Princes Street, or any other common fence railing standing open to inspection.

The complaint to the Dean of Guild was presented on 29th December 1899, at which time the work under the agreement had been going on continuously and uninterruptedly for about eight months. The old stone bridge had, as stated in the complaint, been removed, the temporary wooden bridge erected and in use, that is with the line running on it, and the erection of the girder-bridge begun. In February 1900, when the interlocutor appealed from was pronounced, the work was all but, if not quite completely finished; and in June, when the case came before us, was completely finished to the satisfaction of all parties, and also of the Board of Trade, without whose approbation the new bridge could not be used as it is and has been for now a long while. I have pointed out that everything but the new bridge has disappeared, and is practically incapable of being restored. The notion of interdicting the use, or ordering the removal of this bridge, and thus stopping indefinitely the traffic on the Leith and Cramond branches of the Caledonian Railway seemed *prima facie* so repulsive that at the hearing the learned counsel for the respondent was asked by one of us (possibly myself) whether anyone had complained to the respondent of injury done or threatened to his interests, and if not, whether, differing from the Magistrates and Council, the railway company, and the Board of Trade, he, as Dean of Guild fiscal, had any objection to

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the position or structure of the new bridge on which the line was running? The answer, as I understood it, was distinctly in the negative, the learned counsel saying in terms that no complaint had been made by anyone of injury to his interests done or threatened—that the respondent could state no objection to the position or structure of the bridge, and had no intention of asking for its removal, or for any alteration of it, and that what he asked and would be content with was an affirmance of the Dean of Guild's finding, that the bridge was a building which by the Act of 1891 required a warrant for its erection. He represented the legal question on which this finding depended, viz., the meaning and import of the expression "house or building" as used in the enactment founded on, as one of such public interest and importance as justified the Dean of Guild fiscal in pressing for a decision of it, although the decision might not, or even certainly would not, be followed by any practical consequence or result in this case. When the matter was thus presented to us at the hearing I ventured to suggest that *prima facie* it seemed objectionable to turn an appeal in such a Dean of Guild Court process as the present into a declarator of a legal question on which nothing practical and within the scope of that process was to follow. Nevertheless, recognising the importance of the legal question and the consequences to which the decision of it either way may lead, I have thought it proper to consider it carefully, and to form and express an opinion upon it. At the same time, for reasons already suggested, and others to which I shall shortly refer, I think it would be irregular and improper to pronounce a declaratory finding upon it in this appeal.

I have already called attention to the time during which the operations had been going on, and the very advanced stage which they had reached in the end of December, when the respondent made his complaint. The only explanation of this delay which suggests itself to my mind is, that it had not sooner occurred to him or to the Dean of Guild that the operations were such as to require a warrant. No other has been offered or suggested. I cannot impute to either of them ignorance of the fact that the operations had been agreed on between the appellants and the Magistrates and Council. The Dean of Guild being an *ex officio* member of the Council was a party to the agreement, and his fiscal was also fiscal to the Magistrates and Council, *i.e.*, the city fiscal appointed by them. But ignorance is not suggested, and indeed could not be, looking to the character of the operations continued for months in a crowded thoroughfare under the superintendence of the city authorities. I cannot doubt the *bona fides* of the Dean of Guild and his fiscal in taking, and for six or eight months holding, the view which I think the sound one. But neither can I doubt the *bona fides* of the appellants and of the Magistrates and Council in taking the same view. It is perhaps more accurate to put it thus—that the appellants and the Magistrates and Council acted not contumaciously but in *bona fides* in not applying for a warrant, and acting without one, inasmuch as it did not, and excusably did not, occur to them or their ordinary officials and legal advisers that a warrant was needed. Now, assuming, contrary to the opinion which I have expressed, that the appellants and their advisers were in error in proceeding to build the bridge without a Dean of Guild warrant, what is the legal consequence of their having done so? I say nothing

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about a fine not exceeding £25, for had that been what was asked we should probably have been spared any litigation, at least in this Court, unless, indeed (which is possible), the appellants concurred with the respondent in thinking the legal question raised by the complaint and the Dean of Guild's interlocutor of serious public interest and importance. The prayer for an order to remove the bridge carrying the railroad, and for an interdict which might stop all traffic on the line at any moment, is what makes the case serious, and no doubt brings it here. Is this prayer reasonable, and such as may lawfully and reasonably be granted by the Dean of Guild? If so, the case may no doubt be sent back to the Dean of Guild, for he has not yet dealt with it. If not, we may terminate the case now. And this is what, in my opinion, we ought to do, for I am indeed very clearly of opinion that it ought not to have been brought at the date when it was, and in the then existing state of things, even on the assumption that a Dean of Guild warrant was formally required to carry into execution the agreement between the railway company and the city authorities.

Quod fieri non debet factum valet is true in many cases, and, I think, is so here. When anyone is so injured by the *quod fieri non debet* that the only remedy is its destruction, it will not be upheld. When the injury thus done is such as may be reasonably and sufficiently compensated otherwise than by destruction at unconscionable cost to the party who has in good faith committed a mistake, such destruction will not be ordered, but compensation given otherwise. But where such mistake has not been attended with injury to anyone, the idea of an order for destruction seems extravagant, and accordingly at the hearing we were, as I have already stated, informed by the respondent's counsel that there was no intention to ask for such an order. I thought this ought to have ended the case, because when taken along with the indisputable and indeed undisputed fact that the appellants had acted throughout not contumaciously but in good faith, it seems to me to shew that the complaint ought not to have been presented. It was, however, argued, that we ought to give a decision upon the construction of the statute as the Dean of Guild had done, and that if we did so, it necessarily followed that we ought to affirm his order on the appellants to lodge an application for warrant with relative plans such as in his opinion ought to have been lodged before the work was commenced. If the appellants ought not to have executed or even commenced the work without having applied for and obtained a warrant therefor, they must, of course, take such consequences as, looking to the circumstances, ought to follow, but an order made after the building has been erected to lodge an application with plans for a warrant to erect it does not commend itself to my mind as legal or even sensible. The view suggested in support of it apparently is that it is the right of the Dean of Guild Court to have an application for warrant and relative plans lodged, and thereupon, disregarding the finished building, and the admitted fact that it is in all respects satisfactory to everyone interested, to form a judgment upon and dispose of the application on the supposition that the building has not yet been commenced. There is no instance of such an order being made with the approbation of this Court, or, so far as we know, at all.

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Passing through the West Princes Street Gardens I observed numerous buildings and erections which would certainly come under section 59 and section 48 of the Act of 1891 on the respondent's construction of them. They consist of girder bridges over the North British Railway, a band-stand, an ornamental fountain, an embankment with large architectural stairs, and several statues, also green-houses. On inquiry, I was informed that these had all been erected without any Dean of Guild warrant. I made the same inquiry and got the same information regarding the Scott Monument in East Princes Street Gardens, and the Albert Memorial Statue in Charlotte Square. I notice these facts, not as bearing or affording any argument on the construction of the statute, which they certainly do not, but as having an obvious illustrative bearing on the view which I have endeavoured to present on the application of the maxim *quod fieri non debet factum valet*. The trustees of the Scott Monument would, I should think, elevate their eyebrows with some surprise if now desired to lodge in the Dean of Guild Court an application with relative plans for a warrant to build the monument. It would be idle to continue the illustration by further allusion to the girder bridges, &c., in West Princes Street Gardens, or to the Albert Memorial Statue in Charlotte Square.

LORD TRAYNER.—I must, with all respect, express my dissent from the tenor of the opinion which has just been expressed. While I agree with the view that the appellants in erecting their bridge acted *in bona fide*, it is right to notice that such good faith has never been impugned or disputed; and on the other hand, the view that the respondent's proceedings have been nimious and oppressive appears to me to be quite unwarranted.

The question to be decided under this appeal is one of law; there is no material fact regarding which the parties are not agreed. The facts are these:—In the course of last year the appellants found that it would be convenient and desirable to replace a bridge which carried their railway across one of the streets of the burgh by a larger and more stable structure. They accordingly took down their old bridge, and built along the sides of the street I have referred to certain stone piers of considerable dimensions on which to rest their new bridge. This they did without asking or obtaining any warrant from the Dean of Guild. While the appellants' operations were in progress the respondent (the fiscal of the Dean of Guild Court) presented a petition to the Dean of Guild, craving (1) interdict against the appellants proceeding with their works without warrant; (2) for the imposition of a penalty; and (3) for an order for the removal, if and so far as required, of the unauthorised building. This petition was based upon the provisions of the Edinburgh Police Act of 1891, which need be no further noticed than to say that they fully warrant the prayer of the respondent's petition if they are applicable to the case before us. The defence to the petition, however, stated on record, and maintained in argument at the bar, was twofold—(1) that the statutory provisions founded on by the respondent do not apply to railway companies, and therefore not to the appellants; and (2) that even if this view was not sustained, the building complained of is not a "building" within the meaning of the Edinburgh Police Acts. This latter ground of defence seems to me untenable. The interpretation clause

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of the Edinburgh Police Act of 1879 (which has not been repealed, as the appellants erroneously contended) declares that "the word 'building' shall extend to and comprise all buildings and erections of what kind and nature soever," except dwelling-houses, which are separately defined. In view of this declaration I do not see how it can be maintained that the work complained of is not a building within the meaning of the Act. The work in question is certainly an "erection" of some kind; it is a series of stone piers, almost continuous like a wall, running along the sides and abutting on one of the streets of the burgh for a considerable length. Not only in the statutory but also in the popular sense of the term the piers are buildings; they are built up of stone and lime, the work of masons and builders, and are just as much buildings as the walls of a house.

The other ground of defence seems to me also untenable. It is based upon a consideration of the terms of some clauses in the Edinburgh Police Act of 1896, and chiefly on the terms of section 74. Now, that section certainly provides that the provisions of Part V. of that Act (with certain exceptions which do not touch this case) shall not apply "to the railways or stations of any railway company, or the buildings connected therewith." But nothing in Part V. of the Act of 1896 repeals either expressly, or (as I think) by necessary or even reasonable implication, the statutory provisions on which the petition before us is founded. Indeed, Part V. makes no reference whatever to applications to the Dean of Guild for a warrant to erect buildings within the burgh, or any reference to the procedure of the Dean of Guild Court beyond providing how a citation to the Dean of Guild Court may be signed, and the length of time within which a Dean of Guild warrant may be acted upon. The Dean of Guild's jurisdiction is not touched upon in a single sentence of Part V., and no exemption from that jurisdiction is conferred on any individual or company. The only statute which exempts a railway company from the jurisdiction of the Dean of Guild is the Burgh Police Act, 1892, section 517. But that Act does not apply to Edinburgh (section 5 and Schedule II.), which is expressly exempted from its provisions. In my opinion, therefore, both grounds of defence fail, and the appellants must therefore be dealt with as subject to the provisions of the Act of 1891.

The interlocutor pronounced by the Dean of Guild (now under appeal) after certain findings, in which I concur, orders the appellants forthwith to make "an application for warrant with relative plans." This may appear to order a superfluous proceeding, now that the bridge has been completed; and so far as the prayer for interdict is concerned it is. But it is not, or may not be, at all superfluous with reference to the prayer for an order to have the unauthorised building removed. I trust that no such removal will be found to be necessary. But the Dean of Guild will judge of that when the plans are laid before him. It was said at the bar, no doubt, that removal of the building was not in contemplation, and that one, probably the chief, purpose of the petition was to have it decided, whether the Dean of Guild's jurisdiction did or did not extend to the buildings of railway companies. I think that question was competently brought before us in the present form, and should be here decided.

In my opinion the interlocutor pronounced by the Dean of Guild, now

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appealed against, is one within the competency of the Dean of Guild to pronounce, and one with which we should not interfere.

It is scarcely necessary to notice the plea urged by the appellants that their new bridge was erected with the sanction and under an arrangement with the Lord Provost and Magistrates of the city. That body has no authority to exercise the functions of the Dean of Guild Court. It can neither sanction nor refuse sanction to the erection of buildings within burgh. Any agreement or arrangement, therefore, made with it appears to me to be irrelevant to the matter before us. I have not overlooked the fact that under the Edinburgh Police Acts large powers are conferred on the Corporation for widening, altering, making, and improving the streets of the burgh; but I can find no clause or provision in this Act (and none was referred to) which entitles the Corporation to build or authorise building within burgh at its own hand, or without the sanction and warrant of the Dean of Guild.

I think the appeal should be dismissed.

LORD MONCREIFF.—I am entirely of the same opinion. I shall content myself with making a few observations upon the only points on which I understood the appellants to rely in argument, which did not, according to my recollection, include several of the considerations upon which Lord Young dwelt. I agree that we should simply dismiss this appeal, and remit the case to the Dean of Guild to proceed. I am quite satisfied with the reply for the respondent, which I think was exhaustive and complete. The appellants have entirely failed to shew that in Edinburgh the jurisdiction of the Dean of Guild does not extend to railway companies as fully as to other proprietors within the city, except to the limited extent to which railways are exempted by the 74th section of the Edinburgh Improvement and Tramways Act of 1896. Apart from that clause there is no express exemption, and I do not see any reason for thinking that any further exemption is to be implied.

During the discussion I had some difficulty in ascertaining the precise conditions and limits of the appellants' argument. Counsel admitted, and indeed could not dispute, that the Dean of Guild has jurisdiction over dwelling-houses which are the property of a railway company as in the case of any other proprietor. But he endeavoured to shew that the Edinburgh Municipal and Police Amendment Act of 1891, on the 59th section of which this petition is founded, does not in the case of any proprietor confer jurisdiction on the Dean of Guild over any buildings except dwelling-houses and buildings connected with dwelling-houses. He endeavoured to establish this by an examination of certain clauses in the statute which he said could only relate to dwelling-houses; and to infer it from the absence in the interpretation clause of any definition of the word "buildings." In regard to the latter point the answer is complete, that in the Act of 1879, which is incorporated with the Act of 1891, the word "buildings" is declared "to extend to, and comprise all buildings and erections of what kind and nature soever, and every part of such buildings, except dwelling-houses." In regard to counsel's criticism of various sections in the Act of 1891, while it is true that many of these sections relate to dwelling-houses and buildings con-

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nected with them, the 48th and 59th sections are sufficiently wide to apply to buildings of all descriptions.

The appellants' argument on section 74 of the Act of 1896 seemed to be that it contains a recognition of the previous exemption of railways from the jurisdiction of the Dean of Guild, except in connection with dwelling-houses. This is an assumption which the clause, in my opinion, will not bear. The clause itself applies only to certain new provisions introduced by the Act of 1896; it does not profess to affect the jurisdiction of the Dean of Guild either at common law or under the provisions of previous statutes. The language of the section seems to be taken from a clause (section 577) in the General Police Act of 1892 (which does not apply to Edinburgh), by which the whole of the procedure of that Act relating to the jurisdiction of the Dean of Guild, except as regards dwelling-house, was declared not to apply to railways; and this seems to have suggested to the appellants the idea that neither under statute nor at common law had the Dean of Guild in Edinburgh jurisdiction over railways, except in connection with dwelling-houses. In my opinion this contention is erroneous, and it is satisfactory to find that the practice, as we were told by Mr Wilson, has been for railway companies within the jurisdiction of the Dean of Guild of Edinburgh to apply for this authority when erecting buildings such as this bridge. The bridge abuts upon a public street, and therefore seems to be just such a building as in the public interest the Dean of Guild should have jurisdiction over. The jurisdiction of the Magistrates and Council, in regard to streets, is distinct and separate from the jurisdiction of the Dean of Guild over buildings abutting upon streets, and does not supersede the latter.

THE COURT dismissed the appeal, and remitted the case to the Dean of Guild to proceed.

HOPE, TODD, & KIRK, W.S.—CAIRNS, M'INTOSH, & MORTON, W.S.—Agents.

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Nov. 6, 1900. Mackintosh v. Galbraith and Arthur.

GEORGE MACKINTOSH AND ANOTHER (Pursuers), Respondents.—*Campbell, Q.C.—Hunter.*

W. B. GALBRAITH (Defender), Respondent.—*Ure, Q.C.—Guy.*

DAVID ARTHUR (Defender), Appellant.—*Salvesen, Q.C.—Findlay.*

Expenses—Several defenders—Successful and unsuccessful—Liability inter se.—Galbraith, who had been trustee on a coachbuilder's sequestrated estate, was sued in 1899 after his discharge, by Mackintosh for delivery of a carriage he had deposited with the coachbuilder, and for damages. Galbraith denied liability, and stated that in 1897 he sold the bankrupt's stock in trade to Arthur, and that Arthur by mistake had sold the pursuer's carriage along with the stock, and pleaded all parties not called. The pursuer then raised an action against Galbraith and Arthur, jointly and severally, pleading—"The defender Galbraith having carelessly and negligently failed to protect the said car, and the defender Arthur having acted illegally and wrongfully in taking possession of and selling same, they are jointly and severally liable to the pursuers for the loss and damage thereby sustained." Arthur's defence was that he never had possession of the pursuer's carriage, and had not sold it. After a proof, the Sheriff held Arthur liable in damages, and assoilzied Galbraith, and found Arthur liable in expenses to both parties.

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2D DIVISION. Sheriff of Lanarkshire.

In an appeal the Court affirmed the judgment on the merits, but (*diss.* Lord Young) found that the pursuer was liable for Galbraith's expenses, and that Arthur was not liable for them.

MAJOR GEORGE MACKINTOSH, with consent and concurrence of Mrs Mackintosh, of Balnespick, Inverness, raised an action in 1899 in the Sheriff Court at Glasgow against W. B. Galbraith, C.A., Glasgow, who had been trustee on the sequestrated estates of J. & W. Reid, coach-builders, Inverness, but had been discharged, concluding (1) for delivery of a Ralli car which he had deposited with Messrs Reid for the purposes of repair and storage, and for payment of £20, or (2) failing delivery and payment as aforesaid, for payment of £50.

Galbraith denied liability, and stated in defence that in 1897 he sold the bankrupt's stock in trade to David Arthur, auctioneer, Glasgow, who by mistake had sold the pursuers' carriage along with the stock, and pleaded, *inter alia*, (3) All parties not called.

In consequence of this defence and plea, the pursuers thereupon raised a second action with the same conclusions as in the first, directed against both Galbraith and Arthur, jointly and severally, and pleaded, *inter alia*;—"(2) The pursuers having entered into a contract of safe keeping or deposit with the said J. & W. Reid, and they having become bankrupt, and the said W. B. Galbraith having taken control and possession of their business and effects as condescended on, the said contract became binding upon him, and the same not having been implemented, the pursuers are entitled to decree against him as craved. (3) The defender Galbraith having given no notice to the pursuers that he would not be responsible for the safe keeping of the said car, and having acted carelessly and negligently, as condescended on, to the pursuers' loss and damage, is personally bound to indemnify the pursuers against loss incurred through his fault. (4) The Ralli car in question being the property of the pursuers, and the defender Arthur having illegally and wrongfully taken possession of and sold same, the pursuers are entitled to decree against him as craved, with expenses. (5) The defender Galbraith having carelessly and negligently failed to protect the said car, and the defender Arthur having acted illegally and wrongfully in taking possession of and selling same, they are jointly and severally liable to the pursuers for the loss and damage thereby sustained.

In defence, Galbraith repeated his defence to the previous action, and Arthur, while admitting he had sold the car, denied liability on the ground that the car had been sold and delivered to him by Galbraith's representative as part of the bankrupt stock.

The actions were conjoined, and proof led, and on 22d January 1900 the Sheriff-substitute (Spens) pronounced an interlocutor in which he found, *inter alia*, that Galbraith had not sold the car to Arthur, and was not guilty of *culpa* in connection with the disposal of it, and that Arthur had not taken sufficient care with regard to the exclusion from the bankrupt's property of the car in question, but had sold it at the auction without any effectual investigation, after a question had been raised as to its not being part of the bankrupt stock; and having found that the car was not in a position to be restored, assessed its value at £20, and for that sum gave decree against Arthur, and assoilzied Galbraith.

With regard to expenses, the interlocutor proceeded,—"Finds the defender Arthur liable for the expenses of the pursuer, as also for the expenses of the defender Galbraith."

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On appeal the Sheriff (Berry), on 25th May 1900, affirmed this interlocutor.*

The defender Arthur appealed, and, in addition to an argument on the merits, argued as to expenses;—The pursuer was not entitled to convene several defenders and leave them to fight out at their own expense the question which was liable. He was bound to know and select his proper objector, and if he convened a defender against whom he had no claim, he must pay that defender's expenses himself. The practice in cases of poor-law settlement was not applicable. The question there was one entirely between the defending parishes.

Argued for pursuers;—The conflicting positions taken up by Galbraith and Arthur rendered it necessary to call both; which was in fault depended on considerations personal to each. The liability necessarily lay between them, and Arthur said it lay on Galbraith. The pursuers could not know till after the proof, and were not bound to put themselves in the position of having to decide between the two.[1] The case was analogous to poor-law settlement cases, where the parishes of birth and settlement were convened as defenders, and the unsuccessful had to pay the successful defender's expenses as well as the pursuer's.

LORD JUSTICE-CLERK.—In this case I have come to the conclusion that the decision on the merits at which the Sheriffs have arrived is the right conclusion. I think that no fault is attributable to Galbraith the trustee, who in selling the bankrupt stock to Arthur did nothing which could lead Arthur to suppose that the pursuer's Ralli cart was included in the sale. On the contrary, it was by the inventory made plain that the Ralli cart was the property, not of the trustee, but of a customer of the bankrupt. I think, therefore, that Galbraith is entitled to be assoilzied. Arthur, on the other hand, was plainly in fault, and I think that it is proved that he proceeded to sell the cart notwithstanding warning conveyed to him that it was private property, and therefore that he was rightly decerned against for the price.

Upon the question of the expenses in the Court below, I do not agree with the view taken by the Sheriffs, who have found Arthur liable for the expenses both of the pursuer and of the defender Galbraith. I think that here the pursuer might, had he exercised due care in his inquiries, have ascertained that the case he truly had was not against Galbraith but solely against Arthur. I do not therefore think that the case is one in which the

* "NOTE.— . . . On the question of expenses it was contended for the defender Arthur that he should not be found liable for those incurred by the trustee, or for anything beyond the expenses of the action against him. It was, however, the natural course for the pursuer to bring the action at first against the trustee who had succeeded the bankrupts in possession of the Ralli car, and it was not till after Arthur had been brought into the field, and it was shewn by the proof that its disappearance was due to fault, not on the part of the trustee but on his part, that the responsibility for the loss could be brought home to him. In the circumstances I think that he has properly been found liable in expenses to both the other parties to the litigation. He must also be found liable to both in the expenses of this appeal."

[1] Caledonian Railway Co. v. Greenock Sacking Co., May 13, 1875, 2 R. 671; Cowan v. Dalziels, Nov. 23, 1877, 5 R. 241.

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one defender who was in the wrong should be made to pay the expenses of a defender who should not have been convened in the case, and if convened, should have been allowed to be set free of the case at once. I think, therefore, that the proper person to pay Galbraith's expenses is the pursuer who brought and pressed the case against him.

LORD YOUNG.—I have no hesitation in concurring with the judgment proposed in regard to the merits,—that is, that the pursuer is entitled to judgment against the defender Arthur, and that the defender Galbraith is entitled to decree of absolvitor.

With respect to the question of expenses, your Lordship has expressed the opinion that Arthur should not be liable in Galbraith's expenses. I am of a different opinion, and think with the Sheriff and Sheriff-substitute that he should. I agree with them that Galbraith is entitled to his expenses if he is assoilzied, and further, that he is entitled to a decree against the pursuer, unless he is satisfied with a decree against his co-defender to pay them. If he is satisfied with such a decree, it would be ridiculous to go through the form of making the pursuer liable, by a decree against him, to pay the expenses, and then to ordain Arthur to relieve him. There is a practice, and occasionally there is an opportunity for acting upon it, of finding one of two defenders liable in expenses to the other. The question is whether this is or is not a case for the application of that rule. The pursuer here brought his action against both defenders; in his first petition he called Galbraith, and that was immediately followed by another against both Galbraith and Arthur, with a prayer to conjoin the actions. That was thought reasonable, and a record was made up between the pursuer and both defenders without objection. No additional expense was caused to Galbraith by this procedure, and I therefore deal with the question as if there had been only one action against both defenders. What was the question to be tried? It was admitted that one or other of the defenders should be found liable to the pursuer, and on what did the solution of that question depend? It depended on this, whether Arthur had taken away the car without authority and disposed of it, as Galbraith said; or whether, as Arthur said, Galbraith had sold and delivered it to him. It occurs to me that that question could only be properly tried with both defenders, and could not be properly tried without both. No doubt the pursuer might, if ill advised, have tried it with one of them, but the result would not have been binding on the other. And if he were unsuccessful, and then brought an action against the other, the decision would not have been *res judicata*, and he might have failed in his second action also. I therefore think that the only reasonable course was to try the question with both. A more typical case for the application of what is admittedly competent, viz., to make one defender pay the expenses of the other, I cannot conceive. I repeat the qualification, that the successful defender may refuse to take a decree against his co-defender. But a sensible defender usually would give his consent, and such consent is constantly given. I am therefore of opinion that there is no ground for interfering with the judgment which has been pronounced by both Sheriffs.

LORD TRAYNER.—In so far as concerns the merits of this case I concur in

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the judgments pronounced by the Sheriffs. I think it is established by the evidence in the case (1) that the car in question was not sold by Galbraith to Arthur, and (2) that Arthur sold the car after he had been duly warned that it was not part of the stock which he had bought. In these circumstances there can be no doubt that Arthur is bound to pay the value of the car to the pursuer. But I am unable to concur with the Sheriffs in regard to their disposal of the question of expenses. The matter stands thus: When the pursuer discovered that his car had been sold he claimed its value from Arthur, who had sold it. Arthur repudiated liability on the ground that the car had been sold to him by Galbraith, whereupon the pursuer claimed from Galbraith, who in turn repudiated liability on the ground that he had not sold the car to Arthur. The pursuer then raised his action against Galbraith, who stated in defence judicially what he had already explained extrajudicially to the pursuer, but pleaded that all parties had not been called, on the ground that Arthur was the proper debtor in the claim, if there was a claim at all. On this the pursuer raised an action against Galbraith and Arthur, and the two cases were conjoined. Now, in my opinion, the pursuer having before him the conflicting views of the two defenders, should have informed himself of where the truth lay, and directed his claim, and insisted in his claim, against the person (and him only) who, according to his information, was responsible. I do not think a pursuer is entitled to convene two or more defenders who each and all deny liability, and say that liability lies on one or other of them. He must select his debtor and proceed against him. If he takes the other course—the course adopted here—he does so at the risk of being found liable in expenses to those defenders who were not his debtors, and against whom consequently no action should have been brought. But I see no reason why an unsuccessful defender should be held liable in expenses to a successful defender who, as the result shewed, should never have been called. I am therefore of opinion that the Sheriffs were wrong in finding the defender Arthur liable in expenses to the defender Galbraith. As between the pursuer and Galbraith the question presents more difficulty. I think the plea of all parties not called should not,—certainly need not,—have been put forward. If Galbraith was not liable to the pursuer it was no concern of his who was, and calling Arthur into the field did nothing to strengthen Galbraith's defence. On the other hand, the pursuer might have disregarded that plea and insisted on his right to a decree against Galbraith, if he could establish Galbraith's liability. On the broad ground that the pursuer's action against Galbraith was unfounded, and unsuccessful, I think the pursuer must be found liable in expenses to Galbraith. What I have now said refers only to the expenses incurred in the Court below.

I should perhaps add, that the cases arising under the Poor-Law Act, referred to in the debate, do not, in my opinion, form any precedent for what the Sheriffs have done. In these cases where two defenders are summoned, the one representing the birth parish and the other the parish of alleged residential settlement, the pursuer having called the defenders practically retires from the case. The defenders there admit that one or other is liable, and the question which is liable is a question between themselves. But if a relieving parish raised an action against two parishes on the ground

that the pauper had a residential settlement in one or other of these parishes, and both denied liability, then the pursuer would get his expenses against the parish found liable, and be liable in expenses to the parish assoilzied. That is the kind of case we are dealing with here.

LORD MONCREIFF.—On the merits I agree with the Sheriffs.

On the question of expenses, however, I am of opinion that, while the defender Arthur is liable in expenses in the Sheriff Court to the pursuer, he is not liable to his co-defender Galbraith.

Where a pursuer convenes two defenders, I do not doubt that in certain circumstances it is in the discretion of the Court in the event of one defender being found liable and the other not to find the unsuccessful defender liable in expenses not only to the pursuer, but to the successful defender. We are familiar in practice with this being done in poor-law cases; but the reason for that is obvious, as the form of the summons in such cases shews. Where, as usually happens, the relieving parish obtains an admission that the pauper was born in the parish of A, and A avers that a residential settlement has been acquired in the parish of B, the relieving parish brings a summons against A and B, concluding against them alternatively; and, having nothing to prove, simply watches the case while it is determined between A and B whether the pauper has or has not acquired a residential settlement. Whichever of the parishes A or B is unsuccessful pays the expenses of the successful parish, as well as those of the pursuer.

But except in poor-law cases such practice as to expenses is exceptional, though not incompetent, the general rule being that, if a pursuer convenes two defenders and one is assoilzied, the pursuer, and not the unsuccessful defender, pays the expenses of the successful defender.

In the present case, while I sympathise with the pursuer, I do not see sufficient grounds for subjecting the defender Arthur in the expenses of the successful defender Galbraith. The pursuer did not, as it were, put this question of liability *in medio*, and leave the two defenders to fight it out. Whether this would have been competent is very doubtful; but he did not do it. His object was to obtain a decree against both defenders jointly and severally. The fifth plea in law for the pursuer is—"The defender Galbraith having carelessly and negligently failed to protect the said car, and the defender Arthur having acted illegally and wrongfully in taking possession of and selling same, they are jointly and severally liable to the pursuers for the loss and damage thereby sustained." And the defenders' witnesses were all cross-examined on behalf of the pursuer, as well as on behalf of the other defender. No alternative case is made on record, or in the course of the proof.

Besides, a very little inquiry should have satisfied the pursuer that he had not sufficient grounds for proceeding against Galbraith. It was certainly not a sufficient reason for his doing so that Arthur alleged that Galbraith sold the Ralli car to him. Galbraith's assurance, supported by the bankrupt Morris Reid and others, should have satisfied him that there was no sale of that car.

The result is that I am of opinion that the pursuer is entitled to expenses

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against Arthur in the Court below; that, as Galbraith has been assoilzied and is not entitled to expenses against Arthur, he must get his expenses in the Court below from the pursuer.

As to the expenses in the appeal, I think there should be no expenses as between the pursuer and Arthur. Galbraith must get his expenses as against the pursuer.

THE COURT, finding in fact and law in terms of the interlocutor of 22d January 1900, dismissed the appeal *quoad* the merits: *Quoad* the expenses, the Court pronounced these findings:—"Recall the said interlocutors in so far as they find the defender Arthur liable in the expenses of the defender Galbraith: Find the pursuer entitled to expenses against the defender Arthur in the inferior Court only: Also find the defender Galbraith entitled to expenses against the pursuer both in the inferior Court and in this Court; and *quoad ultra* find no further expenses due as between the pursuer and the said defender Arthur."

ALEX. ROSS, S.S.C.—MACPHERSON & MACKAY, S.S.C.—SIMPSON & MARWICK, W.S.—Agents.

No. 15.
Nov. 6, 1900.
Cadzow Coal Co., Limited, v. Gaffney.

CADZOW COAL COMPANY, LIMITED, Appellants.—*Salvesen, Q.C.—Chree.*
CHARLES GAFFNEY, Respondent.—*Johnston, Q.C.—Younger.*

Master and Servant—Workmen's Compensation Act, 1897 (60 *and* 61 *Vict. cap.* 37), *First Schedule* (1) (*b*).—A miner entered the service of a coal company on Friday, 23d March; he did not work on Saturday, the 24th; he worked on Monday, the 26th, and on every day thereafter until Thursday, the 29th, when he received injuries, on account of which he claimed compensation under the Workmen's Compensation Act, 1897, from his employers.

Held that these facts afforded a sufficient basis for calculating the claimant's "average weekly earnings" in terms of the First Schedule (1) (*b*) of the Act.

Opinion per Lord Trayner that the word "weekly" in the schedule referred to calendar weeks.

Opinion per Lord Moncreiff *reserved* on the question whether a workman who had been in the employment during one week only was excluded from the benefit of the Act.

2D DIVISION. Sheriff of Lanarkshire.

CHARLES GAFFNEY, miner, Hamilton, having claimed compensation under the Workmen's Compensation Act, 1897, against the Cadzow Coal Company, Limited, the matter was referred to the arbitration of the Sheriff-substitute (Davidson) at Hamilton, who awarded compensation, and, at the request of the company, stated a case for appeal.

The case set forth:—The respondent entered the defenders' employment on Friday, 23d March last, on which day he earned 7s. 7d. On the 24th he did not work. He worked on Monday, the 26th March, and every day thereafter till the 29th, on which day he was knocked down by a hutch and so severely injured that he was unable to work till 14th May. During the four days from 26th to 29th March inclusive he earned the sum of £1, 12s. He was not paid any wages by the defenders before the accident. He and other miners in appellants' employment were engaged from day to day. Wages were paid fortnightly on Saturday, but if the miners desired they could usually

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get their wages on the intermediate Saturdays. The 24th of March was an intermediate Saturday.

The Sheriff-substitute decided that the amount the respondent earned on Friday, the 23d March, was his wages for the week in which that Friday occurred; that the amount he earned on the following week, viz., the 26th, 27th, 28th, and 29th March, was his wages for that week; and that the Court was entitled to strike an average between them, which the Sheriff-substitute did, and awarded compensation at the rate of 9s. 10d. per week.

The question of law was,—"Whether the respondent, having entered the employment of the appellants on 23d March 1900, and worked on that day, and having also worked on the 26th, 27th, 28th, and 29th March 1900, on which last day he was injured, is entitled in law to compensation under the First Schedule (1) (*b*) of the said Act?"*

The undernoted authorities were cited at the hearing.[1]

LORD JUSTICE-CLERK.—Whatever anomalies there may be in regard to the right to compensation under this statute, we must deal with the statute as we find it. Its purpose is to give a right to compensation to workmen who have been injured in the course of their employment apart from any question of fault on the part of the employers. But when it came to the working out of that right to compensation the Legislature has thought proper to enact that the amount of compensation shall be based on the average weekly earnings of the injured person, and it has been said that, as you cannot have a case of a weekly average if you have only one week to determine by the injured person must have worked for more than one week in order to entitle him to compensation. From this it is argued by the appellants here that the present case must be taken to be a case of working for one week only, because the respondent had been in their employment at the date of the injury for a single day only in one of the weeks. I am unable to assent to that. It is not wages to which the injured person would be entitled if he worked for two full weeks that we are to take as the basis of computation, but earnings which he did in fact make. If he worked for a short time only in one week, and in consequence earned little for that week, then

* The Workmen's Compensation Act, 1897 (60 and 61 Vict. cap. 37), sec. 1, enacts,—"(1) If in any employment to which this Act applies personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the First Schedule to this Act."

The First Schedule contains the following:—

"(1) The amount of compensation under this Act shall be," *inter alia*—

"(*b*) Where total or partial incapacity for work results from the injury, a weekly payment during the incapacity after the second week not exceeding fifty per cent of his average weekly earnings during the previous twelve months, if he has been so long employed, but if not, then for any less period during which he has been in the employment of the same employer, such weekly payment not to exceed one pound."

[1] Lysons v. Andrew Knowles & Sons, Limited, L. R. [1900], 1 Q. B. 780; Stuart v. Nixon & Bruce, L. R. [1900], 2 Q. B. 95 [both reversed by the House of Lords, L. R. [1901], A. C. 79]; Doyle v. Beattie & Sons, July 10, 1900, 2 F. 1166; Russell v. M'Cluskey, July 20, 1900, 2 F. 1312.

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he must suffer, because he cannot bring up to a high figure the sum from which the average is to be struck. This is how the Sheriff-substitute has dealt with the case. It seems to me that he has taken the proper course, and that we should adhere to his judgment.

LORD TRAYNER.—I am of the same opinion. The principle of the Act is that a workman in an employment to which the Act applies shall be entitled to compensation from his employer for injuries received by him in the course of his employment. The amount of compensation to which the workman is to be entitled is fixed by the First Schedule of the Act, and it has been held that a workman cannot recover compensation under the Act unless he has been at least two weeks in the employment, because the statutory standard for measuring compensation can only be applied in circumstances which enable the Court to strike an average. I think we can here fix the amount of compensation to which the respondent is entitled in terms of the statutory standard. In the course of the argument use was made of the words "wages," "weekly wages," and "average weekly wages." But that is not the language of the statute, and to introduce these terms may only add to difficulties in connection with the construction of this statute, already sufficiently great. The statute makes no reference to the wage or weekly wage of the workman, but to the amount of his "earnings" in a week. A workman obviously might earn in any week less than what would be recognised as his weekly wage by working for less than a full week, or he might earn more by working overtime. The statute, however, only takes account of what the workman "earned" in the week. It was also suggested that as in some employments the working week may begin, say, on a Tuesday, and end on the following Monday, we should regard "week" in the statute as if it were six full days. I do not think so. The statute is not dealing with special employments, but with the general question, and when it speaks of weeks I regard it as meaning the space of time which commences on Sunday and ends on Saturday. In the present case it appears that the respondent worked for one day in the week ending Saturday, 24th March, and that the sum which he received for that day's work constitutes his earnings for that week. In the same way, the sum he received for his four days' work in the following week constitutes his earnings for that week; and if these two sums be added together and then divided, you get his average weekly earnings in the two weeks preceding his injury. The Sheriff-substitute has awarded compensation on this principle, and I think that his judgment is right.

LORD MONCREIFF.—Although the decision which we are about to pronounce goes further than any previous decision on the point, I think that it is in accordance with the proper construction of the statute. There is nothing in the body of the statute to the effect that an injured workman shall not be entitled to compensation unless he has been in the employment for more than one week. Continuity of employment is not a condition of the right to compensation according to the body of the statute. The question arises only inferentially from the terms of the first schedule to the Act. That schedule provides that the amount of compensation in the case of a

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workman who has been totally or partially incapacitated for work shall be based on his average weekly earnings during the period of his employment. This has been held to imply that service for at least two weeks is an essential condition of a right to compensation, because, it is said, you cannot strike a weekly average unless you have the earnings of at least two weeks. But I should like to reserve my opinion on the question whether a workman who had worked only for, say, five days in a single week is excluded from the benefit of the Act. I doubt whether such a result was within the view of those who framed the Act; but assuming that work during two weeks is essential to the right to compensation, I think that even on that construction the conditions of the statute are here sufficiently fulfilled. The respondent did work during two weeks in a popular sense, for he worked (no doubt for one day only) in the week ending 24th March, and he also worked in the following week each day until the 29th March, when he was injured. He earned 7s. 7d. for the first week, and £1, 12s. for the second week. If we add these two sums together and then divide the total, we get the average weekly earnings of the respondent. This method of computation is in favour of the employers, because the respondent's earnings were small in the first week, as he then worked for only one day, and thus the average is greatly reduced. I think that the Sheriff-substitute has arrived at the right conclusion, and that we should answer the question accordingly.

LORD YOUNG was absent.

THE COURT answered the question in the affirmative.

W. & J. BURNESS, W.S.—SIMPSON & MARWICK, W.S.—Agents.

No. 16.

Nov. 6, 1900. Brodie v. North British Railway Co.

JOHN BRODIE, Appellant.—*Salvesen, Q.C.—Findlay.*
THE NORTH BRITISH RAILWAY COMPANY, Respondents.—*Sol.-Gen. Dickson, Q.C.—Glegg.*

Master and Servant—Workmen's Compensation Act, 1897 (60 *and* 61 *Vict.* c. 37), *sec.* 7 (2)—*Railway—Private Railway—"On or in or about" a railway.*—A trading company's premises were connected, by a siding, which was its own property, with a line of railway belonging to a railway company. The siding, which was not constructed or carried on under any Act of Parliament, was used solely for the traffic of the trading company, and for that purpose was used by the railway company by means of its own rolling-stock and servants. A servant of the railway company, while so employed, was accidentally injured at a point on the siding three-quarters of a mile from its junction with the line of railway.

Held that the accident had not occurred "on, in, or about" a railway within the meaning of the Workmen's Compensation Act, 1897.

2D DIVISION. Sheriff of the Lothians and Peebles.

IN this arbitration under the Workmen's Compensation Act, 1897, John Brodie, a goods guard, claimed from the North British Railway Company compensation for injuries received by him while in their employment.

The Sheriff-substitute (Maconochie) having dismissed the claim, John Brodie claimed and obtained a case, which stated as follows:—"The facts proved or admitted were as follows:—On January 15th, 1900, the appellant was injured on a siding of the Coltness Iron Company's mineral line while in the performance of his duty as a goods

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guard in the employment of the respondents. Said line is a private line of railway belonging to the said Coltness Iron Company, and it was not constructed and is not carried on by them or by any other company under the powers of any Act of Parliament. Said mineral line has a communication with the Caledonian Railway Company's system at a point near Newmains, shewn on the plan produced, and also at a point near Prospecthill, also marked on said plan. Said mineral line has a communication with the respondents' system at a point near Newmains, marked on said plan, but it has no other communication with the respondents' line. The Caledonian Railway Company are in the habit of sending daily a small part of their through goods traffic from the point first above mentioned to the point second above mentioned, both on their line, over the said mineral line, instead of sending it exclusively over their own line, which is somewhat longer, but they do not do this in virtue of any Act of Parliament or of any arrangement between them and the owners of the private line. The respondents, by means of their own engines and trucks, deliver at the Coltness Ironworks, by said private line of railway, ore consigned to the Coltness Iron Company from various parts of the country, and take away in a similar way mineral consigned by the Iron Company to various consignees. The respondents have no arrangement with the owners of the private line with regard to the carriage of goods other than those above mentioned, and they do not use the said line for the carriage of such other goods. The accident occurred on a siding connected with the said private line at a point about three-quarters of a mile from the only point at which the main mineral line is connected with the respondents' system.

"On 20th June 1900 I gave judgment. I held in law that the said accident did not take place on, in, or about a railway within the meaning of section 7 (2) of the Workmen's Compensation Act, 1897, and dismissed the application, with expenses to the respondents.

"The question of law for the opinion of the Court is,—Whether the accident took place on, in, or about a railway within the meaning of the Workmen's Compensation Act, 1897?"*

Argued for the appellant;—(1) The accident took place "on" a railway. The siding might not belong to the railway company, but the Regulation of Railways Act distinguished between "belonging to" and "of." This was a siding "of" the railway company *pro tempore* and in a reasonable sense for the purposes of its business in delivering and accepting traffic, and *quoad* that the railway company was the undertaker. It was using the siding by agreement with the iron company, and was thus virtually in the position of a lessee.

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* The Workmen's Compensation Act, 1897, enacts (sec. 7):—"This Act shall apply only to employment by the undertakers, as hereinafter defined, on or in or about, *inter alia*, a railway." Subsec. 2.—'"Railway' means the railway of any railway company to which the Regulation of Railways Act, 1873, applies, . . . and 'railway' and 'railway company' have the same meaning as in the said Act of 1873."

By the Regulation of Railways Act, 1873, section 3, the term "railway company" includes any person being the owner or lessee of, or working any railway in the United Kingdom constructed or carried on under the powers of any Act of Parliament, and the term "railway" includes "every station, siding, wharf, or dock of or belonging to such railway, and used for the purposes of public traffic."

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Further, the siding was used for public traffic. It carried traffic to and from the public and the iron company by means of the railway company's rolling stock and servants at the ordinary rates. It was used also by the Caledonian Railway Company for public traffic. (2) In any event, in a reasonable sense, this was an accident "about" a railway. It was immaterial whether the accident took place three-quarters of a mile or one hundred yards from the railway. In all decisions as to "in or about," regard had been had to the circumstances.[1]

Argued for the respondents;—The accident had not occurred "on" a railway, as the siding was not a railway to which the Regulation of Railways Act applied. That Act applied only to railways under the jurisdiction and regulation of the Railway and Canal Commissioners, which did not cover private railways in private ground. This was a siding of the iron company, and not of the railway company. The words "or belonging to" in the Act were exegetical of the word "of." Further, it was used for the private traffic of the iron company only, and the agreement between the railway company and the iron company had reference only to such traffic. The Caledonian Railway had no leave to use the siding, and could be prohibited. The limit of a railway company's liability was for accidents on public railways; the burden was not imposed on them on private lines. (2) The accident could not be said to have taken place "about" a railway. "About" was referable to the locality of the railway, and not to the business of the railway carried on at some distance from it.[2] Here the accident took place three-quarters of a mile from the railway, which could not be said to be "about."

LORD JUSTICE-CLERK.—The facts in this case are very clearly stated by the Sheriff-substitute. The real question is, whether the accident which occurred took place on, in, or about a railway to which the Regulation of Railways Act of 1873 applies, for unless it did the section 7 (2) of the Workmen's Compensation Act will not apply. I am of opinion that the place being three-quarters of a mile from the respondents' railway, and on a private line made for the service of a private company, and under the control and management of that private company, the accident did not occur upon a railway to which the Regulation of Railways Act of 1873 applies, and I therefore would propose to answer the question submitted to the Court in the negative.

LORD TRAYNER.—The appellant, a servant in the employment of the respondents, was accidentally injured in the course of his employment, and he claims compensation in respect of his injuries under the provisions of the Workmen's Compensation Act, 1897. The answer made to the appellant's demand is, that in the circumstances stated the appellant can maintain no claim under the Act on which he founds. The Sheriff-substitute has given effect to this answer and dismissed the appellant's petition. I think he is right.

The injury which the appellant received was so received on a railway

[1] Middlemiss v. County Council of Berwick, Jan. 17, 1900, 2 F. 392.
[2] Fenn v. Miller, L. R. [1900], 788; M'Millan v. Barclay, Curle, & Co., Nov. 10, 1899, 2 F. 91.

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siding belonging to the Coltness Iron Company, about three-quarters of a mile from the place where that siding connects with the respondents' system. In one view, therefore—the popular view—the appellant was injured on, in, or about a railway. But was it a railway within the meaning of the Act? Railway is there defined as meaning the "railway of any railway company to which the Regulation of Railways Act, 1873, applies." The siding on which the injury was received was not, and is not, the railway of any railway company, but is the railway of the Coltness Iron Company. Nor is it a railway to which the Regulation of Railways Act applies, in respect (1) it was not constructed, nor is it carried on, under the powers of any Act of Parliament, and (2) it is not used for public traffic, but only for the traffic of the Coltness Iron Company.

It was maintained, however, for the appellant that even if the siding on which he was injured was not a railway within the meaning of the Workmen's Compensation Act, yet that the railway of the respondents was so, and that he was injured on, in, or about that railway. I cannot adopt that view. The result of the decided cases, both in England and here, is that the words "on, in, or about," imply local contiguity to the factory or railway where the injury for which compensation is claimed was received. There was no such contiguity here. The site of the injury was three-quarters of a mile away from the respondents' railway, and a much less distance than that has been held, more than once, not to satisfy the condition of "on, in, or about." I am therefore of opinion that the question put to us should be answered in the negative and the appeal dismissed.

Lord Moncreiff.—I think the Sheriff-substitute's decision is right. The claim is made under the Workmen's Compensation Act, 1897, against the appellant's employers, the North British Railway Company. Under that Act compensation can only be obtained for injuries sustained on or in or about a railway. "Railway" is defined as meaning the railway of any railway company to which the Regulation of Railways Act, 1873, applies. Under that Act, section 3, the term "railway company" includes any person being the owner or lessee of, or working any railway in the United Kingdom constructed or carried on under the powers of any Act of Parliament, and the term "railway" includes "every station, siding, wharf, or dock of or belonging to such railway, or used for the purposes of public traffic."

Now, the accident occurred upon a siding on a private line of railway belonging to the Coltness Iron Company. This private line had a connection with the respondents' main line at Newmains, and the place where the accident occurred was at a distance of three-quarters of a mile from the connection. Under an arrangement between the respondents and the Coltness Iron Company, the former were in use to deliver and take away by means of their own engines and trucks by that private line of railway ore consigned to, or mineral consigned by, the Coltness Iron Company.

The question is, whether the Act of 1897 applies to the private line in question. It was argued in the first place that the siding could be regarded as a siding of the respondents' railway. I do not think that this contention is well founded. The siding is a siding of a private line belonging to the

Coltness Iron Company, and not of any part of the system of the respondents' company. No. 16.

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Next, it is said that the accident occurred "about" the respondents' railway. This is a more plausible ground, because the private line is connected with the respondents' railway, and the respondents' engines and trucks daily use it in connection with the public traffic which is carried on upon the respondents' railway. But this is not in my opinion sufficient. It is true that by means of the connection the respondents' engines and trucks can, under the arrangement with the Coltness Iron Company, deliver and take up ore in the way in which I have mentioned. But for all that the line is a private line, and the position of the respondents in regard to it is just the same as if in a town they had sent their carts to the private premises of a trader for the purpose either of delivering goods consigned or taking away goods for carriage by their line.

Further, the accident occurred at such a distance from the respondents' own line that I think the siding cannot in any reasonable sense be described as being about the respondents' railway.

I would only add in conclusion that the private line appears to be connected not only with the North British but with the Caledonian system, and it might with equal force be maintained that it was a part of that system. It is settled by decision that in order to bring the *locus* of an accident within the scope of the statute it is not enough that the workman should at the time of the accident have been employed on the employer's business. It is also necessary under the 7th section that the accident should have occurred "on or about" the premises there mentioned. It was not intended that the Act should apply to private railways, and I think that we should be setting a dangerous precedent if we hold that this line of railway fell within the scope of the Act.

LORD YOUNG was absent.

THE COURT answered the question in the negative, and dismissed the appeal.

MARCUS J. BROWN, S.S.C.—JAMES WATSON, S.S.C.—Agents.

NICHOLAS ROBINSON AND ANOTHER (Robert Gray's Trustees), First Parties.—*Campbell, Q.C.—Sandeman.* No. 17.

MRS AGNES WILSON, Second Party.—*Campbell, Q.C.—Sandeman.*

MRS EUPHEMIA DOW, Third Party.—*Lees—R. C. Henderson.*

WILLIAM HUNTER AND OTHERS (Directors of the Dundee Institution for the Education of the Deaf and Dumb), Fourth Parties.—*Lees—R. C. Henderson.*

Nov. 7, 1900. Gray's Trustees v. Dow.

Writ—Testament—Holograph Addition—Subscription.—A man executed a will, written for him by another person, by subscribing it before two instrumentary witnesses. Some time afterwards the testator inserted in a space which had been left between the end of the will and his subscription and those of the witnesses, a holograph addition which began "Codicil," and made provision for the disposal of an annuity which had lapsed through the death of the annuitant since the execution of the will.

Held that the holograph addition was a valid part of the testamentary writings of the deceased.

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Nov. 7, 1900.
Gray's Trustees v. Dow.

2D DIVISION.

THIS was a special case for the determination of a question as to the validity of two holograph additions to a testamentary deed left by Mr Robert Gray, 10 Roslin Terrace, Dundee, who died unmarried at Dundee on 19th December 1899.

The facts, as stated in the case, were as follows:—

The testamentary deed in question (a facsimile of which was produced with the case) was written on a printed form of will in the English style. In so far as written it was (apart from the holograph additions) written by Mr John Miln, actuary in the Dundee Savings Bank, at the testator's request and according to his instructions, and was duly subscribed by the testator in presence of two witnesses (who subscribed as such) on 7th July 1893.

By his will, as thus framed, the testator appointed certain persons to be his trustees and executors, and bequeathed to "Mrs Agnes Wilson, my housekeeper, an annuity of thirty pounds per annum payable" at the terms and on the conditions specified, "I also bequeath to Mrs Barbara Wilson of Glasgow, mother-in-law of the said Agnes Wilson, an annuity of ten pounds per annum." Then followed an annuity of £5 to a Mrs Robert Dow and one of £10 to a niece of the testator. The testator then directed his trustees, on the death of the last surviving annuitant, to pay over the residue of his estate to the Association for the Education of the Deaf and Dumb in Dundee, to be applied in establishing bursaries or scholarships.

When the will was found in the testator's repositories after his death it had on it the holograph additions in question, both of which were written in red ink. The case bore that "when it was signed and witnessed there was no writing in red ink on the will. After it was signed the will was handed to the deceased, who retained the custody of it."

The first of these additions was written on the margin at the point containing the bequest to Mrs Barbara Wilson. It was in these terms:—"Mrs Barbara Wilson died on the 22nd of December, year 1894. Her annuity falls to Agnes Wilson afore mentioned." These words were neither signed nor initialled by the testator.

The other holograph addition was written in a space which had been left as if for a testing-clause between the end of the will and the testator's subscription. This addition had no special signature or initials appended to it. It was in the following terms:—"*Codicil.*—The will above was written by John Miln, formerly clerk to John Sturrock, writer, Dundee. I hereby enjoin that the annuity of ten pounds designed for Mrs Barbara Wilson, who died in Glasgow last year, shall be added to the annuity of Mrs Agnes Wilson forementioned, together with free use of my house furniture for her life, including my library, and my trustees foresaid may choose anything if they like for themselves."

The case further stated that the admitted facts with regard to the additions in red ink shewn on the will were as follows:—Mrs Barbara Wilson died on 22d December 1894. About a week after her death the testator had a conversation with Mrs Agnes Wilson in his house. "He asked her whether she wished to remain in his house after his death, seeing that she would have no home in Glasgow in consequence of the death of her mother-in-law, who lived there. Mrs Agnes Wilson said she would like to remain, and the deceased then told her that the £10 annuity which he had left to her mother-in-law would be added to her annuity, as he did not think she would have

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enough, and that she would get the use of his furniture during her life. . . . On the same day he told her that he had written a codicil to his will in red ink, and that it was all right now. He told her also that the codicil gave her an additional annuity of £10 and the furniture until she died, and that the furniture was then to be sold by his trustees. He many times, on later dates, repeated these statements to Mrs Agnes Wilson."

The parties to the special case were—(1) The trustees and executors under the will, (2) Mrs Agnes Wilson, (3) Mrs Robert Dow, (4) the directors of the Dundee Institution for the Education of the Deaf and Dumb.

The question of law was,—"Are the red ink holograph additions to the said will, or either and which of them, valid and effectual as part of the testamentary writings of the deceased Robert Gray?"

The first and second parties maintained that the holograph marginal note, and the holograph addition written in red ink of the will beginning "Codicil," or at least that the addition beginning "Codicil" contained a good and valid testamentary provision by the deceased, which must receive effect.

The third and fourth parties maintained that the two additions in question were invalid and ineffectual, being unsigned and otherwise destitute of the formalities necessary to give them due testamentary effect under the law of Scotland.

At the hearing the first and second parties did not offer any argument in support of the validity of the marginal addition. On the question regarding the validity of the addition beginning "*Codicil*," the undernoted authorities were cited.[1]

At advising,—

LORD JUSTICE-CLERK.—The document, of which a facsimile is before us, bears on its face to be signed by the testator, with the exception of the marginal addition on the first page, which has no special authentication. Taking the document as it stands, I have no difficulty in holding that it is effectual in all its parts, with the exception of the marginal addition, and that it is quite in accordance with the rules which govern the authentication of deeds to hold that the red ink addition which is written between the testator's signature and the body of the will must receive effect. It is, no doubt, distinguished from the deed by being headed "codicil," in the testator's handwriting, and being written in red ink, but I think these facts afford no reason for not giving effect to it, looking to the position which it occupies in the deed. The marginal addition is not in form a part of the deed; it could not be got in except by something which shewed that it was intended to be brought in. What is written on the margin is deliberative, and does not shew a final resolve in the mind of the testator. But the codicil is not in that position.

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[1] *By the first and second parties.*—Speirs v. Home Speirs, July 19, 1879, 6 R. 1359; Russell's Trustees v. Henderson, Dec. 11, 1883, 11 R. 283; Burnie's Trustees v. Lawrie, July 17, 1894, 21 R. 1015; Stair, iv. 42, 6. *By the third and fourth parties.*—Brown v. Maxwell's Executors, May 21, 1884, 11 R. 821; Goldie v. Shedden, Nov. 4, 1885, 13 R. 138; Parker v. Mathieson, March 9, 1876, 13 S. L. R. 405; Pattison's Trustees v. University of Edinburgh, Nov. 9, 1888, 16 R. 73.

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If we are entitled to look at the facts, we find that the testator had said to Mrs Wilson that it was his intention to make the additional provision for her which he made by his codicil, and further, that he told her that he had done so. There is, therefore, nothing in the admitted facts to throw doubt upon the conclusion which I draw from the deed itself.

I am accordingly of opinion that the question of law should be answered by declaring that the marginal addition is not effectual, but that the "codicil" is.

LORD TRAYNER.—I agree. Of course a testamentary writing to be effectual must be subscribed; and the question here is, is this document subscribed? The case against it is that it is difficult so to hold, because of the use of the word "codicil," and also because it contains within itself evidence that it was written after the earlier part of the deed. I think the codicil is not the less truly subscribed because the testator's name was already written below it, and, in my opinion, that name authenticated everything that was written above it. In fact, the whole deed, including the codicil, is subscribed—the testator's name is "subscribed" to it all. It is probable that the testator, finding that he had room between the end of the deed and the signature to put in the codicil, did so, intending that the one signature should serve for the whole deed. And in doing so I think he complied with the strict rule that a deed must be subscribed. If we go past the deed itself and take into account the stated facts—although I doubt the propriety of doing so—the statements and admissions of the parties exclude the idea that this addition was merely deliberative, for we are told that the testator not only said that he was going to make these additional provisions, but also said that he had done so. But I think the codicil is effectually made part of the deed apart from that extrinsic evidence.

LORD MONCREIFF.—I am of the same opinion. I assume that every holograph will must be authenticated by the signature of the testator, or by his initials, if it was his habit to sign by means of his initials. In some cases parole evidence has been admitted to connect the signature with the writing; and where that is necessary it would appear to be competent. The point which is to be ascertained here is, whether the addition in red ink—I do not mean the marginal addition—was deliberative or not. I think it is clear that the testator's intention was that the codicil should get the benefit of, and be authenticated by the signature "Robert Gray" which he had already written as his subscription to the body of the deed. The peculiarity of the case is, that the signature does duty both for the will and the codicil. But if it is plain that the testator intended it to serve for both, I see no reason why his intention should not receive effect.

The only other observation I have to make is this—it often happens that a testator in making holograph interlineations or marginal additions to his will neglects to authenticate them by his initials. Now, it is quite settled that the mere fact that the will itself is subscribed will not be sufficient to sustain such holograph alterations, although in a sense they are inserted above the subscription, because often these are put on tentatively; and if they are not authenticated it would not be safe to regard them as the expres-

sion of a completed intention. Here, instead of making a marginal addition or interlineations, the testator has put this addition immediately above his signature at the end of the deed. I am clearly of opinion that he intended the addition so made to form part of his testamentary writings, and I therefore agree that the question should be answered as your Lordship proposes.

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LORD YOUNG was absent.

THE COURT answered the question of law "by declaring that the red ink addition on the margin of the will of the deceased Robert Gray is not a valid and effectual addition to the said will, and that the holograph red ink addition at the end of the said will and beginning 'codicil' is a valid and effectual part of the testamentary writings of the said deceased Robert Gray."

CARMENT, WEDDERBURN, & WATSON, W.S.—KINMONT & MAXWELL, W.S.—Agents.

MRS SARAH M'ADAM OR CROSBIE, Appellant.—*Dove Wilson.*
HENRY HAY BROWN (Robert Crosbie's Trustee), Respondent.—*Cook.*

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Bill of Exchange—Joint Acceptors—Relief inter se—Proof—Cautioner.—In a claim of relief by one of two acceptors of a bill against the other it is competent to prove by parole the true nature of the transaction between the acceptors and their reciprocal obligations.

Bill of Exchange—Proof—Parole—Collateral Agreement—Bill drawn on behalf of another.—A bill was drawn by A and accepted by B, who became bankrupt. In the sequestration a claim was made by C, who produced, along with the bill, an affidavit signed by A, to the effect that he had drawn the bill on behalf of C, and in pursuance of this A blank indorsed the bill to C after C's claim had been lodged. In a proof before the trustee it was established by parole evidence that A had signed the bill as drawer on behalf of C, and that B had accepted the bill in consideration of a debt due by him to C. *Held* that the parole proof was competent, and that C as holder, indorsee, and true creditor, was entitled to a ranking.

1ST DIVISION. Sheriff-substitute of Dumfries and Galloway.

THE estates of Robert Crosbie, farmer, Nether Keir, Auldgirth, were sequestrated on 21st January 1899. On 6th February 1899 Mrs Sarah M'Adam or Crosbie, M'Cubbington, Dunscore, the mother of the bankrupt, lodged with the trustee, Henry Hay Brown, an affidavit and claim for sums of £121, 4s. 1d. and £273, 14s. 2d. On an appeal from a deliverance of the trustee rejecting these claims the Sheriff-substitute, at Dumfries (Campion), on 30th June 1899, recalled the deliverance of the trustee, allowed the appellant a proof *prout de jure* in support of her claim, and remitted to the trustee to take said proof, and thereafter to re-adjudicate on the claim.

In regard to the claim for £121, 4s. 1d. the following facts were proved:—On 29th October 1890 the bankrupt, Robert Crosbie, got a loan of £100 from John Hiddleston, draper, Dumfries, for which a bill was drawn by Hiddleston upon and accepted by the bankrupt and Mrs Crosbie. After several renewals the amount of the bill was paid by Mrs Crosbie on 29th October 1894. The signature of Hiddleston was thereafter cancelled.

This bill Mrs Crosbie produced in support of her claim for the principal sum of £100. The balance of the claim, £21, 4s. 1d., was made up of interest from 29th October 1894, the date of payment of the bill, to 26th February 1899, the date of lodging the claim. Apart from the bill there was no writ to support this part of the claim.

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As regards the second item of £273, 14s. 2d., the following facts were proved:—On 16th April 1892 Robert Crosbie obtained from Robert Stoba, solicitor, Dumfries, a loan of £200, which was secured by a heritable bond granted by Mrs Crosbie over Lagganlees, a small property belonging to her. Mr Stoba also took a bill for the £200 from Robert Crosbie. Lagganlees was subsequently purchased by John Gibson, Olive Bank, Maxwelltown, Mrs Crosbie's son-in-law, under burden of the bond in favour of Stoba, and in January 1897 the bond was paid up by Gibson and discharged. The bill for £200 was at the same time delivered up by Stoba to Gibson on the understanding that the latter was acting for Mrs Crosbie. Thereafter, on 17th February 1897, Gibson drew a new bill upon Robert Crosbie (who accepted) for £250, representing the original bill of £200 and accrued interest. Gibson deponed that he had no instructions from Mrs Crosbie to get the bill, but that he considered he had a right to it on her behalf in order to preserve legal evidence of the debt due to her by Robert Crosbie. He also appended an affidavit to Mrs Crosbie's claim in the sequestration, in which he declared "that the interest as creditor in the bill for £250 is entirely in my mother-in-law Mrs Crosbie," and eight days after the claim was lodged he blank indorsed the bill to Mrs Crosbie. It farther appeared that Gibson had on other occasions transacted business for Mrs Crosbie, who was a woman of seventy-three years of age. Mrs Crosbie produced the bill, drawn by Stoba and accepted by the bankrupt, for £200, and the bill for £250, in support of her claim, which consisted of the principal sum of £250 and interest thereon from 17th February 1897 to the date of the claim, amounting to £23, 14s. 2d.

By a deliverance dated 4th April 1900 the trustee rejected Mrs Crosbie's claim on the ground that what was sought to be proved, in both branches of the claim, was a loan by the claimant to the bankrupt, and that this could not be established by parole, while the bills could not be treated as documentary evidence of the loans. The Sheriff-substitute, on 15th June 1900, affirmed this deliverance on the same grounds.

Mrs Crosbie appealed, and argued;—(1) It was competent at common law to shew by parole evidence that the appellant accepted the bill as cautioner, and was entitled to relief for the whole sum expended in retiring the bill against the other obligant who had received the proceeds, and was the principal debtor.[1] Apart from this, parole proof was expressly authorised by sec. 100 in a case like the present. This was not a case where parole proof was offered to contradict the bill, because the bill did not determine what were the liabilities *inter se* of the joint acceptors.[2] Apart from proof, the presumption was that each, in a question with the other, was liable for a half, and to this extent the claim ought, in any event, to have been sustained. (2) As regarded the bill for £250, the appellant was as indorsee of the bill entitled to a ranking, unless the transaction was fictitious and without value, but the proof shewed that the appellant was the

[1] Drummond v. Nicholson's Creditors, 1697, M. 12,329; Smollet v. Bell & Rannie, 1793, M. 12,354; North British Insurance Co. v. Tunnock and Fraser, Nov. 1, 1864, 3 Macph. 1, at p. 5, 37 Scot. Jur. 1; Hamilton & Co. v. Freeth, July 17, 1889, 16 R. 1022; Kilpatrick v. Kilpatrick, Nov. 27, 1841, 4 D. 109; Lindsay v. Barmacotte, Feb. 19, 1851, 13 D. 718, at p. 725, 23 Scot. Jur. 315.

[2] Simpson v. Brown, June 8, 1888, 15 R. 716, *per* Lord Shand at p. 718.

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true creditor in the bill, and that the whole transactions were *bona fide*.

Argued for the respondent;—(1) The argument that parole proof was competent at common law was negatived by the case of *Walker's Trustees* v. *M'Kinlay*.[1] Since the date of the cases quoted from Morison's Dictionary by the appellant, the Mercantile Law Amendment Act, 1856, had limited proof of guarantee to writ. The statutory requirement was not satisfied merely by a name on the face of a bill, which could not be regarded as proving anything except the liabilities attached to this species of instrument. But, further, this was not a bill at the date of the claim, as the drawer's name was cancelled. Accordingly, what the appellant asked the Court to sanction was parole proof of a loan without any extant obligation in writing as a foundation for such proof. For the same reason the claim could not be maintained even to the extent of one-half. The 100th section of the Bills of Exchange Act, 1882, even if it applied to a cancelled bill, did not cover a case like the present. It only related to questions arising on the bill, and the rights *inter se* of co-acceptors; rights arising on payment of the bill, and after its existence as a bill was ended, could not be said to fall within this category. It had been decided in a recent case[2] that payment of a bill could only be proved by writ, and the same limitations must apply to a claim of relief which depended on proof that the proceeds of the bill had been received as a loan by one of the co-obligants from the other. Such a loan must be proved independently of the bill, by competent evidence (just as in the case of payment of the bill), because it was admitted that the bill itself did not determine the mutual rights and obligations of the co-acceptors. (2) As regarded the second item, it was clear that the indorsation of the bill for £250, not having been made till after the lodging of the claim, could not give a title unless the appellant had all along held the equitable right as true creditor in the bill. This did not appear on the face of the bills, to which the claimant was not a party, and in order to prove that she was the true creditor the appellant proposed to prove by parole a loan by her to the bankrupt. This was clearly not competent. It was said that Gibson, who was the drawer of the bill for £250, acted as agent for the appellant, but he had no authority and never disclosed the transaction to the alleged principal. The appellant never intended to keep up the loan. Unless there was proof of consideration, the granting of the bill was struck at by the Act 1621, c. 18, as an alienation to a conjunct and confident person. Gibson, to whom the bill was granted, stood in this relation, and it was not said that he gave value. It had never been held that the Act could be elided by proof that the person to whom the alienation was made acted as agent for another.

At advising,—

LORD PRESIDENT.—The question in this case is whether certain facts relative to two bills of exchange claimed on by the appellant, Mrs Crosbie, in the sequestration of the estates of her son, Robert Crosbie, can competently be proved by parole evidence, and if such evidence is competent whether the proof adduced is sufficient to establish these facts?

[1] June 14, 1880, 7 R. (H. L.) 85.
[2] Robertson v. Thomson, Oct. 18, 1900, *ante*, p. 5.

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The two bills of exchange upon which the appellant claims are one for £100, dated 20th December 1893, drawn by John Hiddleston, upon and accepted by the appellant and the bankrupt, and the other for £250, dated 17th February 1897, drawn by John Gibson upon and accepted by the bankrupt.

The question relative to the first-mentioned bill is whether a claim of relief by the appellant against the bankrupt for the sums which she paid under the bill can be proved by parole. She alleges in effect that she accepted the bill to procure the advance for the bankrupt, that he got the whole proceeds, and she accordingly claims a ranking on his estate for total relief.

It was not disputed in the argument before us that where there are two acceptors of a bill there is from the form of the instrument a presumption that, as between themselves, the acceptors are ultimately liable only each in one-half of the amount, and that if one has paid the whole the other would *prima facie* have a claim of relief to the extent of one-half. But as the question of relief does not depend solely or mainly on the terms of the bill, but the real nature of the transaction, and as proof of the true relations of the acceptors *inter se* would not in any way contradict the terms of the bill, I consider that those relations can competently be proved by parole, so that, if in the result it is established that the bill was exclusively for behoof of one of them who got the whole proceeds of it, the other would be entitled to total relief. I arrive at this conclusion independently of section 100 of the Bills of Exchange Act, 1882, and consequently it does not appear to me that for the purposes of the present question we require to give any opinion as to the construction or effect of that section.

The case of the bill for £250 is somewhat different, as the name of the appellant does not appear upon it, the sole drawer being John Gibson and the sole acceptor being the bankrupt; and the question relative to it practically resolves into this, whether it is competent to prove by parole that John Gibson, in drawing the bill, acted on behalf or in the interest of the appellant, and that the sum of £250, in respect of which it was granted, was truly due by the bankrupt to her. It is alleged that in taking the bill John Gibson virtually acted as a *negotiorum gestor* or volunteer agent for the appellant, to whom he was aware that the bankrupt was owing a just debt of the amount for which the bill was granted. This again is a question as to which it appears to me that parole proof is competent, as it does not in any way contradict the terms of the bill, but relates to something outside of it. It appears from the proof that in April 1892 the bankrupt required an advance of £200, and that Mr Stoba agreed to give a loan of that amount upon the appellant granting to him a postponed bond for it over a small property which belonged to her, the bankrupt at the same time granting a bill to Mr Stoba as a sort of collateral security for the same sum upon the bond, and the bill being granted the £200 was advanced to the bankrupt. The advance was repaid in January 1897 by John Gibson, a son-in-law of the appellant, who purchased the property under burden of the bonds upon it, including the £200 bond. As the £200 was truly due to the appellant, John Gibson got up the bill, with a view to recovering the

amount on her behalf, and afterwards obtained for the benefit of the appellant the bill for £250 claimed on as representing the £200 due under the prior bill and accrued interest. Upon these facts I think that the appellant is entitled to a ranking for the amount of the last-mentioned bill, seeing that the debt was truly due to her by the bankrupt, and parole proof being, in my view, competent, because it is not adduced to contradict or interfere with the terms of the bill, but to establish relevant facts collateral to and outside of it.

LORD ADAM.—There were two questions argued in this case—(1st) whether Mrs Crosbie is entitled to rank in respect of the bill for £100, and (2d) whether she is entitled to rank in respect of the bill for £250.

The bill for £100 was drawn by John Hiddleston, and accepted by Mrs Crosbie and the bankrupt. It was paid by Mrs Crosbie when it became due, and was then handed over to her. In the meantime, Mr Hiddleston's signature was deleted, as often is done in such cases, to prevent, I suppose, the bill from getting into circulation again. Well, Mrs Crosbie having paid the £100 to the drawer of the bill, no question arises between him and the acceptors. The only question is, whether the acceptors can have their mutual relations as acceptors settled outwith the bill, and the true state of liability between them proved by parole evidence, and not by reference to writ or oath. It was said by counsel for the trustee that Mrs Crosbie could not, in any view, prove this by parole evidence, because the allegation made by her was that she paid the bill as cautioner for the bankrupt, and that, accordingly, there was a difficulty arising out of the Mercantile Law Amendment Act, 1856 (sec. 6), which prevents guarantees or cautionary obligations from being proved otherwise than by writ. But that argument is used under a misapprehension of the circumstances of the case. The only cautionary obligation—if any there was—was between the creditor on the bill and Mrs Crosbie, she guaranteeing that her son, or failing him, she herself, would pay the bill. And the present question is, whether, having paid the bill in full, she is entitled to have relief for that payment from the other acceptor. It is not a question of caution at all, but of relief, and I cannot see why the extent of the liability must be determined by writ only and not by parole evidence. It was not disputed that in the case of this bill the presumption is—there being no evidence to the contrary—that the acceptors were each liable in one-half of the bill, and that if one paid the whole he would be entitled to relief from the other. Now, I see no incompetency in Mrs Crosbie proving that she paid the whole amount, and that her son was the true debtor, and in that case why should she not be entitled to relief against him? It is not a question of proving a loan by parole evidence, but of whether or not it was the fact that the whole amount was paid by Mrs Crosbie, and that her son was the true debtor.

With reference to the bill for £250, the position is this: There is a document of debt for £250, of which she is the indorsee, holder, and creditor. Why should she not be ranked in respect thereof? The answer is that she did not pay the value. That is not true in point of fact, for she did pay the sum of £200 to the debtor on the bill, and her money went to the renewal of a bill for £200, of which this present bill is the representative.

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Again, it is said that because the name of her son-in-law, who was negotiating for her, appears on the bill, it could not be held that she really gave value for it. I do not agree with that view. I think it is clearly proved that Crosbie got the £200 from her in 1892. I therefore concur in holding she is entitled to rank on this bill.

LORD M'LAREN.—I have very little to add, but I shall state my opinion on the points in the case in the order in which they have been argued to us.

1. With reference to the bill for £100 signed by the mother and son as joint acceptors, it appears to me that in the case of a joint obligation, whether undertaken in a bond or cash-credit obligation, or by joint subscription of a bill, it is no doubt of the essence of the obligation that each party is liable *in solidum* to the creditor, but there is nothing whatever in the words of the obligation to determine the reciprocal liability *inter se* of the joint obligants, or the extent of the right of relief which will arise when payment is made by one of them. We are familiar with the rule of law that payment of money in a question between debtor and creditor can only be proved by writ or oath, but I have yet to learn that this rule applies when the question is not one between debtor and creditor, but where payment is to be proved with reference to a collateral right, such as the right of relief of a co-obligant who pays the debt out of his own funds. There is no presumption that joint obligants are liable in equal shares *inter se*, and in business it is a common occurrence that a signature should be appended to a bond or bill without the party signing receiving value, and with the view of assisting or accommodating his cosignatory. If there is no presumption of fact as to the liability *inter se* of the joint obligants, the question of liability must be investigated by proof at large, if, as I assume, there is no limitation to writ or oath. In this case the proof is clear that Robert Crosbie received the whole proceeds of the bill, and in a question with his mother, who has paid the bill, is liable in total relief.

2. In regard to the bill for £250 I shall only say this, that Mrs Crosbie is holder as indorsee, and *prima facie* is entitled to enforce it against the bankrupt, who is the acceptor, and the proof, so far from displacing this presumption, appears to me to support it.

LORD KINNEAR.—By their joint acceptance of the bill for £100 Mrs Crosbie and her son, Robert, are placed in the position of joint obligants in a question with the drawer, but their reciprocal obligations *inter se* are not determined by anything on the face of the bill. If these reciprocal obligations are to be ascertained at all, and they are not constituted by written instrument, they must be ascertained by parole proof. There is no question of the rule of law that if one of two joint obligants pays more than his share of the debt he is entitled to relief against the other obligant, and the fact of payment, as well as the facts which go to shew that the actual payment has exceeded the obligant's share, are proper subjects for judicial inquiry. In this case it is proved that Robert Crosbie received the contents of the bill, and that the bill has been met by Mrs Crosbie, and if he got the money for his own purposes, and she has paid the whole amount, the consequence is that she has paid his debt, and is entitled to be reimbursed by him. I know

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of no rule of law which should prevent the mother from making good this claim, and it does not appear to me to be necessary to consider any question as to the application of section 100 of the Bills of Exchange Act, 1882. As to the claim upon the bill for £250, I have nothing to add to what your Lordships have said.

THE COURT pronounced the following interlocutor:—"Sustain the appeal: Recall the interlocutor of the Sheriff-substitute, dated 15th June 1900, together with the deliverance of the trustee, dated 4th April 1900: Remit to the trustee to rank and prefer the claimant (appellant) in terms of her claims as stated in her affidavit and claim, with the exception that the interest found due on the bill for £250 is restricted to interest on £200, and decern," &c.

ARTHUR B. PATERSON, W.S.—E. A. & F. HUNTER & Co., W.S.—Agents.

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Duke of Atholl v. Wedderburn.

DUKE OF ATHOLL AND OTHERS, Pursuers.—*Sol.-Gen. Dickson—C. N. Johnston.*
H. S. WEDDERBURN AND OTHERS, Defenders.—*Dundas, Q.C.—Blackburn.*

Duke of Atholl v. Glover Incorporation of Perth.

DUKE OF ATHOLL AND OTHERS, Pursuers.—*Sol.-Gen. Dickson—C. N. Johnston.*
GLOVER INCORPORATION OF PERTH AND OTHERS, Defenders.—*Dundas, Q.C.—Blackburn.*

Expenses—Taxation—Excerpts from Session Papers.—The expense of making and printing excerpts from session papers *disallowed* as between party and party.

(IN the Court of Session, March 3, 1899, 1 F. 658, and in the House of Lords, May 28, 1900, 2 F. (H. L.) 57.) 1ST DIVISION.

In both these appeals the House of Lords found the Duke of Atholl and Others entitled to expenses in the Court of Session and in the House of Lords. The Auditor in his taxation allowed a charge of £40 for making and printing excerpts from the session papers in cases in Morison's Dictionary and in Shaw's Reports.

On the report coming up for approval, the defenders objected, *inter alia*, to this charge.

LORD ADAM.—As regards this objection it appears that there were several old cases referred to by both parties, which are very briefly reported, and it is alleged that the reports were incorrect, and that the grounds of these decisions could not be understood or the point decided ascertained without reference to the session papers. In the course of that investigation Mr Johnston's clients printed large excerpts from the session papers, and the question is whether he is entitled to charge the expense thereby incurred against the unsuccessful party. These excerpts may have been useful to the Court and to counsel, but I take it they are of the nature of things which a party may do to facilitate the apprehension of the case by counsel, but which he cannot charge against the opposite party. In the ordinary course counsel obtains and reads in the course of his argument the session papers, and I think we cannot allow the expense of procuring and printing excerpts from them.

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LORD M'LAREN.—As regards this objection, I agree that it would be an innovation to allow the expense of excerpts from printed reports because they are referred to merely as precedents. Where a reference to old documents is necessary in the course of a historic inquiry, the rule might be different.

The LORD PRESIDENT and LORD KINNEAR concurred.

THE COURT disallowed the charge.

THOMSON, DICKSON, & SHAW, W.S.—DUNDAS & WILSON, C.S.—Agents.

No. 20.

Nov. 14, 1900. Macknight's Trustee v. Corporation of Edinburgh.

HUGH MARTIN (Macknight's Trustee), Petitioner.—*Dewar—J. B. Young.*

THE CORPORATION OF EDINBURGH, Respondents.—*Lord-Adv. Murray—F. T. Cooper.*

Arbitration—Award—Leave to Appeal—Failure of Justice—Housing of Working Classes Act, 1890 (53 *and* 54 *Vict. c.* 70), *Schedule II.* (26).—Under Schedule II. (26) of the Housing of Working Classes Act, 1890, leave to appeal against the arbitrator's award fixing the amount of compensation for lands compulsorily taken under the Act can be granted by the Court only "upon being satisfied that a failure of justice will take place if such leave is not granted." In an application for leave to appeal by the owner of the lands in terms of the Schedule, *held* that it was not a sufficient ground for granting leave—(1) that the arbitrator had limited the skilled evidence of the value of the lands to two witnesses on each side, or (2) that he had, in addition to hearing such evidence, personally inspected the lands in the presence of the parties, and in his award had proceeded in part on his own judgment as a man of skill.

Observations on the meaning of the words "failure of justice" in Schedule II. (26).

1ST DIVISION.

THE EDINBURGH CORPORATION, as Local Authority, prepared in 1897 an improvement scheme under Part I. of the Housing of Working Classes Act, 1890, dealing with an "unhealthy area" within the city. The scheme was duly confirmed by Act of Parliament. In carrying out part of this scheme it was necessary for the Corporation to acquire certain lands, consisting of dwelling-houses in Allan Street, Stockbridge, which belonged to the late Alexander Macknight, advocate, and which, at his death, formed part of his trust-estate. Hugh Martin, S.S.C., was the sole accepting and surviving trustee upon Mr Macknight's estate.

On 6th December 1899 a notice to treat was served by the Corporation upon Mr Martin as proprietor and trustee, with relative plans of the lands proposed to be taken. Certain negotiations followed, but the parties failed to agree as to the compensation payable, and on 20th February 1900 Mr Hall Blyth, civil engineer, Edinburgh, was, in virtue of the powers conferred by the Act of 1890, appointed arbitrator under the improvement scheme by the Secretary for Scotland. The trustee lodged a claim in the arbitration for £2500, while the Corporation offered £1030, 16s. On 3d May 1900 the arbitrator inspected the property in question in presence of the parties and their advisers, and on 5th May he issued an order allowing the parties a hearing, with power to examine two witnesses only on each side.

At this hearing on 12th May Mr Marwick, architect, and Mr Lawrence, surveyor, were examined for the claimant, and agreed in esti-

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mating the value of the subjects at £2470.* Bailie Brown, valuator and house factor, who was also convener of the committee for carrying out the improvement scheme, the only witness examined for the Corporation, valued the property in its existing state at £1133. With reference to section 21 of the Act this witness stated that in his view the property fell under the second subsection of that clause, being in a defective condition as regards sanitation and repair. He estimated the amount required to put the property into a proper state at £1000, including loss by non-occupancy during the repairs. Mr Marwick's evidence on this point was that the houses were in fair condition for houses of the class, and that they could be put into a reasonably good state of repair for £30 to return the existing rental, and with this view Mr Lawrence agreed. Mr Marwick admitted, however, that the tenants were of an inferior class, and that the wear and tear upon the houses was very great.

In the proceedings before the arbitrator it was brought to his notice that in the previous negotiations the property had been valued on behalf of the Corporation by three city valuators at £2117. This was admitted by the Corporation, who explained that this valuation was made on the basis of avoiding the expenses and delay of arbitration, and without taking into account the special provisions of section 21 of the Act.

On 15th May the arbitrator issued proposed findings, and after hearing parties he issued his final award on 6th June 1900, finding the claimant entitled to £1556 as compensation for the lands; and he thereafter, on 17th August 1900, issued a certificate for this amount, in terms of the Act.

The claimant thereafter presented a petition to the First Division of the Court of Session for leave to appeal in terms of Schedule II., sec. (26).†

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* The Housing of Working Classes Act, 1890 (53 and 54 Vict. cap. 70), enacts:—

Sec. 21 "(2) On the occasion of assessing the compensation payable under any improvement scheme in respect of any house or premises situate within an unhealthy area evidence shall be receivable by the arbitrator to prove—

"(1st) . . .

"(2ndly) That the house or premises are in such a condition as to be a nuisance within the meaning of the Acts relating to nuisances, or are in a state of defective sanitation, or are not in reasonably good repair; or

"(3rdly) That the house or premises are unfit, and not reasonably capable of being made fit for human habitation;

and if the arbitrator is satisfied with such evidence, then the compensation

"(*a*) . . .

"(*b*) Shall in the second case be the amount estimated as the value of the house or premises if the nuisance had been abated, or if they had been put into a sanitary condition, or into reasonably good repair, after deducting the necessary expense of abating the nuisance, or putting them into such condition or repair, as the case may be; and

"(*c*) Shall in the third case be the value of the land and of the materials of the buildings thereon."

† The Housing of Working Classes Act, 1890, Schedule II., enacts:—

(7) (Quoted by the Lord President, p. 93).

(9) "After the arbitrator has arrived at a decision on all disputed cases brought before him, he shall make an award under his hand and seal, and such award shall be final, and be binding and conclusive (subject to the provisions concerning an appeal hereinafter contained) upon all

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Argued for the petitioner;—(1) The arbitrator was bound to regard the evidence before him, and was not entitled to act on his own knowledge as an expert. He was not a mere valuator, but an arbitrator. Under section 21 evidence was declared to be receivable "to prove" the condition of the property as regards sanitation and repair. The arbitrator had dealt with this property as insanitary, and in bad repair, and as thus falling under subsection 2. In doing so, he relied not upon the evidence, but upon his own examination. If he allowed evidence he was not entitled to disregard it in favour of his own view. If the petitioner was right in this contention, then the arbitrator's decision was clearly against the weight of the evidence. Both as regards the valuation, and as regards the condition of the property, Bailie Brown's evidence was unsupported, and was in direct opposition to that of the other two witnesses, and, as regards the valuation, was also inconsistent with that of the three city valuators who had placed the value at £2117. Bailie Brown was too intimately associated with the scheme to be an unbiassed witness. (2) The arbitrator had acted irregularly in limiting the evidence to two witnesses on each side. Apart from this limitation, the petitioner would have brought forward other witnesses, including the city valuators, who had previously valued the subjects. It was true that he had not tendered further evidence, but this would have been useless in face of the limitation. A retrial should be granted on the two grounds that the arbitrator had erred in limiting the proof, and had given an award contrary to the evidence which he had allowed to be led.

Argued for the respondent;—(1) The Court was not sitting here as a Court of appeal, but to correct a "failure of justice," arising from some specific error in the conduct of the arbitrator. The function of the Court was much the same as in motions for a new trial in jury cases. In regard to the first objection taken by the petitioner, there was nothing in the Act to prevent the arbitrator from proceeding upon his own knowledge as an expert, either wholly or with the assistance of such evidence as he might deem necessary. In fact, the

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persons whomsoever, and no such award shall be set aside for irregularity in matter of form."

Section (26) "In the following cases, namely," *inter alia*,—

"(*a*) When the party named in any certificate issued under the provisions hereinbefore contained of the amount of the compensation ascertained by any award under Part I. of this Act . . . is dissatisfied with the amount in such certificate certified to be payable, and such amount exceeds one thousand pounds,

the party dissatisfied may, upon obtaining the leave of the High Court, which leave may be granted by such Court or any Judge thereof at Chambers in a summary manner, and upon being satisfied that a failure of justice will take place if the leave is not granted, submit the question of the proper amount of compensation to a jury, provided that such party give notice in writing to the other party of their intention to appeal within ten days after the cause of appeal has arisen.

"The cause of appeal shall be deemed to have arisen," *inter alia*,—

"(1) Where a certificate has been issued as aforesaid, at the date of the issue of the certificate."

Section (33) enacts that in the application of the Act to Scotland :—

"(*e*) Any reference to the High Court shall be construed as a reference to the Court of Session."

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language of section 7 of the Second Schedule seemed to shew that he might ascertain the facts necessary for his decision in any manner he should find most convenient. An arbitrator had this power at common law (Bell on Arbitration, p. 264), and in this summary procedure the arbitrator would presumably have powers as wide. It was, therefore, not a "failure of justice" that the arbitrator acted on his own skill as an expert who had examined the subjects for himself. (2) As to the second ground of complaint, it came to this that the award should be set aside because the petitioner had other witnesses whom he might have examined, but whom he did not tender. Besides, the arbitrator was not bound to hear an unlimited number of skilled witnesses on a matter of value as to which he was as able as an expert to form an opinion.

LORD PRESIDENT.—This petition raises an important question, for we are told that this is the first occasion on which such an application has been made to this Court under the Housing of the Working Classes Act, 1890, although many cases must have been settled under that Act throughout Scotland without any attempt to have the award of the statutory arbitrators set aside. In dealing with the question raised we must walk entirely by the code which the statute provides for arbitration proceedings, and what may be called complaints arising out of such proceedings. Such a code we find in the Act of 1890, and the Schedules annexed thereto. The first matter is the appointment of an arbitrator, and under Schedule II., section 4, that appointment is to be made by the Secretary for Scotland. In this case Mr Blyth was appointed, who, it is a matter of common knowledge, has had great experience of the matters with which he required to deal, and I cannot doubt that the Secretary for Scotland in nominating him had regard to his obvious qualifications for the duties which he would have to perform. The Schedule next goes on to make certain provisions for the procedure in the arbitration. Under section (7) it is provided that "In every case in which compensation is payable . . . the arbitrator shall ascertain, in such manner as he thinks most convenient, the amount of compensation demanded by the claimant, and the amount which the Local Authority may be willing to pay; and after hearing all such parties interested . . . as may appear before him . . . he shall proceed to decide on the amount of compensation to which he may consider the claimant to be entitled." Under the procedure thus prescribed great latitude is left to the arbitrator. The Schedule further by section (9) provides that "after the arbitrator has arrived at a decision he shall make an award under his hand and seal, and such award shall be final, and be binding and conclusive (subject to the provisions concerning an appeal hereinafter contained), upon all persons whomsoever, and no such award shall be set aside for irregularity in matter of form." So that, subject to the provisions regarding appeal, as high a degree of finality is given to the decisions of the statutory arbitrator as could well be. The provisions as to appeal, under which the case comes before us, are contained in section (26) of the Schedule. It is there provided that the claimant, if dissatisfied with the amount of compensation awarded him, may, if that amount exceeds £1000, "upon obtaining the leave of the High Court, which leave may be granted by such Court or any

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Judge thereof at Chambers in a summary manner, and upon being satisfied that a failure of justice will take place if the leave is not granted, submit the question of the proper amount of compensation to a jury." An appeal is not to be granted as matter of course, or otherwise than on special cause shewn. It would have been a very singular scheme of legislation to have provided that where an arbitration in regard to such a matter is initiated by a high officer of State appointing an arbitrator, his decision should have been lightly set aside, and a jury trial granted. Such a scheme is not what we are accustomed to in legislation regarding such matters. It is difficult to imagine language which would more carefully define and limit the grounds upon which alone the Court is to allow the dissatisfied party to have jury trial, as the provision is that it must be satisfied that a failure of justice would take place if it is not granted. This being so, the position of the petitioner in this case is that he must satisfy us that there will be a failure of justice if a retrial of this case before a jury is not allowed.

We have had a full statement of what took place before the arbitrator, and we are therefore in a position to form an opinion as to whether a failure of justice would take place if the leave sought is not granted. It appears that Mr Blyth, the arbitrator, examined the property, and one would suppose such a skilled person would be well able to judge from such examination what was the class and character of the property with which he had to deal. But he did not rely solely upon his examination of the property—he heard evidence. Two gentlemen were examined as witnesses on one side and one on the other, and the arbitrator seems to have thought he was entitled to limit evidence when, as in this case, it amounted to little more than expression of opinion as to value. One of the matters on which there was a sharp difference of opinion between the witnesses was as to the number of years' purchase of the rental which should be taken in fixing the amount of compensation for property of such a class and in such condition as the property in question, one of the witnesses putting it as high as twelve years' purchase, and another at only half of that period. Which of the estimates is right must depend very much on the condition, the age, the class, and the surroundings of the property, whether the rents are well or ill-paid, whether the tenants are destructive or not, and whether the cost of repairs is great. Now, the account of this property, as we find it in the proof, is rather a depressing one. It is situated in an area which we are told has been scheduled as insanitary, but it is said that the particular building is not itself insanitary, though its surroundings are so. No doubt that was duly considered by the arbitrator when he visited the property. On the question of cost of repairs we have some very clear, if somewhat lurid, light from what Mr Marwick, the petitioner's leading witness, said in reply to a question put by the arbitrator,—"A workman's house I would put on a slightly higher scale than this, but here you have the wasters of society, and the 'drunks,' who kick the panels out of the doors, and an immense number of children, who make holes in the plaster, and break it down." Now, that is a sentence from the testimony of the leading witness for the petitioner, and it requires no comment. It does not appear to me surprising that the arbitrator thought he should take a somewhat moderate number of years in converting the rental of such subjects into a capital sum. There

are clauses in the Act of 1890 which afford some guide to persons charged with the duty of considering the question of compensation. Section 21, subsection (2), provides that when dealing with premises situated within an unhealthy area evidence may be taken; "(2dly) that the house or premises are in such a condition as to be a nuisance within the meaning of the Acts relating to nuisances, or are in a state of defective sanitation, or are not in reasonably good repair," and if the arbitrator is satisfied with the evidence, the estimated expense of putting the property into a proper state is to be deducted from the amount of compensation allowed. It would not be surprising if the arbitrator thought that these provisions had some application to the present case. And again, in the same subsection, it is provided that evidence may be taken to shew "(3dly) that the house or premises are unfit and not reasonably capable of being made fit, for human habitation," in which case the compensation is to be the value of the land and the building materials on it. All these provisions go to shew that a moderate standard of compensation is to be taken in these cases, and the evidence goes to prove that the property in question, if not within these classes, was not very far removed from them. We have no reason to suppose that the arbitrator did not apply his mind to all these matters, and he was eminently qualified to determine the amount of compensation which should be awarded. In determining whether injustice would be caused by refusing a retrial before a jury we have to consider the provisions of the statute as applied to the information before us, and when we find, as we do here, that the arbitrator has conducted the proceedings in accordance with the provisions of the statute, and that there is no reason whatever for thinking that a failure of justice will take place if the leave sought is not granted, I think that we should refuse to grant that leave. It would be very unfortunate if it came to be regarded as anything like a matter of course that an arbitrator's award upon a question of the value of urban property which he had examined should be set aside, and the elaborate and costly machinery of a jury trial set in motion, especially in the case of property of small value where the cost would be quite disproportionate to any likelihood of getting a more satisfactory decision from the jury than from the arbitrator.

LORD M'LAREN.—It is necessary to keep in view that the present process is not an ordinary process of appeal. It is an application for the retrial of a matter submitted to a statutory tribunal on the grounds specified in the statute. I think there is much force in an observation which was made by the Lord Advocate in the course of his argument, that the statutory grounds upon which such a retrial may be granted are not dissimilar to those upon which a new trial will be granted as against the verdict of a jury. In this connection I would remind your Lordships that in the Act 55 Geo. III., introducing jury trial into Scotland, in the clause dealing with the grounds for a new trial, after specifying as such grounds misdirection by the presiding Judge, a verdict contrary to the evidence, &c., the clause proceeds, "or for such other cause as is essential to the justice of the case." This last expression is very nearly the same as that which we have to construe as a ground of allowing an appeal, viz., "failure of justice." The one expres-

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sion is affirmative, the other is negative; but the essential condition contemplated by both is that it would be inconsistent with justice that the determination complained of should be allowed to stand.

In considering the facts of the present case it is to be observed that this is an award by an arbiter eminent in his profession, and of great experience as a railway engineer in cases of valuation of houses and property. It is not alleged that he has deviated in any way from the procedure enjoined by statute. He has applied his mind to the matter submitted, after hearing evidence and after a personal inspection of the property. I observe from the terms of the award that prior to issuing it, the arbiter submitted it to the parties in draft, and heard their representations in regard to it, so that it is very unlikely that he can have overlooked or omitted any consideration material to the case.

The only tangible objection to the award is that the arbiter heard but one witness for the Corporation, and that witness was a bailie, and therefore biassed in the direction of a low valuation. There might have been some reason in this objection if the arbiter had accepted the figure put forward by this witness, but he has not done so; he has taken as the true valuation one which lies between Bailie Brown's valuation and that proposed by the witnesses for the appellants. Whether he was right or wrong as to the value he has fixed, it is not for this Court to inquire. The question for us is, whether there has been in the conduct of this arbitration a failure of justice, and I am very clearly of opinion that no such case has been established, either in law or in fact, so as to entitle us to sustain this application.

LORD ADAM and LORD KINNEAR concurred.

THE COURT refused the application.

HUGH MARTIN & MACKAY, S.S.C.—THOMAS HUNTER, W.S.—Agents.

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Yuill v. Ross.

ANDREW ARTHUR GAVIN YUILL AND ANOTHER, Petitioners.—*Lord-Adv. Murray—A. S. D. Thomson.*
ALEXANDER ROSS AND ANOTHER, Respondents.—*Salvesen, Q.C.—C. D. Murray.*

Trust—Trustee—Application for Appointment of Judicial Factor.—An application was presented by two out of four trustees, with the concurrence of certain of the beneficiaries, craving the Court to supersede the administration by the trustees and appoint a judicial factor on the ground that the trust had become unworkable owing to differences between the petitioning trustees on the one hand and the two remaining trustees on the other. The remaining trustees and the chief beneficiary under the trust opposed this application.

Circumstances in which the Court *refused* the application.

1ST DIVISION.

JOHN M'CASLAND YUILL, fruit and spice merchant, Glasgow, died on 8th June 1900, leaving a trust-disposition and settlement, whereby he disponed and conveyed his whole means and estate to and in favour of Thomas James Gilchrist Boyes, writer in Glasgow; Alexander Ross, writer in Hamilton; Andrew Arthur Gavin Yuill, fruit and spice merchant in Glasgow, his brother; and Robert Osborne Pagan, Writer to the Signet, Cupar-Fife, as trustees for the ends,

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uses, and purposes therein mentioned. The trust purposes were (1) payment of debts; (2) delivery of his furniture and plenishing to his widow, and (3) to convey, realise, and distribute the remainder of his means and estate to and amongst the parties who might be entitled thereto, including his widow, for her rights of terce and *jus relictæ*, in addition to the furniture, at the time of his death according to the law of Scotland.

The truster was survived by his widow, who was entitled to one-half of his moveable estate, by his brother Andrew Yuill, one of the trustees, by two sisters,—Mrs Boyes, wife of Thomas J. G. Boyes, also a trustee, and Mrs Watson,—and by his mother Mrs M'Casland or Yuill, who was entitled to one-third of the remaining half of the moveable estate. The trustees accepted office, and obtained confirmation on 13th October 1900.

Differences having arisen between Mr Yuill and Mr Boyes on the one hand, and Mr Ross and Mr Pagan on the other, the two former presented a petition on 22d October 1900 to the First Division for the appointment of an additional trustee, or alternatively craving that the administration of the trustees should be superseded by the appointment of a judicial factor.

The petition set forth:—"The trust has become unworkable on account of the opposition of Messrs Pagan and Ross to the appointment of a law-agent in the trust. The whole beneficiaries, with exception of the widow, are desirous that Messrs Boyes & Fergusson should be the law-agents, but Messrs Pagan and Ross decline to assent to this, and in consequence there is a complete deadlock, to the great detriment of the estate. Several matters in connection with the trust require immediate attention. None of the truster's debts are paid, a bond-holder is threatening to raise an action of maills and duties, rents fall to be uplifted, and none of the estate is being ingathered. The estate amounts to upwards of £8000, and it is not being administered on account of the obstinate refusal of Messrs Pagan and Ross to give effect to the all but unanimous desire of the beneficiaries for the appointment of law-agents. In order to end this deadlock, which threatens to be disastrous to the estate, the petitioning trustees approached the other trustees on 13th August, suggesting the appointment of a fifth trustee, and on the invitation of Mr Ross, submitted a list of four totally disinterested persons, who are all capable men of business and were intimate friends of the truster, that they might select one of them to be assumed as an additional trustee, but neither Mr Ross nor Mr Pagan will take any step in the matter, and the estate is thus left without anyone to manage it."

The petition was presented with the concurrence of all the beneficiaries with the exception of the truster's widow, but at the hearing it was intimated that Mrs Watson had withdrawn her concurrence.

Mr Ross and Mr Pagan, along with Mrs Yuill, the truster's widow, lodged answers.

From the petition and answers it appeared that the trustees differed in regard to two points (1) the appointment of a law-agent, and (2) the institution of proceedings against Andrew Yuill, one of the petitioning trustees, for the recovery of debts alleged to be due by him to the truster.

As regarded the first of these matters, Mr Boyes, who was supported by Mr Yuill, claimed the law-agency of the trust on the ground that he had been agent for the truster. This was opposed by the respondent trustees on the grounds, *inter alia*, that Mrs Boyes was not only

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a beneficiary whose interests conflicted with those of the deceased's widow, but was also a debtor to the trust; and, further, that Mr Boyes was the personal agent for Mr Andrew Yuill, who was also largely indebted to the trust. The respondent trustees further objected to Mr Boyes voting upon the question of the appointment of his own firm, and accordingly claimed that their motion against his appointment was carried by a majority of the trustees entitled to vote. In their answers the respondents further stated that the petitioners had opposed a motion at their instance to take steps to recover the amount due to the trust-estate by the petitioner Andrew Yuill. In this matter also the respondents claimed "that their motion was carried by a majority, upon the ground that Mr Yuill was not entitled to vote in this matter." The respondents Mr Ross and Mr Pagan, thereafter instructed Messrs Smith Clark, W.S., to take the proceedings in question, but before the summonses were served, the present petition was boxed on 22d October 1900.

At the hearing the undernoted cases were cited.[1]

LORD PRESIDENT.—It is always a somewhat delicate question whether in any particular case a judicial factor should be appointed to supersede trustees in the administration of a trust. This is what is asked for in this case, as the alternative proposal for the appointment of an additional trustee was not seriously pressed. In general a judicial factor will only be appointed where there is danger to the estate, or where there is such a deadlock in the administration of the trust as to make the situation impossible. Now, in this case, although the situation is inconvenient and unfortunate, it is not proved that the trust has become unworkable. Mr Pagan and Mr Ross have conducted the business of the trust and have obtained the services of agents when that was necessary. The position of the other two trustees is different, and not so favourable. Mr Yuill is in the position of being the largest debtor to the trust, and Mr Boyes is in the position of being a candidate for the agency of the trust. The leading beneficiaries are not desirous that the administration of the trustees should be superseded by that of a judicial factor, and of those who were originally represented as having consented to the present application some have withdrawn. In particular the widow of the truster is not a consenter, but desires the administration by the trustees to continue. Again, the administration of the trust by a factor would be much more expensive than the administration by the trustees. An additional consideration which weighs with me is that the two trustees who oppose this application have not been guilty of any remissness or neglect in the administration of the trust, and that they are willing to continue that administration. If it was necessary to make any unfavourable observations they would rather be directed against the petitioners.

On the whole matter, I am not satisfied that a case has been made out for the appointment of a judicial factor, and I think the petition should be refused.

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[1] *For the Petitioners.*—Aikman, Dec. 2, 1881, 9 R. 213; Dick, Dec. 16, 1899, 2 F. 316. *For the Respondents.*—Blisset's Trustees v. Hope's Trustees, Feb. 7, 1854, 16 D. 482; Hope v. Hope, Oct. 29, 1884, 12 R. 27.

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LORD ADAM.—I am of the same opinion. The first question we have to consider here is not what has been the conduct of the parties, but what is most for the benefit of the estate. Whatever I might think of the conduct of the petitioners, that would not weigh with me if it appeared for the benefit of the estate that their petition should be granted. Those who are carrying on the trust here have done nothing, so far as I can see, which they should not have done; but if I had been persuaded a deadlock in the management of the estate would result, I would not have hesitated to appoint a judicial factor. But there are no signs of a deadlock here. So far as the conduct of the trust hitherto is concerned, I venture to think these two trustees were quite entitled to appoint a law-agent for the purpose of recovering a debt due by a person who happened to be himself a trustee, and that there was nothing blameable in that matter. And what confirms me in that opinion is that the beneficiaries seem to take the view that there would be no deadlock created by our refusal. The widow, who is a large beneficiary, takes that view, and is opposed to the proposal to appoint a judicial factor, and that is, I think, a strong reason for our not doing so. In view of the expenses attendant on a judicial factory I think a beneficiary is quite entitled to say that he prefers the existing administration. On the whole matter, therefore, I am of opinion that the case for removal and appointment is not made out.

LORD M'LAREN.—I cannot help thinking that it would be for the interest of the beneficiaries that all the trustees should signify their willingness to retire and assent to the appointment of a judicial factor. But I think there has not been a sufficient trial of the existing trust administration.

The objection is that in the case of two trustees, who are responsible for the raising of this case, the one is anxious to be appointed law-agent to the trust, and the other is a debtor to the trust. That is not put as an imputation against the trustee. If he is a debtor to the trust, it is only because the truster had lent him money. I am not prepared to assent to the proposition that where a difficulty arises in administration through two trustees having interests adverse to the trust we are therefore to supersede the administrators. I am not satisfied that they are entitled to call on their colleagues to take that course.

LORD KINNEAR concurred.

THE COURT refused the petition.

A. C. D. VERT, S.S.C.—J. & D. SMITH CLARK, W.S.—Agents.

DUGALD GRÆME MACDOUGALL AND OTHERS, Petitioners.—*Cullen.* No. 22.

Nov. 15, 1900.
Macdougall.

Service of Heirs—Disponee or heir of provision—Declaratory service to establish propinquity.—A disponed to B for her liferent use allenarly, and to B's children *nascituri* in fee. B took infeftment in liferent. *Held* that on B's death her children were entitled to be served as heirs of provision in general to B for the purpose of establishing their propinquity and of obtaining a marketable title.

Maule, 3 R. 831 (*per* Lord President Inglis), *explained* and *distinguished*; *Dundas* v. *Dundas*, 2 S. 145 (N. E. 133), and *Peacock* v. *Glen*, 4 S. 742 (N. E. 749), *followed*.

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Nov. 15, 1900. Macdougall.

1st Division. Sheriff of Chancery.

By his trust-disposition and settlement, dated 18th April 1826, Peter Paul, grocer in Greenock, conveyed to trustees his whole estate, heritable and moveable, which should belong to him at the time of his death, directing them, *inter alia*, to dispone, convey, and make over his said estate (subject to a liferent in favour of his wife) to his children therein named, and *nascituri*, in liferent, for their liferent use allenarly, and to their children in fee, in terms substantially repeated in the conveyance after mentioned. Peter Paul died in 1832, predeceased by his wife. On 3d December 1847 John Walker, sole surviving trustee and executor of Peter Paul, executed a disposition in implement of the said trust-disposition and settlement which contained the following clause:—"In the second place, I do hereby give, grant, assign, dispone, convey, and make over to and in favour of the said Mary Paul, Andrew Paul, Janet Paul, Jean Paul, Peter Paul, Catherine Paul, and William Paul, the only surviving children of the said Peter Paul, equally among them in liferent, for their liferent use allenarly," &c., "and the share of each liferenter to the children to be lawfully procreated or already procreated of his or her body, equally among them, males and females, in fee."

Mrs Janet Paul or Macdougall, one of the disponees named in the above disposition, died in 1890, predeceased by her eldest son, Dugald Macdougall, who left two children, Dugald Græme Macdougall and Mrs Laidlaw. Mrs Macdougall was survived by four younger children, Mrs Corney, Mrs Williams, Mrs Paterson, and James Macdougall.

In January 1900 the two grandchildren and the four children of Mrs Macdougall presented a petition to the Sheriff of Chancery for service as "nearest and lawful heirs of provision in general to the said Mrs Janet Paul or Macdougall, under and by virtue of said trust-disposition and settlement and disposition."

Mrs Macdougall had taken infeftment under the disposition in liferent only.

The Sheriff of Chancery (Chisholm), on 14th February 1900, pronounced the following interlocutor:—"Finds that the deceased Mrs Janet Paul or Macdougall died at Caulfield, Melbourne, in the colony of Victoria, on the 16th day of January 1890, and had at the time of her death her ordinary or principal domicile furth of Scotland: Finds that the petitioners Dugald Græme Macdougall and Mrs Marion Macdougall or Laidlaw are children of the deceased Dugald Macdougall: Finds that he was the eldest son of the said Mrs Janet Paul or Macdougall; and further, finds that the said Dugald Macdougall has left no other children or issue of children now surviving: Finds that the petitioners Mrs Catherine Johnstone Macdougall or Corney, Mrs Margaret Macdougall or Williams, Mrs Ann Jane Macdougall or Paterson, and James Macdougall, are all children of the said Mrs Janet Paul or Macdougall: Finds that she has no other children or issue of children now surviving other than as above mentioned: Finds that under the destination in the disposition founded on the said Mrs Janet Paul or Macdougall was only a liferenter for her liferent use allenarly, and that there is nothing in her *hæreditas jacens* which requires to be taken out of it by a service: Finds further that the petitioners are not heirs of provision to her under and by virtue of the trust-disposition and settlement and the said disposition, both mentioned in the petition; therefore refuses the prayer of the petition, and decerns." *

* "Note.—In this case I am of opinion, on the authority of the case of

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The petitioners appealed to the First Division.

Argued for the petitioners;—The Sheriff had decided that the children of Janet were disponees, and therefore not entitled to service. Apart from *Maule's* case (referred to by the Sheriff) there had been a practice of using service for the purpose merely of establishing propinquity in cases of children *nascituri*. The objection to a declarator for that purpose in this Court was that it was impossible to get contradictors. The Court of Chancery was the only Court where such a proof could be obtained. The petitioners only desired declaratory service as heirs of provision. They did not maintain that service was necessary to take up the right, but that it was necessary to declare it. The mother was only infeft in liferent, and therefore the feudal fee was in the disponer, so that the appropriate service was general service. The practice was supported by the authority of conveyancers and by decisions.[1] The cases of *Carleton* and *Peacock* shewed that service had been used as a means of preserving evidence of a fact. In *Peacock* the only use of the service was to establish the extrinsic fact that the heirs of the body had failed and the right of the conditional institute emerged. The Sheriff had judged of this question by too narrow a test, viz., that of logical consistency with the theoretical principles of conveyancing.

LORD M'LAREN.—This appeal has been brought from the Sheriff of Chancery to determine whether the appellants, who are in the position of beneficial fiars, are entitled to be served heirs of provision in general to their mother, who is designed in the deed as a liferenter for her liferent use allenarly. There is no doubt, at this period of the history of the law, as to what is the meaning of such a destination. It vests in the mother a fiduciary fee for her children unborn and unnamed, and gives her a beneficial interest in the income only. The mother having died, the fiars now desire to make up a heritable title to the property. If they cannot make up a title by service it is not easy to see how they can make up a marketable title.

The question is, whether as a general deduction from the theory of such destinations, or as a consequence of a practice continued for such a length of time as to have the force of law, these children are entitled to be served heirs of provision to their mother.

The difficulty which presented itself to the Sheriff of Chancery was this: that as the mother took only a liferent title in the estate, there was no fee in her *hereditas* to be taken up by her heirs. The view of the Sheriff is

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Maule (3 R. 831), that the service craved is not competent. The petitioners claim service as heirs of provision under two deeds: (1) a trust-deed, in which there is no conveyance, but merely a direction to convey to the person to whom they are claiming to be served heirs of provision, viz., Mrs Janet Paul or Macdougall; and (2) a disposition in implement of the direction of the trust-deed. By these writs the said Mrs Janet Paul or Macdougall has only a liferent for her liferent use allenarly, and there is a destination over to her children. In these circumstances I do not think that the petitioners are heirs of provision under the deeds."

[1] Bell's Lectures on Conveyancing (3d edition), 1105; Duff's Feudal Conveyancing, 453; Carleton's Creditors v. Gordon, Feb. 8, 1748, M. 14,368; Dundas v. Dundas, Jan. 23, 1823, 2 S. 145 [133]; Peacock v. Glen, June 22, 1826, 4 S. 742 [749]; Andrews v. Laurie, Dec. 12, 1849, 12 D. 344; Ferguson v. Ferguson, March 19, 1875, 2 R. 627.

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that the children are direct disponees under the settlement, and that they ought to be infeft by a notary on the disposition. I am not sure whether the Sheriff had fully considered that, although the beneficiary right of the mother under the deed is limited to a liferent use, yet she had a nominal fee in contemplation of law which might, if supported by practice, be used as the basis of a general service. I do not think that there was any substantial right such as could be taken up by special service, but there was at least a nominal fee in the mother, and this, it is said, entitles her children to be served heirs in general to her, to the effect of having their propinquity ascertained and their characters as heirs determined. Much might be said for and against the competency of this procedure if the point were open; but it is known to the profession that for a very long time it has been the practice to serve children heirs of provision to their parents under destinations such as the present. The cases of *Dundas*[1] and *Peacock*[2] are very direct authorities for this procedure. I have reason to know that this procedure has been largely followed, because when I held the position of Sheriff of Chancery I had to inquire into the practice.

The Sheriff is under a misapprehension in thinking that the case of *Maule*,[3] to which he refers, is an authority inconsistent with the practice of making up a title by what has been called a declaratory service. The question in that case was not one of title, but of substantial right, and the observations of the Lord President must be taken with reference to a case of that character, and by way of illustration of the nature of the destination.

I do not doubt that it might be possible by a declaratory action to have it established that these fiars are entitled to be infeft, but that would be an unusual mode, and not satisfactory to a purchaser. The decree in such an action would not usually proceed on evidence, though I do not say that an *ex parte* proof would not be competent. Lord President Inglis gave great attention to feudal questions, and was certainly not less conversant with this than with other branches of the law, of which he was so eminent an exponent. If his Lordship had intended to discountenance the practice, I should have expected that he would have made a more direct pronouncement on the subject. I do not think that the question was in his Lordship's mind, nor did it enter into the decision of the case.

I think that the petitioners, provided their propinquity is proved, which in this case is merely a formal matter, are entitled to decree of service.

LORD ADAM.—I agree. My understanding certainly is that it has been the practice to make up titles in this way.

LORD KINNEAR.—I agree with your Lordships. If this had been the first application for the service of children as heirs of provision to a fiduciary fiar there might have been much to be said against it. But the strongest thing would have been that there was no practice to support it. This is a matter in which practice is everything. But there is no doubt about the practice, and it is therefore unnecessary to consider the logical

[1] 2 S. 145 [133]. [2] 4 S. 742 [749]. [3] 3 R. 831.

difficulty which embarrassed the Sheriff in reconciling that practice with certain technicalities of the law of inheritance. No. 22.

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The LORD PRESIDENT concurred.

THE COURT pronounced the following interlocutor:—"Sustain the appeal: Recall the interlocutor of the Sheriff of Chancery, dated 14th February 1900: Find in fact," &c. [The findings in fact were the same as in the interlocutor of the Sheriff of Chancery]: "Find further that the petitioners are entitled to be served as the nearest and lawful heirs of provision in general to the said Mrs Janet Paul or Macdougall under and by virtue of the trust-disposition and settlement and the disposition granted in implement thereof, both referred to in the petition, and remit to the Sheriff of Chancery to serve them accordingly in terms of the prayer of the petition."

WM. B. RAINNIE, S.S.C., Agent.

THE GLASGOW COURT HOUSES COMMISSIONERS, Pursuers (Reclaimers). —*Sol.-Gen. Dickson, Q.C.—Younger.*
THE COUNTY COUNCIL OF THE COUNTY OF LANARK, Defenders (Respondents).—*Johnston, Q.C.—Cook.* No. 23.

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Statute—Construction—Glasgow Court Houses Act, 1890 (53 *and* 54 *Vict. cap. lviii.*), *sec.* 13.—For the purpose of providing and maintaining Sheriff Court Houses, the county of Lanark is divided into four separate districts, one of which, the Lower Ward District, comprises the Lower Ward of the county, the city of Glasgow, and the burgh of Rutherglen. The Sheriff Court Houses of Glasgow are the Sheriff Court Houses of this district alone.

By sec. 13 of the Glasgow Court Houses Act, 1890, the Court House Commissioners were empowered to apportion, assess, and charge sums of money borrowed by them under the Act upon three public bodies, the Corporation of Glasgow, the County Council of the county of Lanark, and the Magistrates of Rutherglen, "in proportion to the gross valuation for the year ending on the 15th May 1890 of the lands and heritages situated within the respective areas under the jurisdiction of such public bodies."

By sec. 15 it was provided that the County Council of Lanark "as representing the Lower Ward thereof" should pay to the Glasgow Court Houses Commissioners the sum chargeable against the County Council.

In an action by the Commissioners against the County Council of Lanark for £7669 as their proportion of the sum chargeable under the Act against the three bodies, the sum sued for being arrived at by taking the gross valuation of all lands and heritages within the county as the area within the jurisdiction of the County Council, the defenders maintained that the valuation should have been limited to the Lower Ward of the county, which was alone liable for the assessment.

The Lord Ordinary (Low) held that, having regard to the facts that the power of assessing was limited to the Lower Ward, and that the other parts of the county had no interest in the Glasgow Court Houses, the words in sec. 13, "the respective areas under the jurisdiction of such public bodies," were capable of being read as referring only to areas which are under their jurisdiction for purposes connected with the Glasgow Court Houses, and fell to be so read.

The pursuers having reclaimed, *held* (*rev.* the judgment of Lord Low) that the terms of sec. 13 were unambiguous, and not capable of construc-

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tion; and that the "area under the jurisdiction of" the County Council referred to in the section was the whole county.

Held further (*aff.* judgment of Lord Low) that, while the valuation for the year ending 15th May 1890 was to be taken as fixing the value of the subjects in the different areas, the Commissioners were to take the respective areas of jurisdiction of the three public bodies as these actually existed at the date of apportioning the assessment.

THIS was an action at the instance of the Glasgow Court Houses Commissioners, incorporated under the Glasgow Court Houses Amendment Act, 1872, against the County Council of the county of Lanark, and also against the Corporation of the city of Glasgow, and the Provost, Magistrates, and Council of the royal burgh of Rutherglen for any interest they might have, to make payment to the pursuers of the sum of £7669 sterling, with interest thereon at the rate of £5 per centum per annum from 16th December 1899 till payment.

The sum sued for was the proportion of money borrowed by the pursuers under the Glasgow Court Houses Act, 1890, which, by resolution dated 24th November 1899, they had charged upon the County Council of Lanark in virtue of the powers conferred on them by sec. 13 of the Act. The County Council alone defended.

The following narrative of the facts and of the contention of parties is taken from the opinion of the Lord Ordinary (Low):—

"By the Glasgow Court Houses Act, 1890, the pursuers were authorised to acquire certain lands and buildings for the purpose of enlarging and improving the Sheriff and Justice of Peace Court Houses in the city of Glasgow. For the purposes of the Act the pursuers were authorised to borrow, upon the security of the assessments to be levied by them under the provisions of the Act, a sum not exceeding £100,000.

"By the 13th section of the Act it is provided: 'The Commissioners may apportion, assess, and charge the sums of money from time to time borrowed and outstanding under the powers of this Act, and all interest due thereon, upon the several public bodies mentioned in the schedule to this Act annexed, in proportion to the gross valuation for the year ending on the 15th day of May 1890, of all the lands and heritages situated within the respective areas under the jurisdiction of such public bodies.'

"The public bodies mentioned in the schedule are the Magistrates of Glasgow, the County Council of the county of Lanark (the only defenders who have lodged defences), and the Magistrates of Rutherglen.

"The pursuers now sue the defenders for payment of £7669, which they allege to be the proportion of money borrowed under the Act which has been charged upon and is payable by the defenders in terms of the 13th section.

"The sum sued for has been arrived at by taking the gross valuation for the year 1890 of all lands and heritages within the whole county of Lanark, and by including as within the county a certain area (the valuation of which for the year 1890 was £354,859) which in 1891 was taken out of the Lower Ward of the county and added to the city of Glasgow.

"The defenders maintain (1) that in fixing the amount of the borrowed money which they are to contribute the pursuers are not entitled to take into account the valuation of the county of Lanark as a whole, but only of the Lower Ward; and (2) that it is not com-

petent for the pursuers to treat lands which are, in fact, in the city of Glasgow, as forming part of the county. No. 23.

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"For the purpose of providing and maintaining Sheriff Court Houses, the county of Lanark is divided into four separate districts, one of which, the Lower Ward District, comprises the Lower Ward of the county, the city of Glasgow, and the burgh of Rutherglen. The remaining wards of the county are in other districts, and have nothing to do with the Glasgow Sheriff Court Houses. Further, the defenders maintain that the whole of the sum charged upon them under the 15th section of the Act of 1890 falls to be paid by assessment upon the Lower Ward alone.

"In these circumstances, the defenders' contention is that the words in the 13th section 'lands and heritages situated within the respective areas under the jurisdiction of such public bodies,' refer, so far as the defenders are concerned, only to the Lower Ward.

"The pursuers, on the other hand, maintain that the 13th section is not open to construction, and that, as the jurisdiction of the defenders undoubtedly extends over the whole county of Lanark, the valuation of the whole county must be taken in fixing the proportion of the borrowed money to be paid by them."

On 15th June 1900 the Lord Ordinary pronounced the following interlocutor:—"Finds that the pursuers, in ascertaining the amount for which they are authorised to charge and assess the defenders, the County Council of the county of Lanark, in terms of the 13th section of the Glasgow Court Houses Act, 1890, are not entitled to take into account the valuation for the year ending on the 15th day of May 1890 of the lands and heritages within the whole county of Lanark, but only within the Lower Ward thereof; and further, that the pursuers are bound to deduct from the said valuation of the Lower Ward, and to add to that of the city of Glasgow, the valuation of those parts of the Lower Ward taken from the county and annexed to the city by the City of Glasgow Acts, 1891 and 1896; with these findings, appoints the cause to be enrolled for further procedure, and grants leave to reclaim."*

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* "OPINION.—. . . Now, I agree with the pursuers to this extent, that, *prima facie*, the area over which the County Council has jurisdiction is the whole county. But I think that the words used in the 13th section are capable of construction, and that the context and the subject-matter of the enactment may shew that they were intended to be used in a more restricted sense than that which they would naturally bear if standing alone.

"The 13th section, in the first place, and in the part under construction, only provides how the proportions of money borrowed by the pursuers, payable by the three public bodies named, are to be ascertained, and it is then enacted that 'such public bodies shall be bound as quickly as possible to pay to the commissioners any such sums so apportioned.' Now, of course, a county council is only a representative body, and I think that the presumption is that the capacity in which it is directed to pay the money is also the capacity in which it is referred to for the purpose of fixing the proportion which it is to pay. If therefore the defenders are given power to assess the whole county for the Glasgow Sheriff Courts, there is no difficulty. But if the defenders' power of assessment is limited to the Lower Ward, it is difficult to see any principle upon which the amount which they have to pay, in a question with the city of Glasgow and the burgh of Rutherglen, should be fixed by reference to the valuation, not of

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The pursuers reclaimed.

The arguments are sufficiently set forth in the opinions of the Lord Ordinary and of the Court.

LORD JUSTICE-CLERK.—The first question in this case is whether the 13th clause of the Glasgow Court Houses Act of 1890 is to be read according to the plain meaning of the words to be found in it, or whether they are open to construction, and must be read in the different sense. By a series of statutes provision was made for Court Houses for the different Courts of law which held their sittings in Glasgow, and the taxation necessary for providing the funds to be expended were, as regards the landward part of the county of Lanark, put on the Lower Ward of that county. In many clauses this is expressed in distinct terms. And even in this statute of 1890, in the 15th section, special matters relating to assessment on the Lower Ward are dealt with, where an alteration is being made upon the assessment in connection with some of the previous Acts. These clauses in

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the Lower Ward, but of the whole county. It was said that the buildings which the pursuers are authorised by the Act to erect are to be used as an Appeal Court for the county as a whole. That would have been a very good reason for making the whole county contribute, but I do not think that it is any reason why the Lower Ward should contribute more than its proportion.

"The main question therefore seems to me to be, whether the defenders have power to raise money to pay the amount charged against them under the 13th section except by assessments laid upon the Lower Ward only?

"The assessing clauses of the Act of 1890 are the 10th and the 15th, but in order to understand the effect of these sections it is necessary to go back to earlier statutes.

"The Glasgow Court Houses Amendment Act, 1868, proceeded upon the narrative that 'it would be for the advantage and convenience of the said city' (of Glasgow), 'and of the Lower Ward of the county of Lanark' (including the burgh of Rutherglen) 'that additional accommodation should be provided for the Judges attending the Justiciary Courts at Glasgow, and for the Sheriffs, Justices of Peace, Magistrates, and Council, and inhabitants of the said county and city.' The commissioners were therefore empowered to acquire lands and to erect Court Houses, and for defraying the expense of doing so they were by section 10 authorised 'to levy and raise by assessment annually for such period as they may find to be necessary, on and from all heritages situate within the parliamentary and municipal boundaries of the city of Glasgow, and within the Lower Ward of the county of Lanark, including the burgh of Rutherglen, such sums of money as shall be sufficient for the several purposes before mentioned.'

"The buildings authorised by the Act of 1868 were duly constructed, and in 1878 certain arrangements had been made between the commissioners and the city of Glasgow and the Lower Ward, the result of which was that (to use the words of the preamble of an Act which was passed in the latter year for the purpose, *inter alia*, of giving effect to these arrangements) 'the only amount which the Court House Commissioners will require to levy under the Court Houses Acts will be the amount necessary to defray the expenses of maintaining that portion of the said buildings occupied by the Justices of Peace Court and the buildings occupied by the Justiciary Court.'

"Accordingly by the 6th section of the Glasgow Municipal Buildings Act, 1878, it was provided: 'On the passing of this Act the power of the Court Houses Commissioners to levy assessments under section 10 of the

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former Acts and in this Act are made the ground for the contention that section 13 must not be read according to its literal meaning, but must be read as if there were words in it which would restrict the assessment to the same area as that to which it is restricted under the other statutes relating to the Court Houses of Glasgow. But the formidable difficulty of doing so is to be found in the very contrast between this clause and those occurring elsewhere which relate to similar matters. This clause says in so many words—(His Lordship read the section)—and the public body mentioned in the schedule is the "County Council of the county of Lanark." These words seem to me to be distinct and unambiguous, and in such sharp and marked contrast to the other assessing enactments in the statutes preceding, that it is impossible to find sufficient ground for putting any gloss upon them not consistent with their direct meaning. It is impossible for the Court to gather what the Legislature intended except from the language used, and the language used being so specific, I feel myself unable to hold that it can be made to mean something different because of likelihood sug-

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Glasgow Court Houses Amendment Act, 1868, shall cease and determine, and in lieu thereof the Court House Commissioners are hereby authorised to estimate, apportion, assess, and charge, in manner after mentioned, the amount necessary to meet the cost, charges, and expenses of conducting the business of the Court Houses Commissioners, and of maintaining and repairing the buildings apportioned to, and occupied by, the Sheriff Courts, Justices of Peace, Justiciary Court, and their several officials, and generally in carrying into effect the purposes of the Court Houses Acts, as amended by this Act, so far as such costs, charges, and expenses shall not be borne by the Commissioners of Her Majesty's Treasury.

"By the 7th section it was provided that in lieu of an assessment under the 10th section of the Act of 1868 being levied by the commissioners within the city of Glasgow, the Corporation should pay to the commissioners year by year, 'out of the assessment by this Act authorised,' such sum as the commissioners should apportion as the share payable by the Corporation.

"The powers of assessment by the Corporation there referred to are to be found in section 29 and subsequent sections of the Act.

"By the 8th section it was provided that, in lieu of an assessment under the 10th section of the Act of 1868 being levied by the commissioners within the Lower Ward of Lanarkshire, the public bodies having powers of assessment within that ward should pay to the commissioners the sum apportioned as the share of the Lower Ward out of certain specified assessments.

"By the Act of 1878, therefore, this change was made in the mode of assessment, that instead of the Glasgow Court Houses Commissioners themselves laying on assessments directly, they merely fixed the amounts payable by the city and the county respectively, and the assessments necessary for raising the money were laid on by the local authorities.

"Coming now to the Act of 1890, it was provided by section 10 that the cost, charges, and expenses of purchasing lands and buildings, and of reconstructing and improving buildings, and the like, 'under the authority of the Act, shall be deemed and held to form part of the costs, charges, and expenses mentioned in section 6 of the Act of 1878, and the power of assessment by that Act conferred upon the commissioners shall apply to and include all such costs, charges, and expenses.

"The pursuers argued that that section had nothing to do with money borrowed under the powers conferred by the Act, but only applied, like the

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gested from the correlation in which it is found. I am therefore of opinion that the Lord Ordinary's interlocutor should be altered in so far as relates to the first question.

In regard to the second question, which is the question whether in apportioning the assessment the pursuers are bound to deduct from the valuation of the Lower Ward of Lanarkshire, and to add it to that of the city of Glasgow, the valuation relating to the lands and heritages of the Lower Ward which have been annexed to the city, I am of the same opinion as the Lord Ordinary, that they are bound to do so, and upon the same grounds.

LORD YOUNG.—I concur.

LORD TRAYNER.—There are three public bodies liable to the pursuers in the assessment in question, who may be briefly designed as (1) the Corporation of Glasgow, (2) the Corporation of Rutherglen, and (3) the County Council of Lanark. The last-named body alone defends this action, and it contends that the proportion of the assessment for which it is liable is only

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provision in the Act of 1878, to annual expenses. I cannot take that view. The section applies to the cost of the purchase of lands and other capital expenditure, and the power of assessment is given to enable the pursuers to raise the amount necessary to meet such costs. It seems to me that the assessments authorised in this section are the very assessments upon the security of which the pursuers are authorised to borrow money for the purposes of the Act.

"The 15th section of the Act comes in place of the 8th section of the Act of 1878, and provides that the County Council of Lanark (the defenders) 'as representing the Lower Ward thereof and the police burghs therein,' and the Magistrates and Town-Council of Rutherglen, shall pay to the pursuers, out of certain specified assessments, 'such sums as the commissioners shall estimate, apportion, assess, and charge as the shares payable respectively by the said County Council and Magistrates of the royal burgh of Rutherglen, for the costs, charges, and expenses of carrying into effect the Court Houses Acts and this Act and the Act of 1878, so far as applicable to the commissioners.'

"No provision is made in the Act of 1890 for the way in which any sum apportioned by the pursuers to the city of Glasgow is to be raised by the Corporation, and I imagine that the provisions of the 7th section of the Act of 1878 are still applicable to them.

"I therefore think that it is plain that whatever sum is apportioned to the defenders under the 13th section must be raised by them by assessment upon the Lower Ward alone, and accordingly I am of opinion that the construction of that section for which the defenders contend must be adopted. As I have already indicated, it seems to me that the words 'the respective areas under the jurisdiction of such public bodies,' are capable of being read as referring only to areas which are under their jurisdiction for purposes connected with the Glasgow Court Houses, with which alone the Act deals. I quite recognise that the fact that in the schedule the County Council are named without any words of limitation, whereas in the 15th section they are described 'as representing the Lower Ward,' is a point in favour of the pursuers' view, but I do not think that that is a sufficient ground for holding that the words in the 13th section are not open to construction, or for putting a different construction upon them than that which would otherwise fall to be adopted.

"The next question is whether the pursuers, in allocating the borrowed money among the three public bodies, are justified in calculating the amount

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that proportion which effeirs to the valuation of lands and heritages in the Lower Ward of Lanarkshire, instead of the lands and heritages in the whole county. The Lord Ordinary has sustained this contention on what he holds to be the proper construction of the 13th section of the Glasgow Court Houses Act of 1890. In reaching this construction his Lordship has taken into account the provisions in several Acts of Parliament of earlier date, in which the assessment (the same or equivalent assessment to that now sued for) has been imposed upon the lands in the Lower Ward of Lanarkshire alone. I should regard what the Lord Ordinary has done as legitimate if it could be said that the 13th section of the Act of 1890 was open to construction. But if that section is plain and unambiguous, then it must have effect according to its plain meaning irrespective of anything to be found in previous Acts. Now, I am of opinion that the section before us is not open to construction, and that the view which the Lord Ordinary has taken is unsound. The section provides that the assessment is to be imposed on the three public bodies I have already designed "in proportion to the gross

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payable by the defenders upon the basis of the valuation of the Lower Ward as it stood in 1890, and before a large part of its area was added to the city of Glasgow.

"The last clause in the 10th section of the Act of 1890 appears to me to have a direct bearing upon that question. It is in these terms:—'Provided that such powers of assessment shall be held to apply to the whole area included within the municipal boundaries of the city and royal burgh of Glasgow, as the same may extend under any Act of Parliament, including any portion of the county of Renfrew over which such area may extend.'

"Now, if I am right in the construction which I have already put upon the assessing sections, the words 'powers of assessment' in that clause simply mean the power which the pursuers have of fixing the amount which the Corporation must raise by assessment, and that is just what the pursuers are empowered to do in regard to borrowed money by the 13th section. The clause therefore seems to me to amount to this, that in allocating the sum for which the Corporation are to assess, the pursuers are to have regard to the whole area which is in fact included within the city of Glasgow at the time when the assessment or allocation is made.

"And that view appears to me to be quite consistent with the 13th section. The main object of that section is to fix the proportions in which money borrowed under the authority of the Act shall be paid by the three public bodies named. The words are, 'in proportion to the gross valuation for the year ending on the 15th day of May, one thousand eight hundred and ninety, of the lands and heritages situated within the respective areas under the jurisdiction of such public bodies.' Now, it is clear that the value of the assessable subjects within the three areas is to be taken from the Valuation-roll of 1890 alone, but I do not think that it follows that the extent of the respective areas is also to be taken in all time coming as that which existed when the roll of 1890 was made up. The words used are no doubt capable of bearing that meaning, but I also think that they are capable of meaning that the value as given by the roll of 1890 shall be applied to the areas which at the time when the allocation is made are in fact under the jurisdiction of the respective public bodies. And it seems to me that there is a sufficient reason for adopting the latter construction. What the commissioners are empowered to assess and charge upon the three public bodies are the sums of money 'from time to time' borrowed and outstanding. The Act therefore contemplated that the pursuers might

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valuation for the year ending 15th May 1890 of the lands and heritages situated within the respective areas under the jurisdiction of such public bodies." There are two things here provided for which are fixed and unchangeable, namely, the three bodies who are to pay the assessment, and the standard by which the amount of the total assessment is to be ascertained. This is clear enough. But it appears to me equally clear and fixed what it is that each is to pay as its proportion, for that is to be estimated on the given valuation of the "lands and heritages situated within the respective areas under the jurisdiction of such public bodies." Jurisdiction is not perhaps the most correct word to use in the circumstances, as the County Council of Lanark has and can exercise no jurisdiction proper in the county. But the meaning of the phrase is clear enough. It is the area over and in which the County Council exercises the power and performs the duties which the Legislature has conferred or imposed upon it. That area is the whole county of Lanark, and therefore it appears to me that the necessary meaning of the statutory provision is that the County Council of Lanark shall pay the assessment in question in the proportion which the valuation (as at the given date) of the lands and heritages in the county of Lanark bears to the valuation of the lands and heritages in the city of Glasgow and burgh of Rutherglen.

There is nothing in the clause before us which limits the proportion which the defenders have to pay to the value of the lands and heritages in the Lower Ward alone, and nothing to suggest such a limitation, and it rather appears to me that the correct inference to be drawn from the difference between the terms of the Act of 1890 and previous Acts is, that in 1890 it was not intended to distinguish between one part of Lanarkshire and another, otherwise the terms of the earlier Acts would have been repeated. The terms of section 15 of the Act of 1890 lends some support to this view, for the Lower Ward of Lanarkshire is there dealt with (as distinguished from the whole county) in such a way as to suggest at least that the two things were present to the mind of the Legislature or those who framed the Act.

But while it is fixed once for all who are to pay the assessment, and what is to be the standard of valuation according to which the respective proportions are to be estimated, I think one of the features necessary for ascertaining the amount of each party's contribution is not so fixed. The area under

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exercise their borrowing powers gradually, and might charge and assess upon the public bodies one sum one year and another sum another year. Now, if the pursuers are bound to assess the Corporation of Glasgow and the defenders according to the respective areas of the city of Glasgow and the Lower Ward as appearing in the Valuation-roll of 1890, although since that roll was made up these areas have been entirely changed, it is plain that the proportions fixed by the 13th section will be entirely overturned. I am therefore of opinion that the duty of the pursuers is to apportion the sum to be assessed according to the areas actually included within the city of Glasgow and the Lower Ward respectively, but upon the basis of the value of the lands and heritages within these areas as given in the Valuation-roll of 1890. Such an apportionment seems to me to satisfy the language of the 13th section, and to maintain the proportions thereby directed.

"I am therefore of opinion that upon both the questions raised in the case the defenders are entitled to prevail."

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the jurisdiction of each of the parties may change, and in fact has changed. While the standard is the valuation of May 1890, it has to be applied to the actual state of facts at the time the assessment is made. Accordingly I am of opinion that the three bodies are liable in that proportion of the assessment which effeirs to the lands and heritages under their jurisdiction respectively when the assessment is made, and that if any lands (for example) have been taken out of the county of Lanark and included within the city of Glasgow, the assessment in respect of the value of such lands must be borne by the city and not by the county. The result is that the County Council of Lanark must pay the assessment in respect of the value of all lands within the county of Lanark at the date of the assessment, except, of course, such lands as are included in the city of Glasgow and burgh of Rutherglen.

LORD MONCREIFF.—I agree in the second finding of the Lord Ordinary, but differ as to the first. The language of the 13th section of the Glasgow Court Houses Act, 1890, differs in such a marked way from that of the previous statutes and other clauses of the Act of 1890 to which the Lord Ordinary refers that I am forced to conclude that the difference is intentional. The clause which we have to construe occurs in a group of clauses—11, 12, and 13—which deal with power to borrow money on security of assessments; and the 13th section deals with the apportionment of such assessments. As regards the County Council of the county of Lanark, the question is whether the area under its jurisdiction which is to be subjected to assessment is the whole county or only the Lower Ward. The Lord Ordinary has held that, while *prima facie* the clause extends to the whole county, the words may be so construed as to confine them to the Lower Ward. Though not without difficulty, I have come to the conclusion that they cannot, for the reason which I have already stated. The clause as it stands it is not merely unambiguous, but in sharp contrast with previous enactments by which burdens in connection with the Glasgow Court Houses were thrown on the Lower Ward alone, and also with clauses which follow in the same statute which shew that when it is intended to confine an assessment to the Lower Ward of the county this is expressly stated. I refer in particular to the 15th section and to the 19th of the Act of 1890.

As to the Lord Ordinary's second finding, I agree with him on the grounds which he states, that the pursuers are bound to deduct from the valuation of the county the valuation of those parts of the Lower Ward which were taken from the county and annexed by the City of Glasgow Acts, 1891 and 1896.

THE following was the interlocutor of the Court:—"Recall the said interlocutor reclaimed against: Find that the pursuers, in ascertaining the amount for which they are authorised to charge and assess the defenders the County Council of the county of Lanark, in terms of the 13th section of the Glasgow Court Houses Act, 1890, are bound to take into account the valuation for the year ending on the 15th day of May 1890 of the lands and heritages within the whole county of Lanark;

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and further that the pursuers are bound to deduct from the said valuation, and to add to that of the city of Glasgow, the valuation of those parts of the said county annexed to the city by the City of Glasgow Acts, 1891 and 1896: Remit the cause to the said Lord Ordinary to proceed therein."

WEBSTER, WILL, & Co., S.S.C.—BRUCE, KERR, & BURNS, W.S.—Agents.

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Nov. 22, 1900. Dornan v. Allan & Son.

JOHN DORNAN, Respondent.—*Hunter—Munro.*
JAMES ALLAN Senior & SON, Appellants.—*Campbell, Q.C.—Younger.*

Contract—Essential Error—Mutual Error—Master and Servant—Workmen's Compensation Act, 1897 (60 *and* 61 *Vict. cap.* 37).—An employer tendered £2, 7s. 4d. to D, a workman, who had been injured in his employment, as in full satisfaction of any claim he might have against him, stating, as was the fact, that he had obtained a report from a surgeon that D would be fit to return to his work in six weeks from the date of the accident. D accepted the money, and granted a discharge in full. The medical opinion on which both parties relied proved to be mistaken, for D was not able for work for more than six months from the date of the accident.

Held (*diss.* Lord Young) that the above facts were not sufficient to shew that the parties, in entering into the agreement for settlement of the workman's claim, were under essential error to the effect of rendering the discharge null and void.

2D DIVISION. Sheriff of Lanarkshire.

IN an arbitration under the Workmen's Compensation Act, 1897, in the Sheriff Court at Glasgow, John Dornan, labourer, Glasgow, sought decree against James Allan senior & Son, ironfounders, Glasgow, for 12s. 6d. weekly, beginning the first payment on 12th September 1899, and continuing until the future orders of the Court.

The Sheriff-substitute (Guthrie), awarded compensation, and on the crave of James Allan senior & Son, stated the following case:—

"Parties were heard before me, of this date (16th March 1900), when the following facts were admitted or proved:—

"1. That the respondent was hurt in the course of his employment in the appellants' works in Possil Road, Glasgow, on 29th August 1899, and that notice of the injury was given on 15th September.

"2. That the respondent signed the receipt and discharge (No. 3/1 of process) on 27th September 1899.*

"3. That the appellants' foreman, John M'Cusker, on that day called for respondent, as he was in the habit of doing, and presented to respondent the said receipt and discharge, and asked him to sign it, in return for a payment of £2, 7s. 4d., being equivalent to four weeks' compensation under the Act, telling him that Dr Mechan, surgeon of the Employers' Association, had reported that he would

* The receipt, which was duly stamped and witnessed, was in these terms:—

"*N.B.—This is a final Discharge. No.* 4727. *Class B.*

"I, John Dornan, 337 Garscube Road, Glasgow, do hereby acknowledge receipt of the sum of two pounds seven shillings and fourpence paid to me by Messrs James Allan senior & Son, ironfounders, Glasgow, in full satisfaction and discharge of any claim competent to me in consequence of personal injury sustained by me on or about 29th August 1899 in the course of my employment with the said firm."

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be fit for work in six weeks from the date of the accident, that is to say, in about a fortnight from the date of the conversation.

"4. That the respondent did not, before signing the document, consult the surgeon (Dr Gunn) who attended at least once a week, as surgeon of the friendly society to which he (the respondent) belonged.

"5. That the respondent read over the document and signed it, and received the money.

"6. That Dr Mechan did report to the appellants as stated by M'Cusker to the respondent.

"7. That it was not alleged or proved that any other representation inducing the respondent to sign the discharge was made by M'Cusker.

"8. That Dr Mechan's report was erroneous, and the respondent was unfit for his usual work till 6th March 1900, a period four times as long as was indicated by Dr Mechan's report.

"9. That both parties in entering into the agreement for the discharge relied on Dr Mechan's report.

"10. That notice of 15th September was given to the appellants in due time, and that in any event the appellants in the circumstances suffered no detriment by delay.

"11. That the respondent's average wages in the appellants' employ were 23s. 8d. a week.

"I found in law that the discharge could not be set aside on the ground of error, induced by misrepresentation of the appellants, but that both parties relied on Dr Mechan's report, and were under essential error, and that the discharge was void and null.

"I accordingly awarded compensation to the respondent at the rate of 11s. 10d. a week from Tuesday 12th September till Tuesday 6th March last, less £2, 7s. 4d. paid to account, and found him also entitled to expenses.

"The following is the question of law which the appellants submit for the decision of the Court:—Whether, in entering into the agreement for the settlement of respondent's claim for compensation, the facts and circumstances are sufficient to shew that the parties were under essential error, to the effect of rendering the discharge in question null and void?"

Argued for the appellants;—The Sheriff's first conclusion in law was sufficient to determine the case against his view. There was here no such error as would make the discharge void. The question was as to whether an honest bargain for settlement could be entered into before it was known how long the effect of the injuries would last. The duration of the effect of the injuries was ascertained as far as possible by the opinion of a reliable man, and a settlement was entered into, both parties accepting that opinion. The error into which the respondent fell was thus not induced by the appellants; neither was there any misrepresentation or concealment. There was no difference between this case and a proposed sale and purchase of stocks relying on the opinion of a stockbroker which turned out to be erroneous; nobody could say that such a contract could be set aside on such a ground, even assuming that the opinion—though *bona fide* —had not been the result of sufficiently careful investigation. Where parties were agreed as to what was the contract they had entered into, it could not be set aside merely because it turned out to have been based on an erroneous calculation, even though both

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parties had erred in the calculation. To set such a contract aside it would be necessary to have in the bargain that it was to subsist only if the calculation was correct. Error to set aside a contract must (1) be error as to existing facts, and not as to expectations of the future, and (2) it must have been induced by misrepresentation of the party founding on the contract.[1] In the passage from Lord Watson's opinion in the case of *Menzies*[1] relied on by the respondent, the word "representation" was obviously used in the sense of "misrepresentation." Here there was no misrepresentation, but a representation which the Sheriff has found to be true. In the absence of misrepresentation there were no grounds for saying that the contract could be set aside merely because it was founded on mutual error. Such a case might arise when there was no *consensus in idem* as to the subject-matter of the contract, or where, there being such *consensus*, the subject-matter of the contract did not in point of fact exist, or was in reality different from what the contracting parties thought it was.[2] As to the other contentions of the respondent, besides being unsound in themselves, they were not raised before the Sheriff, and could not be raised now. The Court could decide only the question decided by the Sheriff, and the case could not be sent back to him[3] to state any new question.

Argued for the respondent;—There was here no element of compromise by taking a sum down in place of a larger possible sum, which distinguished this from such cases as *Wood*.[1] The Sheriff's finding, which was one of fact, and conclusive against the appellants, was that the parties relied, not on the opinion of the surgeon, but on his report. They contracted with reference to the positive statement of the surgeon that the man would be better in three weeks. It was a contract based upon a payment for four weeks, and a recovery from the accident in six weeks, and there was no contemplation by either party of a risk that the time might be longer or shorter. The absence of this element of risk distinguished this case from one of buying or selling stocks. This was a discharge for a specified claim, and could not be founded on to defeat emerging claims not in the contemplation of either party at the time of the discharge, and it was immaterial whether in such a case the mutual error was induced by one of the parties or not.[4] Misrepresentation was not necessary to essential error in order to void a contract; whenever two parties entered into a contract on a mistaken assumption—which might be induced, not by misrepresentations but by innocent representations—but for which they would have declined to contract, there was essential error.[5] Further, the Sheriff, who could deal only with questions under the Act, was not entitled to take the discharge into account, in respect that it amounted to an assignation to

[1] Wood v. North British Railway Co., July 2, 1891, 18 R. (H. L.) 27; Mackie v. Strachan, Kinmond, & Co., July 15, 1896, 23 R. 1030; Mathieson v. Hawthorns & Co., Jan. 27, 1899, 1 F. 468; Munro v. Strain, Feb. 14, 1874, 1 R. 522; Menzies v. Menzies, March 17, 1893, 20 R. (H. L.) 108.

[2] Dickson v. Halbert, Feb. 17, 1854, 16 D. 586, 26 Scot. Jur. 266.

[3] Rae v. Fraser, June 28, 1899, 1 F. 1017.

[4] Dickson v. Halbert, 16 D. 586; Purdon v. Rowat's Trustees, Dec. 19, 1856, 19 D. 206, 29 Scot. Jur. 99; Mercer v. Anstruther's Trustees, March 6, 1871, 9 Macph. 618 (*per* Lord Ardmillan, p. 649), 43 Scot. Jur. 285.

[5] Menzies, 20 R. (H. L.) 108, *per* Lord Watson, p. 142; Pollock on Contract, 6th ed. p. 442.

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the employer of the workman's right to weekly payments, which was incompetent by section (14) of the First Schedule to the Act; and also because it was a settlement for a lump sum, which was competent only after payments had continued for not less than six months, in respect of section (13) of the same schedule—if such a settlement took place before the lapse of six months, it was not final, but could only be imputed to what the Sheriff, irrespective of it, might hold to be the proper weekly payments.

LORD JUSTICE-CLERK.—The question in this case put by the Sheriff is—(Reads). I am of opinion that the question must be answered in the negative. The essential error is said to have been that the parties in settling the claim of the pursuer against the defenders proceeded upon the opinion of a doctor who thought that the pursuer would be free from total disablement in three weeks, whereas in the event he was disabled for a much longer time. It is not the fact that by any act of the defenders, or of any person acting for them, any misrepresentation was made to the pursuer. The Sheriff's findings entirely negative any such idea. What was represented to him was true, viz., that the doctor was of a certain opinion. I cannot hold that, where a doctor gives an opinion, on which parties act in compromising a case for a certain sum, the fact that his opinion proves to be erroneous entitles a party to set aside the settlement made on the ground of essential error. I am unable to see any distinction between this case and the case of *Wood*,[1] in which it was decided in the House of Lords that if a party compromised a case and took a sum of money as compensation for a bodily injury, acting on medical opinion given at the time, the injured party could not get over the settlement, and obtain a judgment for a larger sum, because it proved that his recovery did not take place for a considerable time, and his actual loss from the accident proved to be greater than was anticipated at the time of the settlement.

I therefore am of opinion that the question must be answered in the negative.

LORD YOUNG.—I regard this as a case of very considerable importance. The statute on which the case is submitted to us is one about which there is a variety of opinions. But its object is plainly that where a workman or labourer, such as the respondent, without any serious or wilful misconduct, receives an injury in the course of an employment attended with danger, he shall be entitled to receive such a sum from his employer as will keep him from starving and off the poor's-roll. The Legislature regards such an accident as a risk incident to trade, and which accordingly must be taken by the persons engaging in it. The respondent has brought the matter before the Sheriff by means of arbitration under the Act, on the ground that he had sustained an injury which incapacitated him from work. It does not appear to me from the facts in the case that there was any difference between the parties needing to be compromised. There was no room for compromise. Parties are agreed as to the fact that at the time the agreement was entered into the respondent was injured so as to be incapacitated for work. This is not a matter of dispute, and it occurs to me that the present case is not one

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of compromise in the sense that there was a dispute between the parties to be settled by a compromise. In the observations which I have to make it must be distinctly understood that I do not question the view that if an honest agreement is entered into between different parties it will not be set aside because it turns out more favourable to one of the parties than was expected. But in dealing with such a discharge as the present, attention must be paid to the whole circumstances of the case. Thus, in the case of *Wood*,[1] Lord Selborne commences his opinion by referring to facts to shew that the party injured was, when he granted the receipt, in a condition to exercise an independent judgment. Here one of the material circumstances of the case is that the person from whom this receipt was taken was a working-man admittedly suffering under the effects of an injury incapacitating him totally from work. The findings of the Sheriff-substitute shew that the respondent was hurt in the course of his employment on 29th August 1899 so as to be unfit for his usual work till 6th March 1900, and the terms of the receipt which has been presented by the appellants shew that they were well aware when they presented the receipt to the respondent for signature that this workman was incapacitated for work as the result of the accident, and was therefore entitled every week to half a week's wages as long as he remained incapacitated. The respondent was entitled to a weekly payment as from 12th September, and as the receipt was taken upon 27th September, he was at that date, to the knowledge of the appellants, entitled to compensation for a fortnight. On that day the employers' foreman presented this suffering labourer with a receipt headed, "This is a final discharge," and induced him to sign it in return for £2, 7s. 4d., being four weeks' compensation under the Act, telling him that Dr Mechan, the appellants' surgeon, had reported that he would be fit for work in a fortnight. I should have thought that what would have occurred to anyone intending to do justice would be to pay this workman the compensation to which he was entitled for the past fortnight, and continue to make payment of weekly compensation another fortnight. Then, if the doctor's opinion had been right, the payments would have stopped. Justice would then have been done, and I think that this was the reasonable course to take. Was it a case in which good sense or justice suggested an idea of compromise? There was no difference or dispute to be compromised, and no consideration was given to the workman. Was it conscionable to think that no further payment than that mentioned in the receipt was to be made if the incapacity for work continued longer than the doctor certified that it would?

I do not impute falsehood to the appellants. I take the Sheriff's opinion that they honestly believed that their workman's incapacity for work through the injury would end in a fortnight, but I think it was neither conscionable nor proper for them to take this discharge with the intention of depriving their workman of further compensation in the event of his disability continuing as it did for six months. Such action subverts the purpose for which the statute was passed, viz., to prevent the workman from requiring to go to the poorhouse or suffering starvation. Suppose the doctor, after the receipt had been signed, had come to the appellants and

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said, "I find I was mistaken when I made my report. The period of incapacity will be six months instead of three weeks." If the appellants had said in such a case, "That does not matter. We have got our receipt, and we won't pay more." I do not think we would have countenanced such a reply as a legal position for them to take up, and I do not think any such result follows from the case of *Wood*.[1] I am of opinion that there was here essential error on the part of both parties when they entered into this contract, and that there should be restitution. Every consideration of truth and honesty leads to restitution, so that this workman may receive the compensation which the statute intended he should receive. Therefore, in conformity with the views of the Sheriff-substitute and those which I have added, I think this question should be answered as it has been answered by the Sheriff-substitute.

LORD TRAYNER.—The respondent in this case has put forward a claim against the appellants, his employers, and the defence is that the claim has been discharged. That defence was one which the Sheriff was bound to adjudicate upon, whatever might be the *species facti* on which it was founded. The discharge founded on by the defenders is produced, and its genuineness is not disputed. That appears to me to be conclusive against the pursuer, unless he avers relevant grounds for setting the discharge aside. He now says that he signed the discharge under essential error, and that is his only ground of objection. But essential error, to form a ground of reduction, must be error induced by misrepresentation or undue concealment on the part of the person in whose favour the deed sought to be reduced was granted. The facts of this case as set forth by the Sheriff-substitute negative any such misrepresentation or concealment by the appellants. I think, further, that neither of the parties to the discharge was under any essential error whatever in regard to any fact then existing and ascertained or ascertainable. They were equally informed. They both knew of the accident, of the claim advanced and made, of the probable duration of the incapacity for work, of the average earnings on which the compensation should be calculated. They neither of them knew, and could not know, that the doctor's estimate of the time necessary for the respondent's recovery was understated—but they both believed the doctor, whose opinion was given in good faith. The parties were therefore under no error as to fact; they were both disappointed in their expectations; but that is not a ground for reduction. I think the case of *Wood*[1] is quite in point, and it has been followed in several cases.

I cannot concur in the view on which the Sheriff-substitute has proceeded, that the discharge has to be set aside as ineffectual because of mutual error. Mutual error may be pleaded in support of the contention that there is no contract binding on the parties in respect that by reason of their mutual error they were never agreed *in idem*. But it is a novel view that mutual error as to the consequences which may follow from a contract will invalidate the contract itself. That is not error in regard to fact—it is error in opinion merely.

I regard this discharge as the outcome of a *bona fide* agreement between

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the parties to settle a claim regarding which one party knew as much as the other, and a discharge therefore not liable to be set aside, but one entitled to full effect. I am therefore for recalling the judgment of the Sheriff-substitute, and remitting to him with directions to dismiss the respondent's application.

LORD MONCREIFF.—The only question of law submitted is—(Reads).

It is not competent for us to consider any other question, nor to remit to the Sheriff to state another. There is nothing in the Act to prevent an employer settling with his workman as was done here. The Act contemplates that employer and workman may agree not only as to liability under the Act, but as to the amount and duration of the compensation. And if there is an agreement there can be no arbitration—See section 1 (3).

There is no question here of the *bona fides* of the appellants in accepting the discharge from the respondent, and we are not entitled to proceed on any view which we may take of their conduct in now insisting on it. On the question raised there is no doubt that in one sense both parties to this transaction were in error—that is to say we must hold that they both expected that the workman would be able to return to work at the end of six weeks from the date of his accident, their reason for so thinking being that Dr Mechan, the medical man consulted by the employer, reported to that effect. But it does not follow that this was an error which went to the root of the contract. In order to succeed in reducing the discharge granted by the respondent, he must shew that it was an implied condition of the contract that Dr Mechan's report should ultimately prove to be well founded—with this result, that if on the expiry of the six weeks from the date of the accident it were found that the respondent had not recovered, the discharge should be disregarded, and the respondent should be at liberty to claim compensation as if it had not been granted.

Now, I do not think that that is the true nature of this contract. I think that it was the respondent's intention to accept a lump sum in respect of the injuries which he had received, and that the report which was communicated to him was no more than a means to enable him to decide whether he should accept the appellants' offer or not. The case was just the same as if each party had consulted their own medical man, and both doctors had agreed in saying that the workman would be fit for work in six weeks from the date of the accident. In that case both parties would have been under the same error as here, and would have entered into the contract on an erroneous assumption. But I cannot suppose that in such a case the error so induced would be held to be a sufficient ground for setting aside the contract. The fact is that in all such cases there is always an element of transaction or risk, however much the parties may be guided by the professional advice which they receive. There must be finality about such transactions, and it would never do if it could not be determined whether a discharge so granted was to hold good until it was seen whether the opinions upon which the parties acted were justified by experience or not.

If authority were required, it will be found in the case of *Wood*[1] in the

[1] 18 R. (H. L.) 27.

House of Lords, where the person injured was induced to accept compensation (which proved to be inadequate) on the faith of a report obtained by the railway company. No. 24. Nov. 22, 1900. Dornan v. Allan & Son.

In short, I think that the error which undoubtedly existed here was not a fundamental error, although no doubt it influenced both parties in entering into the contract.

I will only add that the matter might be well tested by considering whether, if the respondent had proved to be fit for work in a day or two, the appellants could have recovered from him the excess of the compensation which they paid him. I think clearly not.

THE COURT answered the question in the negative, sustained the appeal, recalled the award, and remitted to the arbitrator to dismiss the claim.

SIBBALD & MACKENZIE, W.S.—MORTON, SMART, & MACDONALD, W.S.—Agents.

MATTHEW PAUL & COMPANY, LIMITED, Pursuers (Reclaimers).—*Ure, Q.C.—R. S. Horne.*
THE CORPORATION OF THE CITY OF GLASGOW, Defenders (Respondents).—*Lees—Guy.*

No. 25. Nov. 22, 1900. Paul & Co. v. Corporation of Glasgow.

Sale—Warranty—Express Warranty—Advertisement—Implied Warranty—Sale of article under patent or trade-name—Sale of Goods Act, 1893 (56 *and* 57 *Vict. c.* 71), *sec.* 14.—Paul & Co. were the sole licencees and makers of an apparatus known in the trade as "Patterson's Smoke-Prevention Suction Draught for Land and Marine Boilers."

In March 1897 Paul & Company wrote to the engineer of the Corporation of Glasgow calling his attention to their apparatus as a means of both increasing boiler capacity and largely reducing or entirely preventing smoke; and also enclosing a circular, in which it was stated that "The smoke prevention is absolute, and is attained by a proper arrangement of," &c.

In March 1898 the Corporation by letter accepted a written offer by Paul & Company to instal their apparatus at a price stated. Neither the offer nor the acceptance contained any reference to the circular.

The apparatus having been erected, and the Corporation having thereafter rejected it as disconform to contract, Paul & Company brought an action against the Corporation for the price.

The defenders denied that the pursuers had implemented their contract, and stated—that they, the defenders, had ordered the installation, "relying on the statements and warranty contained in the said circular," and—that the apparatus erected did not prevent smoke. They pleaded that the apparatus supplied being disconform to warranty and having been rejected they ought to be assoilzied.

The pursuers pleaded that the contract did not contain any warranty as to the prevention of smoke.

The pursuers renounced probation; the defenders asked for a proof.

The Court (*rev.* judgment of Lord Kincairney) *refused* to allow a proof, and *granted* decree, holding (1) that the defenders were not entitled to found on the circular as containing an express warranty, as the circular was not referred to in the contract; and (2) that in respect of the proviso contained in sec. 14, subsec. 1, of the Sale of Goods Act, 1893, there was no implied warranty, the apparatus in question being a specified article sold under its trade-name—*diss.* Lord Young, who held that the defenders ought to be allowed a proof before answer of their averment that the pursuers had not implemented their contract.

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Paul & Co. v. Corporation of Glasgow.

2D DIVISION.
Lord Kincairney.

THIS was an action at the instance of Matthew Paul & Company, Limited, Levenford Works, Dumbarton, against the Corporation of the city of Glasgow, to recover £400, being the price of an apparatus which the pursuers had supplied to the defenders.

The pursuers averred:—(Cond. 1) "The pursuers are sole licencees and makers of 'Patterson's Smoke-Preventing Suction Draught for Land and Marine Boilers,' which is the well-known trade-name of a specific process designed for adaptation to boilers for the purpose of effecting increased power with a saving of fuel and the prevention of smoke. The apparatus is one in which, by the use of a fan in the main flue leading from the boiler to the chimney, the intensity of the draught and steam production are regulated according to the speed of the fan." (Cond. 2) "On 9th March 1897 the pursuers wrote to Mr A. B. Macdonald, who acted as engineer in the service of the defenders, recommending to the notice of the defenders the said system of suction draught, and they enclosed a circular describing the nature of the said system and the advantages to be derived from its use. A copy of the said circular is herewith produced.* *Inter alia* it contained sketches and letterpress describing fully the methods by which the results claimed for the said system are obtained; and the engineer of the defenders was thus put in a position to judge for himself as to the merits of the pursuers' apparatus. Subsequently certain members of the Baths and Washhouses Committee of the defenders' Corporation . . . visited the pursuers' works, where they saw the Patterson apparatus in operation, and formed a judgment as to the uses of the system on the results obtained."

The pursuers further averred (Cond. 3) that on 27th December 1897 Mr Macdonald, as representing the defenders, sent a letter to them requesting a specification and estimates for the application of "Patterson's Induced Draught" to washhouses at Stobcross and Bain Square in the city of Glasgow, and enclosing sketches shewing that at Stobcross two Cornish boilers and at Bain Square a Babcock and Wilcox boiler were to be built. "In response to inquiries made by the pursuers Mr Macdonald, in letters dated 30th December 1897 and 4th January 1898 respectively, informed the pursuers, *inter alia*, that the Cornish boilers would burn '45 tons breeze' per month of 248 working hours, and the Babcock boiler '70 tons breeze' per month. This information, as was explained to Mr Macdonald, was necessary to enable the pursuers to determine the capacity of the fans, which formed the essential part of their apparatus."

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*The circular stated, under the head "Advantages," that one of these was "Absolute prevention of smoke," and, in the general description of the apparatus, that, "The smoke prevention is absolute, and is attained by a proper arrangement of air admission, which in no way complicates the furnace fittings, together with the washing of the gases by the water spray as they pass through the fan."

In the letter accompanying the circular the pursuers stated,—"We understand that the Glasgow Corporation have at present under way a number of new boiler installations for city institutions, and we enclose herewith a descriptive circular of Patterson's Suction Draught arrangement, which you may find of interest at the present time.

"We would direct your attention specially to the combinations under this system, of a means both for greatly increasing the boiler capacity, and for largely reducing, or entirely preventing smoke, which, so far as we are aware, is not done jointly in any other system. . . .

"On hearing from you we shall be glad to submit a proposal for any of the installations you have at present in progress."

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(Cond. 4) "On the information so obtained the pursuers proceeded to make estimates, and by letter of 14th January 1898 addressed to Mr Macdonald, they offered to supply with their apparatus the said two stations at a cost of £330 per station." A single Lancashire boiler having been on 18th January 1898 substituted for the two Cornish boilers at the Stobcross washhouse, "the pursuers, by letter dated 25th January 1898, addressed to Mr Macdonald, made a new offer for the fitting up of their apparatus at the price of £370 for each installation. No further action, however, was taken by Mr Macdonald towards the fitting up of the pursuers' system at the Stobcross and Bain Square washhouses, but on 3d February 1898 the pursuers received from him a letter enclosing a tracing of a washhouse in Kennedy Street, Glasgow, and requesting them to submit to him sketches for a proposed installation of their apparatus there. No particulars were given, but the tracing sent by Mr Macdonald to the pursuers shewed a boiler of the same type and of like dimensions as the Lancashire boiler previously proposed to be erected at Stobcross, and the pursuers accordingly proceeded upon the footing that the conditions as to coal consumpt were identical with those for which they estimated in connection with Stobcross. On 8th February 1898 the pursuers accordingly made an offer by letter for the said installation, in which, *inter alia*, they said,—'Our price for this installation will be the same as for the others, viz., £370; and an iron chimney 30 feet high and 2 feet 6 inches in diameter will cost about £30 additional.'"

(Cond. 5) On 1st March 1898 the treasurer of the Corporation sent an acceptance. "Said acceptance is in the following terms:—'Having regard to your letters addressed to Mr A. B. Macdonald, City Engineer, of date 14th January, 25th January, and 8th February, with relative tracings, I beg on behalf of the Corporation Police Department to intimate their acceptance of your offer contained in these letters to supply and erect at the Kennedy Street washhouse an installation of Patterson's Suction Draught with 60″ fan, engine, iron chimney, &c., all as specified, for the sum of £400 sterling.' The said acceptance was confirmed by the pursuers on 3d March 1898. No warranty as to the results to be obtained by the apparatus was either asked or given. The defenders relied on the reputation of the apparatus, on the technical skill of their engineer, Mr Macdonald, and on the knowledge of the said members of committee who had seen the pursuers' apparatus in operation." (Cond. 6) "The pursuers thereafter proceeded with the fitting up of their apparatus at the said Kennedy Street washhouse, and they completed it on 9th February 1899. When erected it was in every respect conform to contract, and in all material respects similar to the apparatus which the defenders' said committee saw in operation before the said contract was made," but the defenders refused payment of the price.

The defenders referred to the correspondence for its terms, and made, *inter alia*, the following answers:—In Ans. 2. "Admitted that certain members and officials of the Baths and Washhouses Committee of the defenders' corporation visited the pursuers' works and saw the Patterson apparatus in operation. *Quoad ultra* denied." (Ans. 6) "Admitted that the pursuers thereafter proceeded with the fitting up of their apparatus at the said Kennedy Street washhouse. Admitted that the defenders refuse to make payment of the price. *Quoad ultra* denied. Reference is made to the defenders' statement of facts."

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The defenders' statement of facts contained the following averments, with the answers thereto by the pursuers:—(Stat. 1) "The pursuers in their said circular claimed as one of the advantages to be derived from the application of their apparatus to land boilers, and warranted, the 'absolute prevention of smoke' coupled with a 'large reduction in cost of chimney.' The said circular contains the following warranty:—'The smoke prevention is absolute, and is obtained by a proper arrangement of air admission, which in no way complicates the furnace fittings, together with the washing of the gases by the water spray as they pass through the fan.'" (Ans. 1) "The circular mentioned is referred to. *Quoad ultra* denied. The said circular contains no warranty." (Stat. 2) "Relying on the statements and warranty contained in the said circular, and in order to obviate the erection of a large brick chimney stalk, the defenders ordered an installation of the Patterson apparatus for the Kennedy Street washhouse." The defenders then made certain statements as to delay in erecting the installation, and as to the erection of a temporary fan. The pursuers made answers, which the defenders denied, in so far as inconsistent with their own statements. (Stat. 3) "When the apparatus came to be tried it was found that it did not prevent smoke. On the contrary, black smoke issued on all occasions in great quantities through the chimney from the boiler, alike when the apparatus was worked (as it frequently was) by or in presence of the pursuers' men and by the defenders' men." (Ans. 3) "Denied." (Stat. 4) "On this coming to the knowledge of the pursuers they on 1st April 1899 wrote to Mr Macdonald" suggesting certain changes in order to increase the air supply. "The pursuers by said letter undertook 'that with a sufficient air supply over the bars the smoke will be absolutely prevented.'" (Ans. 4) "The letter mentioned is referred to." The defenders then made averments, and the pursuers made answers thereto, as to attempts by the pursuers to prevent smoke by altering the apparatus. (Stat. 8) "On 2d December 1899, on the failure of the attempts by the pursuers, the defenders wrote to the pursuers, giving them an opportunity of putting the apparatus to their satisfaction within ten days. The pursuers did not avail themselves of this opportunity, and after some correspondence, and after the pursuers' workmen had vainly attempted to work the engine successfully themselves, the defenders, on or about 30th December 1899, rejected the said apparatus as not being conform to warranty, and thereafter caused it to be removed. The letters mentioned by the pursuers in their answer are referred to for their terms. Their explanations are denied, and it is explained that no estimate was given by the defenders of the probable coal consumpt at the Kennedy Street washhouse. The consumpt varied, and the pursuers' complaint on the point had to do with a deficiency in steam, not with production of smoke. *Quoad ultra* the statements in answer, so far as not coinciding with the defenders' statements, are denied." (Ans. 8) "The defenders' letter of 2d December 1899 is referred to. Admitted that the defenders rejected the apparatus and caused it to be removed. *Quoad ultra* denied. . . . On receiving the said letter from the defenders the pursuers sent a man to investigate the apparatus, when it was discovered that throughout all the previous trials the conditions of the contract with regard to the consumpt of coal, as stated in articles 3 and 4 of the Condescendence, had been violated," in certain particulars specified. "Under the con-

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ditions provided for, the pursuers aver, it would give satisfactory results, and the defenders have illegitimately rejected it."

The pursuers pleaded, *inter alia;*—(2) The pursuers having supplied to the defenders the apparatus as contracted for, are entitled to payment of the price. (4) *Separatim*, the apparatus in question having been sold to the defenders without any warranty, the defenders took the risk of its fitness for the purposes to which it was put. (5) The apparatus in question being a specified article, sold under its patent or other trade-name, there was no implied condition as to its fitness for any particular purpose. (7) The defences are irrelevant.

The defenders pleaded;—(2) The pursuers' averments, so far as material, being unfounded in fact, the defenders ought to be assoilzied, with expenses. (3) The apparatus supplied by the pursuers to the defenders being disconform to warranty, and having been rejected by the defenders, the defenders ought to be assoilzied, with expenses.

On 10th July 1900 the Lord Ordinary (Kincairney), before answer, allowed parties a proof of their averments.

The pursuers reclaimed, and at the hearing renounced probation.

Argued for the pursuers;—The pursuers were entitled to decree *de plano*. The only possible defences to this action would have been fraud, or that the article had been badly fitted up, or that the article delivered was not the article which had been ordered, but none of these was averred. The only defence averred was breach of warranty. This was a sale of a specific article by its patent or trade-name, and accordingly the warranty could not be implied.* The Sale of Goods Act of 1893, sec. 14 (1) was declaratory of the common law that no warranty is to be implied from the general description in the name of the apparatus.[1] The warranty, if any, must, therefore, be express, and as there was certainly no express warranty in the correspondence, it must be found, if anywhere, in the circular. But the circular was merely a puff or advertisement, and not a guarantee. It was sent with drawings to a skilled engineer, who could form his own judgment. It was merely a representation, on which the defenders were not entitled to rely in making the contract. They were asked to apply their own judgment. But whether the circular contained a warranty or not, it formed no part of the contract. The contract was completed by the letters of offer and acceptance of 8th February and 1st March 1898, and neither these letters nor the whole correspondence between the parties contained any reference to the

*The Sale of Goods Act, 1893 (56 and 57 Vict. cap. 71), enacts—Section 14,—"Subject to the provisions of this Act, and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale except as follows:—(1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to shew that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose, provided that in the case of a contract for the sale of a specified article under its patent or other trade-name, there is no implied condition as to its fitness for any particular purpose."

[1] Chanter v. Hopkins, 4 M. and W. 399; Ross' L. C. Com. Law, vol. ii., p. 368; Rowan v. Coats Iron and Steel Company, Jan. 6, 1885, 12 R. 395.

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circular, which had been sent out nine months before the correspondence began. There was, therefore, no express warranty.[1] Even if the circular did contain a warranty, it could not be said to be with reference to this contract. The warranty must be a material part of the contract, and it was not sufficient to make it so that one of the parties had it in mind when the contract was made. There was no averment which would entitle the defenders to plead that they relied on the seller's skill or judgment, or on anything but the patentee's circular. The contract was contained in the letters of offer and acceptance, and nothing was averred entitling the defenders to prove anything to modify the contract. The fact that the apparatus had failed to entirely prevent smoke in the circumstances was admitted, and, therefore, there was no room for proof.

Argued for the defenders;—The Lord Ordinary was right in allowing proof. The contract was not confined to the letters of offer and acceptance. The defenders did not contend that the warranty was implied. The circular, which contained an express warranty, and not a mere representation, was the beginning of the correspondence and part of the contract. It was a question of circumstances when representation hardened into warranty.[2] The question as to whether there was warranty was a question of fact, and the question whether the interval between the circular and the letters of offer and acceptance prevented the circular from being imported into the contract was one of fact to be ascertained by proof, and parole evidence was competent.[3] This was a mercantile bargain, and it was necessary and competent to look to the whole correspondence and communings between the parties, which would shew that the pursuers had warranted the apparatus, and that the defenders had relied on the warranty.

Lord Justice-Clerk.—The pursuers sue the defenders for the price of a smoke-prevention apparatus supplied on the defenders' order. It is not contended that the apparatus supplied was not the apparatus which was ordered by the defenders. Their own statement is that they ordered the apparatus to be installed at the defenders' premises, "relying on the statements and warranty" contained in a circular which had been sent to them by the pursuers. They nowhere state that the apparatus supplied was not the apparatus described in the circular, nor do they deny the pursuers' statement that it was. Practically the defence is that the pursuers gave a warranty that by the apparatus "the smoke prevention is absolute." The order and the supply of the article ordered not being denied, the question is narrowed down to this point, whether the defenders have upon record any statements relevant to be remitted to probation for the purpose of proving that the pursuers gave a warranty which they have failed to make good. Now, the only warranty alleged is that already referred to, namely, the trade circular containing the statement above quoted. But the fact is stated, and not denied, that that circular was sent to the defenders, not at the time of the bargain of sale, but many months before any negotiations for a

[1] Hopkins v. Tanqueray, 1854, 23 L. J., C. P. 162; Chalmers v. Harding, 1868, 17 L. T. R. (N. S.) 571; Malcolm v. Cross, June 9, 1898, 25 R. 1089.

[2] Rough v. Moir & Son, March 5, 1875, 2 R. 529.

[3] Prideaux v. M'Murray, 1860, 2 F. and F. 225.

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sale took place between the parties. It was sent on 9th March 1897, and no communication took place between the parties until 27th of December of the same year. It is thus plain that the circular was sent as an advertising circular only, stating that the pursuers had an article to sell of which they expressed a high opinion as to its efficiency for the purpose for which it was intended. I am unable to see how the sending of that circular in the spring of 1897 can be held to be a warranty in regard to a sale of a specific article which did not take place till January 1898 by offer and acceptance, and in which no allusion is made to any statements regarding the efficiency of the apparatus contained in the trade circular. It was frankly admitted by Mr Lees in his argument that if the letters of contract did not embody the circular, there was no warranty upon which he could support his case. Being of opinion, as I have already said, that the circular cannot be connected with the letters so as to make it part of the contract, even assuming that what was contained in the circular might constitute a warranty, I must hold that the defenders have no relevant defence to the demand that, having purchased a specified article, they should pay the price. I see no ground for allowing the defenders a proof. I do not see any averment by them, which, if they could prove it, would be an answer to the pursuers' case, and, therefore, I move your Lordships to recall the Lord Ordinary's interlocutor, and to grant decree.

LORD YOUNG.—I differ from the opinion which your Lordship has expressed, and agree with the Lord Ordinary, that we cannot decide this case without evidence. I am not of opinion that the pursuers' case, as stated on record, is admitted by the defenders. On the contrary, I think it is distinctly denied. I do not think the contract here was akin to the purchase of a specific article in a shop, or buying an article which you see, a horse, or anything else, where you must look at the thing for yourself, and take it or not as you please. I think the contract here was, or at least may be shewn by evidence to have been, that the apparatus should be constructed and so modified and so put up as to answer the purpose which the pursuers here were informed the purchasers had in view, and which they quite understood. Now, it is averred that what was done was not according to contract. A long correspondence has been produced here, all of which I do not doubt may be referred to as evidence, but we cannot decide the case upon the evidence thereby afforded, unless the parties renounce further probation, which they do not. My present impression is, that if both parties were to renounce probation we should have to decide the case against the pursuers, for I think there is not admission on record or written evidence which would entitle them to judgment upon the footing that their case was admitted or proved by writings produced. But probation is not renounced, and the defenders desire to have evidence of what they state upon the record, that what the pursuers supplied was not according to contract. No doubt the word warranty is used in the plea in law :—"The apparatus supplied by the pursuers to the defenders being disconform to warranty, and having been rejected by the defenders, the defenders ought to be assoilzied, with expenses." In the ordinary case, indeed in every case, the seller warrants that

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the article furnished shall be according to contract. I take the whole evidence at present before us to amount to this,—that the contract between the parties was that the apparatus should be constructed for the defenders with such modifications as were necessary, and be put in their premises so as to accomplish the end which it is stated they had in view, and which was well known to the pursuers. But it is impossible to look to the record here without seeing that the parties are very much at variance upon matters of fact. Take Cond. 3. The pursuers there say,—"In response to inquiries made by the pursuers, Mr Macdonald, in letters dated 30th December 1897 and 4th January 1898 respectively, informed the pursuers, *inter alia*, that the Cornish boilers would burn 45 tons breeze per month of 248 working hours, and the Babcock Boiler 70 tons breeze per month. This information, as was explained to Mr Macdonald, was necessary to enable the pursuers to determine the capacity of the fans, which formed the essential part of their apparatus." Then take Cond. 4: "No particulars were given, but the tracing sent by Mr Macdonald to the pursuers shewed a boiler of the same type and of like dimensions as the Lancashire boiler previously proposed to be erected at Stobcross, and the pursuers accordingly proceeded upon the footing that the conditions as to coal consumpt were identical with those for which they estimated in connection with Stobcross." Well, there is no admission, and the defenders, in their statement of facts, Statement 2, say: "After frequent trials the fan was found to be a failure" (the fan that was constructed so as to suit the apparatus), "but the pursuers informed the defenders in September 1899 that it was only a temporary one, and that they had now put a copper fan in hands." That is, put it in hands to be made. Then the statement in answer is denied, and in Statement 4, at the end of the statement, they say: "The pursuers," by letter which is founded upon, "undertook that with a sufficient air supply over the bars, the smoke will be absolutely prevented." And again the pursuers say in their answer to the defenders' statement 8: "On receiving the said letter" (that is the letter complaining that it was not answering the purpose) "from the defenders, the pursuers sent a man to investigate the apparatus, when it was discovered that throughout all the previous trials the conditions of the contract with regard to the consumpt of coal, as stated in articles 3 and 4 of the Condescendence, had been violated." That is distinctly denied by the defenders, and then at the end of this answer the pursuers say: "Under the conditions provided for, the pursuers aver it would give satisfactory results, and the defenders have illegitimately rejected it." I should therefore have been surprised if the Lord Ordinary had seen his way to decide the case without allowing evidence; but he having come to the conclusion that he could not, and having allowed evidence accordingly, but before answer, so as not to prejudice any plea of the pursuers, I see no ground for altering his judgment.

LORD TRAYNER.—I should not have interfered with the Lord Ordinary's interlocutor allowing a proof, had I been able to find in this record any point, probation in regard to which could have assisted us in deciding the question submitted to us. The case appears to me to be a very simple and

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clear one. The pursuers offered to supply and erect for the defenders an installation of Patterson's Suction Draught Apparatus for £400, and this offer the defenders accepted. The apparatus known by that patent or trade-name was supplied, but it did not produce the results which the defenders expected, and they decline to pay the contract price, not on the ground that what was supplied was other than the apparatus contracted for, but because it did not produce results which they say the pursuers warranted that it would produce. No doubt in the answer to article 6 of the Condescendence, the defenders deny that the apparatus was conform to contract, but they do so under reference to their own statement of facts. In that statement there is no objection stated to the apparatus supplied on any ground except that it did not prevent smoke, as the defenders allege the pursuers warranted it would do, and the defenders' pleas in law shew that their only defence is disconformity "to warranty." The only question therefore is, did the pursuers warrant the apparatus as the defenders allege? There is here no case for implied warranty, for according to the provisions of the Sale of Goods Act, 1893 (sec. 14, subsec. 1), when an article is sold by its patent or trade-name (as this apparatus was), there is no implied condition as to its fitness for any particular purpose. The warranty therefore, must be express; and as the contract was in writing, it is to the contract we must look for the warranty, if it exists.

The apparatus in question was brought under the notice of the defenders by a letter from the pursuers, dated 9th March 1897, in which they enclosed "a descriptive circular of Patterson's Suction Draught arrangement." That circular described as one of the advantages of the arrangement absolute prevention of smoke, but in the letter I have referred to, in which this circular was enclosed, the pursuers told the defenders that the arrangement was one "*for largely reducing*, or entirely preventing smoke," so that even, when first brought before them, the defenders were informed that the absolute prevention of smoke might not be attained. But we are not called on to consider whether the terms of the circular amounted to warranty, or merely to the laudation of his goods by a seller, which the buyer must check for himself, because neither the circular nor the letter of 9th March 1897 are made part of or even referred to in the contract, which was not made until March 1898. The contract then made contains no allusion to the results which the apparatus is calculated or expected to produce. Its smoke-preventing capacity or quality is not mentioned. The only defence to this action, however, is that the pursuers warranted that the apparatus would prevent smoke, and that this warranty had not been fulfilled. I think it plain, on the terms of the contract, that there was no warranty, and that therefore there could not be the breach of warranty on which the defenders alone rely. The defence accordingly, in my opinion, fails, and the pursuers are entitled to decree.

LORD MONCREIFF.—This is an action brought to recover the price of an apparatus called "Patterson's Smoke-Preventing Suction Draught for Land and Marine Boilers," of which the pursuers are the sole licencees and makers, which was sold by them to the defenders in March 1898.

The only defence is that the pursuers warranted that the apparatus would

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secure the absolute prevention of smoke, coupled with a large reduction in the cost of chimney, that the apparatus was purchased on the faith of that warranty, but totally failed to satisfy the representations made by the pursuers. The warranty is said to be contained in a circular issued to the public by the pursuers, in which, among the advantages of the apparatus, absolute prevention of smoke appears.

The Lord Ordinary has allowed a proof before answer. The first question we have to decide is whether this proof is necessary and should be allowed. The second is whether the statements in the circular constitute a warranty.

On the first question,—viz., the admissibility of proof,—I should be slow to exclude any inquiry which would bear upon the question of law which we have to decide. But the matter is brought to a very sharp point by the pursuers renouncing probation; that is to say, we must take the case on the footing that the defenders' statements as to the inability of this apparatus absolutely to prevent smoke are true. Now, if this is conceded, nothing remains except the question of law which arises upon the circular and correspondence.

The question of implied warranty depends on the 14th section of the Sale of Goods Act, 1893, which begins by enacting that, subject to the provisions of this Act, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale except as follows. The first exception is where the buyer makes known the particular purpose for which the goods are required, so as to shew that the buyer relies on the seller's skill or judgment. Pausing there, on the statements of parties I think there might be a serious question whether the defenders did rely on the seller's skill and judgment, because the defenders' engineer made a most careful examination of the apparatus before it was taken over.

But there is an exception from this exception in these terms: "Provided that in the case of a contract for the sale of a specified article under its patent or other trade-name, there is no implied condition as to its fitness for any particular purpose." Now, this was a contract for the sale of an article, the patent or trade-name of which was "Patterson's Smoke-Preventing Suction Draught for Land and Marine Boilers." Therefore under the statute there was no implied warranty.

The question remains whether there was an express warranty. The letters which constitute the contract do not contain one. The circular, which was sent a year before, is not imported. But if we can look at the circular it does not contain a warranty. What is contained in the circular is, at most, an undue laudation of the pursuers' patent.

If I am correct in holding that the real question between the parties would not derive any aid from parole proof, and that, on a fair construction, the circular and the pursuers' letters do not amount to a warranty, the Lord Ordinary's interlocutor should be recalled, and decree given as concluded for.

THE COURT recalled the interlocutor reclaimed against, and gave decree as concluded for.

A. S. DOUGLAS, W.S.—CAMPBELL & SMITH, S.S.C.—Agents.

THE SCOTTISH WIDOWS' FUND AND LIFE ASSURANCE SOCIETY, Appellants.—*Dundas, Q.C.—Fleming.*
JOHN ALLAN (Surveyor of Taxes, Edinburgh), Respondent.—*Sol.-Gen. Dickson—Young.*

No. 26.

Nov. 24, 1900.

Scottish Widows' Fund and Life Assurance Society v. Inland Revenue.

Revenue—Inhabited House Duty—Exemption—Business Premises—"Profit"—Mutual Insurance Society—Customs and Inland Revenue Act, 1878 (41 *and* 42 *Vict. cap.* 15), *sec.* 13, *subsec.* (2).—The Customs and Inland Revenue Act, 1878, sec. 13, subsec. (2), exempts from inhabited house duty "every house or tenement occupied solely for the purpose of any trade or business, or of any profession or calling by which the occupier seeks a livelihood or profit."

The Scottish Widows' Fund and Life Assurance Society had no share capital and no shareholders. Its membership consisted exclusively of the holders of policies of life insurance effected with the Society, and of the purchasers of annuities from it. The bulk of the members were the holders of "participating" policies, *i.e.* members who were entitled to share in the surplus assets of the Society as brought out at each septennial investigation of its affairs; but a small proportion of the policy-holders and all the annuity-holders (who also were proportionally few in number) had no such right of participating in the surplus assets. The Society did not directly insure, or grant annuities to, persons who were not members of the Society, but it reinsured the risks of other life insurance companies. Its accumulated funds, which were of very large amount, and from which it derived a large income, were invested in stocks, shares, and other securities, and it also, to a small extent, purchased reversions.

The Society having claimed exemption from inhabited house duty under the above enactment in respect of premises which it occupied solely for the purposes of its business, the Surveyor of Taxes maintained that the exemption founded on did not apply, in respect that the Society, being a mutual insurance society, could make no trade or business profits, or at all events, if it did to some extent make trade or business profits, that it did not occupy the premises for the sole purpose of making such profits.

Held that the premises in question fell within the exemption, in respect that they were solely occupied by the Society for the purposes of its business by which it sought to make a profit.

Observed that the word "solely" in the statute qualified the word "occupied" and not the words "any trade or business," &c.

New York Insurance Co. v. *Styles*, 1889, L. R., 14 App. Cas. 381, and *Muat* v. *Shaw Stewart*, 17 R. 371, *distinguished.*

Exchequer Cause. 2D DIVISION.

AT a meeting of the Commissioners for General Purposes acting under the Property and Income-Tax Acts, and for executing the Acts relating to Inhabited House Duty, for the county of Edinburgh, held at Edinburgh on 26th July 1899, the Scottish Widows' Fund and Life Assurance Society appealed against an assessment for the year 1898-99 of £45, being inhabited house duty, at the rate of 9d per £, on £1200, the annual value of the premises at 9 St Andrew Square, Edinburgh, owned and occupied by the Society.

The question raised was whether the Society's premises at 9 St Andrew Square, Edinburgh, fell within the exemption provided in section 13, subsection (2), of the Customs and Inland Revenue Act, 1878.*

* The Customs and Inland Revenue Act, 1878 (41 and 42 Vict. cap. 15), enacts:—

Sec. 13. "With respect to the duties on inhabited houses . . . the

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secure the absolute prevention of smoke, coupled with a large reduction in the cost of chimney, that the apparatus was purchased on the faith of that warranty, but totally failed to satisfy the representations made by the pursuers. The warranty is said to be contained in a circular issued to the public by the pursuers, in which, among the advantages of the apparatus, absolute prevention of smoke appears.

The Lord Ordinary has allowed a proof before answer. The first question we have to decide is whether this proof is necessary and should be allowed. The second is whether the statements in the circular constitute a warranty.

On the first question,—viz., the admissibility of proof,—I should be slow to exclude any inquiry which would bear upon the question of law which we have to decide. But the matter is brought to a very sharp point by the pursuers renouncing probation; that is to say, we must take the case on the footing that the defenders' statements as to the inability of this apparatus absolutely to prevent smoke are true. Now, if this is conceded, nothing remains except the question of law which arises upon the circular and correspondence.

The question of implied warranty depends on the 14th section of the Sale of Goods Act, 1893, which begins by enacting that, subject to the provisions of this Act, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale except as follows. The first exception is where the buyer makes known the particular purpose for which the goods are required, so as to shew that the buyer relies on the seller's skill or judgment. Pausing there, on the statements of parties I think there might be a serious question whether the defenders did rely on the seller's skill and judgment, because the defenders' engineer made a most careful examination of the apparatus before it was taken over.

But there is an exception from this exception in these terms: "Provided that in the case of a contract for the sale of a specified article under its patent or other trade-name, there is no implied condition as to its fitness for any particular purpose." Now, this was a contract for the sale of an article, the patent or trade-name of which was "Patterson's Smoke-Preventing Suction Draught for Land and Marine Boilers." Therefore under the statute there was no implied warranty.

The question remains whether there was an express warranty. The letters which constitute the contract do not contain one. The circular, which was sent a year before, is not imported. But if we can look at the circular it does not contain a warranty. What is contained in the circular is, at most, an undue laudation of the pursuers' patent.

If I am correct in holding that the real question between the parties would not derive any aid from parole proof, and that, on a fair construction, the circular and the pursuers' letters do not amount to a warranty, the Lord Ordinary's interlocutor should be recalled, and decree given as concluded for.

THE COURT recalled the interlocutor reclaimed against, and gave decree as concluded for.

A. S. DOUGLAS, W.S.—CAMPBELL & SMITH, S.S.C.—Agents.

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Nov. 24, 1900.

Scottish Widows' Fund and Life Assurance Society v. Inland Revenue.

THE SCOTTISH WIDOWS' FUND AND LIFE ASSURANCE SOCIETY, Appellants.—*Dundas, Q.C.—Fleming.*
JOHN ALLAN (Surveyor of Taxes, Edinburgh), Respondent.—*Sol.-Gen. Dickson—Young.*

Revenue—Inhabited House Duty—Exemption—Business Premises—"Profit"—Mutual Insurance Society—Customs and Inland Revenue Act, 1878 (41 *and* 42 *Vict. cap.* 15), *sec.* 13, *subsec.* (2).—The Customs and Inland Revenue Act, 1878, sec. 13, subsec. (2), exempts from inhabited house duty "every house or tenement occupied solely for the purpose of any trade or business, or of any profession or calling by which the occupier seeks a livelihood or profit."

The Scottish Widows' Fund and Life Assurance Society had no share capital and no shareholders. Its membership consisted exclusively of the holders of policies of life insurance effected with the Society, and of the purchasers of annuities from it. The bulk of the members were the holders of "participating" policies, *i.e.* members who were entitled to share in the surplus assets of the Society as brought out at each septennial investigation of its affairs; but a small proportion of the policy-holders and all the annuity-holders (who also were proportionally few in number) had no such right of participating in the surplus assets. The Society did not directly insure, or grant annuities to, persons who were not members of the Society, but it reinsured the risks of other life insurance companies. Its accumulated funds, which were of very large amount, and from which it derived a large income, were invested in stocks, shares, and other securities, and it also, to a small extent, purchased reversions.

The Society having claimed exemption from inhabited house duty under the above enactment in respect of premises which it occupied solely for the purposes of its business, the Surveyor of Taxes maintained that the exemption founded on did not apply, in respect that the Society, being a mutual insurance society, could make no trade or business profits, or at all events, if it did to some extent make trade or business profits, that it did not occupy the premises for the sole purpose of making such profits.

Held that the premises in question fell within the exemption, in respect that they were solely occupied by the Society for the purposes of its business by which it sought to make a profit.

Observed that the word "solely" in the statute qualified the word "occupied" and not the words "any trade or business," &c.

New York Insurance Co. v. *Styles*, 1889, L. R., 14 App. Cas. 381, and *Muat* v. *Shaw Stewart*, 17 R. 371, *distinguished.*

Exchequer Cause. 2D DIVISION.

AT a meeting of the Commissioners for General Purposes acting under the Property and Income-Tax Acts, and for executing the Acts relating to Inhabited House Duty, for the county of Edinburgh, held at Edinburgh on 26th July 1899, the Scottish Widows' Fund and Life Assurance Society appealed against an assessment for the year 1898-99 of £45, being inhabited house duty, at the rate of 9d per £, on £1200, the annual value of the premises at 9 St Andrew Square, Edinburgh, owned and occupied by the Society.

The question raised was whether the Society's premises at 9 St Andrew Square, Edinburgh, fell within the exemption provided in section 13, subsection (2), of the Customs and Inland Revenue Act, 1878.*

* The Customs and Inland Revenue Act, 1878 (41 and 42 Vict. cap. 15), enacts:—

Sec. 13. "With respect to the duties on inhabited houses . . . the

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The following facts were stated as proved or admitted in the case for appeal after mentioned:—

The premises at 9 St Andrew Square, Edinburgh, were, with the exception of a portion used by a caretaker as his residence, "occupied by the Society exclusively for the purposes of its business."

The Society, which was formed in 1814, was incorporated by the Scottish Widows' Fund and Life Assurance Society's Incorporation Act, 1861 (24 and 25 Vict. cap. lxxxv.), and at the date of the case it was regulated by that Act and the Acts 45 and 46 Vict. cap. lxxv.; 46 Vict. cap. xxii.; and 54 Vict. cap. vii.

"The Society has no share capital, and there are no shareholders. Its membership consists of the holders of policies of life insurance effected with the Society, whether these carry a right of participation in the surplus assets of the Society or not, and of the purchasers of annuities. The purchasers of annuities have no right of participation in the surplus assets of the Society. The Society does not insure or grant annuities in favour of persons other than its members, except in the case of re-assurances of other companies. . . . Policy-holders may surrender their policies for a money payment, or they may assign or transfer their interest in the said Society."

The Society's statutes empowered the directors to lay out such part of the funds of the Society as they should think proper in certain specified classes of investments, and it was in these classes of investments that the directors invested the funds of the Society in so far as not required to meet its current liabilities. In investing its funds the Society purchased stock, shares, and other securities. It was also admitted at the hearing before the Court of Exchequer that the Society had power to purchase reversions, and that it had from time to time exercised this power, although not in the year for which the assessment in question was claimed.

"At the end of each period of seven years there is an investigation into the affairs of the Society, and if the total sum of the assets exceed the total sum of the liabilities, an amount not more than the excess of the assets is allocated among the holders of participating policies by way of additions to the sums assured, but with the option of accepting the present cash value of these additions, or of having them applied in reduction of future premiums. In the case of policies which become claims during any of the septennial periods, additions may be and actually are made in anticipation of the surplus to be ascertained at the end of the period.

"The holders of participating policies constitute approximately 95 per cent of the whole membership of the Society. The non-participating policy-holders constitute rather less than five per cent, and the annuitants rather less than one per cent.

"At the end of 1898 the funds of the Society amounted to £14,544,766.

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following provisions shall have effect," *inter alia*,—

(2) "Every house or tenement which is occupied solely for the purpose of any trade or business, or of any profession or calling by which the occupier seeks a livelihood or profit, shall be exempted from the duties by the said Commissioners upon proof of the facts to their satisfaction, and this exemption shall take effect although a servant or other person may dwell in such house or tenement for the protection thereof."

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"During the year 1898 the Society received:—
"(1) Income from investments, £558,814.
"(2) Premiums in respect of policies of assurance, £998,702.
"(3) Sums paid for the purchase of annuities granted by the Society, £12,811.

"Income-tax is paid upon the whole of the income received in the United Kingdom from the Society's invested funds. This income, so far as received in the United Kingdom without deduction of income-tax, is the subject of direct assessment. There is no other income-tax assessment made upon the Society."

The Society contended that the premises in question were within the exemption provided in section 13, subsection (2), of the Customs and Inland Revenue Act, 1878, on the grounds—"(1) That they are occupied solely for the purposes of the business of life insurance; (2) That the business is to a very considerable extent one by which the occupier seeks a profit in the restricted sense of the Income-Tax Acts; and (3) that the whole business is carried on for profit in the ordinary sense of the word. . . . It was pointed out that the interests, dividends, and other income derived from the Society's large invested funds are assessed for income-tax as profits, that these interests extend to upwards of one-third of the Society's annual receipts, that the main object of the Society's business is the profitable investment of its 14½ millions of funds, and that the labour involved in dealing with these funds is much greater in proportion to the annual receipts therefrom than that involved in receiving the contributions of members."

The Surveyor of Taxes, "while admitting that the premises charged to duty are occupied solely for the purposes of the Society's business, contended that the business is not of such a character as to answer to the definition of a 'business by which the occupier seeks a livelihood or profit.' The main objects for which the Society exists are:—(1) The securing of provisions payable or arising upon the termination of lives or upon survivorships, and (2) the granting of annuities, both upon the principle of mutual assurance. The profitable investment of its funds, however important it may be, is strictly subsidiary to the main purposes for which the business is carried on. In the case of a proprietary company, the company may make a profit or a loss on its contracts with policy-holders, and such profit is a trade or business profit; but in the case of a mutual company like the Scottish Widows' Fund the very idea of profit in this sense is excluded. The Surveyor maintained that in reading section 13 of the Customs and Inland Revenue Act, 1878, profit is to be understood as meaning a trade or business profit."

The Commissioners were of opinion that the premises did not come within the exemption granted by the statute, and accordingly they dismissed the appeal and confirmed the assessment.

The Society obtained a case, from which the foregoing narrative is taken.

The Lord Ordinary in Exchequer (Stormonth-Darling), on the motion of the parties, appointed the case to be heard by the First Division, in terms of the A. S. 9th December 1880; and the case was subsequently transferred to the Second Division.

The nature of the arguments at the hearing sufficiently appears from the contentions of the parties as stated in the case, and from the

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opinions of Lord Trayner and Lord Moncreiff. The undernoted authorities were cited at the hearing.[1]

At advising,—

LORD TRAYNER.—The appellants have been assessed for inhabited house duty in respect of the premises occupied by them for the purpose of their business, and they claim to be exempted from that tax in respect of the provisions of section 13 (2) of the Customs and Inland Revenue Act, 1878. That section is quoted in the case, and need not be repeated here, but generally, so far as we need consider it, it provides that the exemption from inhabited house duty shall be given in the case of every house or tenement occupied solely for the purpose of any business by which the occupier seeks a profit. From what has already been said in more than one decided case, I suppose it cannot now be doubted that an insurance company carries on a business within the meaning of that word as used in the exempting provision. The respondent, however, maintains that in the case of the appellants their business is not one by which a profit is sought in the sense of the Act, and that is the question which we have to decide.

The exemption must, I think, be liberally construed, but without pressing that view unduly, it appears to me that the appellants are entitled to the benefit of the exemption. That they carry on a business is clear. Is it not a business from which they seek to make profit? I can hardly suppose the business is carried on with any other view. The business of life insurance is not purely philanthropic nor charitable; if not, I can see no other reason for its existence than the seeking of profit. It certainly results in profits being made, and that to a very large extent, for the profit made by the Widows' Fund (for example) from the investment of its capital alone amounts to considerably over half a million sterling per annum. It is said that that profit does not arise from life insurance, and that is true. But the profitable investment of the Society's funds, so as to yield profit to its members, is an integral part of the insurance company's business. Its members would be, and would have reason to be, dissatisfied if their capital was left uninvested, and, therefore, unproductive, and would be entitled to complain that the officials of the Society were neglecting the business which, *inter alia*, they were appointed for the purpose of transacting. Apart from this, the company before us as appellants insure strangers to their Society, because they reinsure risks which other offices have undertaken, and purchase reversionary rights. To what end do they transact this business if not for the purpose of gaining profit?

I do not regard the case of *Styles*,[2] relied on by the Surveyor of Taxes,

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[1] *The Appellants founded on*—England v. Webb, L. R. [1898], A. C. 758. *The Respondent on*—New York Life Insurance Co. v. Styles, 1889, L. R., 14 App. Cas. 381; Muat v. Shaw Stewart, Jan. 27, 1890, 17 R. 371; Edinburgh Life Assurance Society v. Inland Revenue, Feb. 2, 1875, 2 R. 394; Glasgow Water Commissioners v. Inland Revenue, May 26, 1875, 2 R. 708; Glasgow Water Commissioners v. Miller, Jan. 8, 1886, 13 R. 487; Smiles v. Edinburgh Merchant Company, Nov. 29, 1889, 17 R. 151; London Library v. Carter, 1890, 2 Tax Cases, 594; Clerical, Medical, and General Life Assurance Society v. Carter, 1889, L. R., 22 Q. B. D. 444.

[2] L. R., 14 App. Cas. 381.

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as deciding anything adverse to the contentions maintained by the appellants. In that case, it was held that the bonus additions added in participating policies were not profits on which income-tax was payable; that such bonuses were, in fact, a return of capital to the members of the society, which had been contributed beyond the amount necessary for the society's operations. There was nothing else in question there, and nothing else decided. Lord Watson said, in the course of his opinion, that with the profits derived from the sale of annuities, &c., "and with the income derived by the company from its investments, we have no concern."[1] The appeal in his view was limited to the question whether bonus additions on participating policies were profits within the meaning of the Income-Tax Act of 1853. Accepting that decision as conclusive of the matter there decided, it does not determine the question before us. It may very well be that certain returns are not profits in the sense of the Income-Tax Acts and yet may be profits in another sense. If a man sells property or stock (that not being his trade or business) for a larger sum than he paid for it, he makes a profit to the extent by which the sale price exceeds the purchase price. But such advantage as is thus gained is not "profit" in the sense of the Income-Tax Acts.

But I take it as settled that the bonuses which from time to time are paid to policy-holders, or added to the amount insured, are not profits on which income-tax can be demanded. It is not so clear, however, that a society which exists, *inter alia*, for the purpose or with the intention of procuring such an advantage for its members, is not carrying on a business which seeks to make profit within the meaning of the exempting clause with which we have here to deal.

It was argued for the Surveyor that the appellant company is not a proprietary but a mutual insurance society, but I fear I did not quite comprehend what this distinction pointed to. That distinction was certainly recognised in *Styles'* case[2] for the purpose of shewing that any sums paid to the shareholders of a proprietary company were profits liable to income-tax, whereas payments to members of a mutual insurance society were or might be different, as not being profits but returned capital. But as regards inhabited house duty, I cannot see the importance of the distinction. A mutual insurance society is a company consisting of partners just as is a proprietary company. The members are associated on different conditions no doubt, but in each case they form a company preserving (according to our law) a separate and independent *persona* from the members who constitute it. The members in each may ultimately be called on to liquidate the company's obligations—but not in the first instance—and the company alone can vindicate its rights, which an individual member cannot. The profits gained by each may be different, proceeding from different sources, and differently distributed. But that is immaterial. If profits are gained by one or other, it is immaterial to the question we are dealing with whence these profits proceed, who gets them, or in what proportion. The question here is, does the society (whether proprietary or mutual) carry on a business by which it seeks to make profit? It may make none or make

[1] L. R., 14 App. Cas. at p. 393.

[2] L. R., 14 App. Cas. 381.

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much—the test is, Does it seek to make profit? and that, I think, the appellants do. For I have shewn that the appellants (apart altogether from the premiums they receive and the bonuses which they give) by reinsurances, purchase of reversions, and investment of capital, all legitimate and proper parts of an insurance business, seek profit and make it.

The only point remaining to be noticed is an argument based on the construction of the exemption clause. The exemption is granted only in respect of premises "occupied solely" for the purpose of any business by which the occupier seeks profit. This, it is now contended for the surveyor, means premises in which no business is transacted or anything done except in the pursuit of profit; that if any business whatever is done or transacted within the premises, gratuitously or otherwise than in pursuit of profit, the exemption clause does not apply. I think this reading of the clause inadmissible. The word "solely," in my opinion, only qualifies the occupation, and does not refer to or qualify the business. That is, I think, the natural and reasonable conclusion, having regard to the fact that the exemption has reference to "inhabited house duty," and from the further fact that the sole occupation is declared to be unaffected by the circumstance that a servant dwells on the premises for the protection thereof—a circumstance which would at one time have rendered the premises liable to this tax as being otherwise occupied than for trade or business purposes. The view of the Surveyor now maintained (which does not appear to have been maintained before the Commissioners) would lead, if sustained, to curious results. A firm of chartered accountants who annually gratuitously audited the accounts of, say, the Royal Infirmary, or any other charitable institution, would be liable in inhabited house duty for their offices, because they did business there which was not done for profit. A bank in like manner would be liable for the tax if it set aside a strong room in which it deposited gratuitously the silver chests of some of its customers, thus not using their whole premises solely in the pursuit of gain or profit. I think this cannot seriously be maintained to be the meaning of the exemption clause—at all events, I think that it is not its meaning.

On the whole matter, I have come to the conclusion that the determination of the Commissioners is wrong.

LORD MONCREIFF.—The question which we have to decide is, whether the appellant society occupies its premises at 9 St Andrew Square, Edinburgh, solely for the purposes of a business by which it seeks a profit in the sense of the statute which at present regulates the incidence of inhabited house duties, viz., the Customs and Inland Revenue Act, 1878, section 13, subsection (2). It is a hard saying that this society, consisting of so many thousand policy-holders and partners, with its large staff of officials and clerks, its capital of upwards of fourteen millions, and its enormous yearly income, does not carry on business for profit. But by piecing together various decisions which have been pronounced by this Court and by the House of Lords, the Surveyor presents a case which is not free from difficulty.

I am not sure that it was seriously maintained that this is not a "business," whether carried on for profit or not. But if that argument, which I

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presume is founded on the case of *The Edinburgh Life Assurance Company*,[1] is insisted on, I am not prepared to give effect to it. That case was decided upon the terms of the Statute 32 and 33 Vict. cap. 14, section 11, in which the word "business" does not occur; the words being "any tenement or part of a tenement occupied as a house for purposes of trade only," &c. The 13th section, subsection (2), of the Act of 1878 is differently expressed, the words being, "Where any of such tenements are occupied solely for the purpose of any trade or business, or of any profession or calling by which the occupier seeks a livelihood or profit." Now, I think we are entitled and bound to give a meaning to the word "business," and besides, it seems to me absurd to say that premises occupied for the purposes of trade on the one hand, and premises occupied for the purposes of a profession on the other, are to get the benefit of this exemption, while large undertakings like that of this society, which perhaps, strictly speaking, fall neither under the category of trade nor profession, but which to a much larger extent than most trades or professions carry on business for profit, are to be excluded.

The Surveyor's main argument, however, was directed to shewing that this is not a business carried on for profit in the sense of the Act; and this is sought to be established as follows:—(1) As regards the surplus premium income, it is said that it has been decided in the House of Lords, in the case of *Styles* v. *The New York Life Assurance Company*,[2] that the surplus premium income of a mutual insurance company which is returned to the policy-holders is not profit; (2) as regards the interest from the invested funds of the Society, it is maintained that it also is something different from profits and gains; and (3) that as regards the purchase of reversions and re-insurances, these form a very small part of the Society's business, and must therefore be disregarded.

Thus, if the Surveyor's argument is sound, the whole fabric of the Society's business, as a business carried on for profit, disappears.

In my opinion, however, for the purposes of the present question, these considerations are one and all insufficient. The case of *Styles*[2] decided, and we must assume rightly, that for the purpose of the Income-Tax Statutes, premium income as such is to be regarded only as so much capital subscribed by the members of the society; and that the surplus which is returned to them simply represents part of their own money which is not required for the purposes of the business, and does not constitute profit in the sense of the Income-Tax Acts.

Assuming that the reasoning of the decision applies to inhabited house duties, surplus premium income forms only a part of the income of this and other mutual insurance societies. In regard to other sources of profit that decision has certainly no application adverse to the Society in this case. As Lord Watson says in the case of *Styles*[3]—"Besides issuing life policies, the appellant company issues without participation sums payable at fixed periods, sells annuities, and has funds invested which bear annual interest. It is not disputed that, in so far as its transactions relate to non-participat-

[1] 2 R. 394. [2] L. R., 14 App. Ca. 381.
[3] L. R., 14 App. Ca. at p. 393.

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ing policies, whether for life or for periods certain, and to annuities, the company carries on a trade in the same sense as any proprietary office does; or that surplus moneys arising upon these transactions are business profits, and as such are liable to income-tax. With these profits, and with the income derived by the company from its investments, we have no concern."

Then as to the question whether income from investments does or does not constitute profit in the sense of the enactment which we have to construe, the Surveyor's argument rests on this, that in the Income-Tax Acts interest on money is separately mentioned as a subject of taxation. The later Income-Tax Acts no doubt are so worded as to reach interest upon money lent or invested, even although the person who receives the interest may make no ultimate profit in his business—*Clerical, &c. Insurance Society* v. *Carter*.[1] But it does not follow that interest from investments does not constitute profit for the purposes of this enactment. The members of a mutual society have more than one object in view in joining it. One is to obtain policies upon as good terms as possible; another is to derive gain from the profitable investment of the large accumulated funds of the Society. In this sense, therefore, I feel no doubt that interest on investments constitutes profit in the sense of the Act.

Lastly, the Society has power to deal in reversions and re-insurances, both of which involve transactions with third parties and may be expected to yield profit.

The business must be judged of as a whole, and so judged, I have no hesitation in saying that it is a business carried on for profit.

I should add that the surveyor also relied on the case of *Muat* v. *Shaw Stewart*.[2] That was a decision of seven Judges, and of course we are bound by it so far as in point. While some of the *dicta* certainly support the Surveyor's argument, I do not think that I misrepresent the judgment, taken as a whole, when I say that it proceeded on this view—that the premises which were occupied in Ardgowan Square, Greenock, as an estate office were not truly occupied for the purpose of any trade, business, or professional avocation, but simply to enable Sir Michael Shaw Stewart, a private gentleman of large means and estates, to transact the business connected with the management of his funds and estates more conveniently than he could do in his own house or in that of his factor. The position of a private individual, however wealthy, dealing simply with the management of his own means and estate is surely widely different from that of a large public body like this Society, which conducts its business for purposes of profit with the aid of a board of directors and a large resident staff.

In regard to the interpretation of the word "solely," I agree with Lord Trayner, with this qualification, that there may be cases in which a substantial part of a tenement may be devoted by the same occupier to purposes in which profit is not sought, so completely unconnected with the business carried on in the remainder as to forfeit the exemption. On such a case I reserve my opinion.

I am therefore of opinion with your Lordships that the Society's premises

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[1] L. R., 22 Q. B. D. 444.

[2] 17 R. 371.

do come within the exemption, and that the appellant society is not liable in inhabited house duty in respect thereof. No. 26.

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The LORD JUSTICE-CLERK concurred.

LORD YOUNG was absent.

THE COURT pronounced the following interlocutor:—"Reverse the determination of the Commissioners: Find the appellants entitled to costs," &c.

TODS, MURRAY, & JAMIESON, W.S.—SOLICITOR OF INLAND REVENUE—Agents.

MRS JANE LOUISA DUFF DUNBAR AND OTHERS (Dunbar's Trustees), Pursuers (Respondents).—*Jameson, Q.C.—M'Lennan.* DONALD BRUCE, Defender (Appellant).—*Campbell, Q.C.—Hunter.* No. 27.

Nov. 24, 1900. Dunbar's Trustees v. Bruce.

Contract—Construction—Lease or Service—Occupancy of house as part remuneration for services.—The proprietors of an estate entered into an agreement with B, a gardener, whereby B agreed to keep in order the policy grounds, garden, and avenue of the mansion-house, for which services he was to receive £15 in money, the occupancy of a cottage in the kitchen garden, and the occupancy and use for his own profit of that garden, and a cow's keep. The proprietors having thereafter dismissed B from their service brought an action to have him summarily removed from the cottage. They did not ask for his removal from the garden.

Evidence on a consideration of which it was *held* (*diss.* Lord Moncreiff) that B occupied the cottage as tenant, and that the pursuers were not entitled to have him removed except after due notice to him as tenant to remove.

2D DIVISION. Sheriff of Caithness, Orkney, and Shetland.

ON 25th August 1899 W. Paterson Smith, solicitor, Wick, factor to the trustees of the late Garden Duff Dunbar of Hempriggs, wrote to Donald Bruce, gardener, Ackergill (part of the Hempriggs estate), as follows:—

"As factor for the trustees of the late Garden Duff Dunbar, Esquire, of Hempriggs, I now give you notice that your services as gardener at Ackergill gardens and policy grounds will not be required by them after Martinmas next (28th November), 1899, and will then be dispensed with. You will, therefore, require to remove at that term, without further notice, from the gardener's cottage at Ackergill presently occupied by you."

Bruce not having removed from the gardener's cottage at Ackergill at Martinmas 1899, Dunbar's trustees, in December 1899, brought an action against him in the Sheriff Court at Wick for summary removing from the cottage, and from the stables and other offices occupied by him in connection therewith.

The pursuers did not pray for the defender's removal from the upper garden after mentioned.

The pursuers averred that from March 1889 the defender had been their gardener at Ackergill under an agreement by which he was to maintain in good order all the ornamental and policy grounds in and around the garden at Ackergill Tower and the avenue leading to the tower, in return for which services he was to receive and did receive £20 in cash (reduced in 1890 to £15), the use of the upper garden, a cow's keep, the occupancy of the gardener's cottage and offices, and the grass of the policy grounds; that no money rent was ever stipulated for, or received in respect of those subjects; that in April 1898 he

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agreed to leave at a week's notice*; and that, in consequence of the receipt of the letter of 25th August 1899, the defender's possession of the cottage had since Martinmas 1899 been vitious, precarious, and without any right or title whatever. In answer to the defender's averments, the pursuers further averred that, if the defender was tenant of the gardener's cottage, his right of occupation was only for such time as he continued in the service of the pursuers, and that consequently his holding was excluded from the operation of the Agricultural Holdings (Scotland) Act, 1883, and the Market Gardeners Compensation (Scotland) Act, 1897, by section 35 of the former Act.†

The defender averred that the contract under which he was in possession of the gardener's cottage was a contract whereby he became tenant of the upper garden, gardener's cottage, and offices at Ackergill at a yearly rent of £20, and undertook to look after the avenue, policy grounds, and lower garden at Ackergill at £15 yearly of money wages and the rent of the said subjects, together £35, with a cow's keep and the grass of the policy grounds; that he was in possession of the said subjects as a market gardener; that the tenancy had been continued annually by tacit relocation; and that the factor's letter of 25th August 1899 was not a written notice of termination of tenancy within the meaning of the Agricultural Holdings (Scotland) Act, 1883, sec. 28.

The pursuers pleaded, *inter alia*;—(1) The service of the defender to the pursuers having terminated at Martinmas 1899 (28th November), and his right to occupy the subjects above specified having thereupon ceased, and he now being in vitious and precarious possession, and having refused to remove therefrom, the pursuers are entitled to warrant and decree, as craved.

The defender pleaded;—(1) The defender being tenant of the subjects in question, and having received no legal notice of the termination of his tenancy, his right to occupy same has not ceased, and the pursuers are not entitled to warrant of ejection. (2) The defender's occupancy being that of a market gardener, he is entitled to receive the notice of termination of tenancy provided by the Market Gardeners Compensation (Scotland) Act, 1897, and the Agricultural Holdings (Scotland) Act, 1883.

A proof was allowed. The evidence was to the following effect:—

Prior to March 1889 the defender had been employed for a number of years as gardener at Ackergill, on ordinary conditions of service.

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* See letters in footnote, next page.

† The Agricultural Holdings (Scotland) Act, 1883 (46 and 47 Vict. cap. 62), enacts:—

Sec. 28. "Notwithstanding the expiration of the stipulated endurance of any lease, the tenancy shall not come to an end unless written notice has been given by either party to the other of his intention to bring the tenancy to an end—" *inter alia*,

"(*b*) In the case of leases from year to year, or for any other period less than three years, not less than six months before the termination of the lease."

Sec. 35. "Nothing in this Act shall apply . . . to any holding let to the tenant during his continuance in any office, appointment, or employment of the landlord."

The Market Gardeners Compensation (Scotland) Act, 1897 (60 and 61 Vict. cap. 22), sec. 1, enacts that the Act should be read and construed as part of the Agricultural Holdings (Scotland) Act, 1883.

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In March 1889 a new arrangement was made, in consequence of the family having ceased to reside at Ackergill, the mansion-house being occupied only by shooting tenants. This new arrangement was not committed to writing between the parties, and there was a conflict of evidence as to whether rent was mentioned as the consideration for the defender's occupancy of the gardener's cottage and the upper garden. A letter, dated 23d March 1889, from Mr Thomas Dalgleish (who was then the sole trustee under the Hempriggs trust, and had died before the date of the proof), to Mr Dunnet, the land-steward of the estate, set forth the following as the conditions of the arrangement:—

"I think it will be well to give Bruce the garden for one year upon the terms contained in the second alternative proposal in your letter to me of the 28th ulto., viz.—That he receives the sum of £20 and the proceeds of the garden, with his cow's keep, as now, and a labourer's cottage, in exchange for his keeping the whole place within the walls and the outside ground from the top of the avenue to the tower, all as at present falling under his duties."

The "garden" here mentioned was the upper garden—a kitchen garden—the "labourer's cottage" was the "gardener's cottage" now in question. There was no evidence as to whether this cottage was, properly speaking, the gardener's cottage of the Ackergill establishment, and necessary to the service of the gardener thereof. The cottage was situated in the upper garden. The defender deponed that the cottage and other offices from which it was sought to eject him "are absolutely necessary for my working of the garden." The defender adduced as witnesses two gardeners from the district, who corroborated the defender on this point, and there was no contradictory evidence.

On entering upon the occupancy of the garden and cottage the defender took over at a valuation from Mr Dalgleish, as trustee, a horse and van, which he thereafter used for taking garden produce to market, and also certain garden tools and flower-pots.

In February 1890, in consequence of differences between the parties, Mr Dalgleish inserted in a local newspaper the advertisement quoted below,* but after some negotiations the defender's engagement was continued, the money payment to him being reduced to £15.

In April 1898 the letters quoted below passed between Dunnet, the Hempriggs land-steward, and the defender.†

In the Valuation-rolls for the years 1889 to 1899 the defender was entered as tenant and occupier of the "garden, Ackergill," at the

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* Advertisement:—

"*Hempriggs Estates.*

"To let, Ackergill garden, entry at 1st March 1890 . . . Conditions of let can be seen with Alexander Dunnet, Hempriggs Estates Office, Sutherland Villa, Wick, who will receive written offers till Monday the 17th inst."

† Letter, Dunnet to defender, dated 8th April 1898:—"I am instructed by Mrs Duff Dunbar to ask if you will remain on in your present place on the following terms, viz.—That you get the garden as at present . . . that you get the same money as at present for keeping the policy grounds in good order . . . and that you bind yourself to remove yourself and family, goods and gear, from your house and garden at Ackergill on one week's notice, to be given at the pleasure of Mrs Duff Dunbar."

Letter, defender to Dunnet, of same date:—"I received yours of the 8.

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yearly rent or value of £15. The returns to the Assessor were signed by the factor for the Hempriggs estate. During these years the defender was assessed, and paid rates as tenant. In the Valuation-roll for the year ending Whitsunday 1900 the pursuers were entered as tenants and occupiers, and the defender as "Inhabitant occupier, not rated." The defender was not consulted as to the change.

In advertisements as to letting the estates for shooting it was stated that the garden was "let" to a tenant, who would supply what was required at market prices.

The defender deponed that if he had not had the use of the garden his wages ought to have been at least £80 for the services which he rendered to the pursuers; other witnesses adduced by him said at least £50.

The defender received his money wages half-yearly at Whitsunday and Martinmas. The lease claimed by him was a yearly lease beginning March 1st.

On 27th February 1900 the Sheriff-substitute (D. J. Mackenzie) pronounced this interlocutor:—(2) Finds that in March 1889 "the pursuers contracted and agreed with the defender that he was to keep in order the policy grounds, garden, and avenue at Ackergill Tower, for which services he was to receive £20 in money, and also to have the occupancy of the cottage referred to in the prayer of the petition, and was to have the occupancy and use for his own profit of what is known as the upper garden, besides a cow's keep: (3) That the defender entered upon the occupancy of the upper garden and cottage as a market gardener: (4) That the pursuers in February 1890 advertised the garden to let in terms of the advertisement quoted" [above], "but that after some negotiation the defender's occupancy thereof was continued, the money payment to him being reduced to £15, and the other conditions remaining as before: (5) That the defender has since occupied the cottage and garden on these terms: (6) That on 25th August 1899 the law-agent for the pursuers wrote the letter No. 26 of process, by which the defender's services as gardener were dispensed with by the pursuers: (7) Finds that at his entry the defender purchased from the pursuers a horse and van, gardening tools, and flower-pots, for the purpose of working the said garden as a market garden: (8) Finds that the defender has been entered as tenant by the pursuers in the Valuation-roll from the year 1889 to the year 1899, and has paid all assessments levied on him as such: (9) That it is not proved that the said cottage is necessary to the service, but that it is proved to be necessary to the defender's occupation as a market gardener: Finds in law that the defender, besides being a servant of the pursuers, occupies the cottage in question as a tenant, and that the said tenancy of the cottage in question, although forming part of the defender's remuneration, was not held during his continuance in any office, appointment, or employment of the landlord: Finds that said tenancy has not been competently brought to an end, and that the pursuers are not entitled to the warrant craved for in the petition: Therefore sustains the defences; assoilzies the defender from the conclusions of the petition; finds" &c.

I agree too Ceep thee gardens and grounds on your terms, and mee too gat valuation for all growing stuff beloning too mee at my outgoing, also for manures which I put on, also for all implements which I hav in working thee gardens at Ackergil Tower."

No reply was sent to the defender's letter.

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On appeal the Sheriff (Wilson), on 30th April 1900, recalled the Sheriff-substitute's interlocutor, and found in fact "that the defender obtained and enjoyed the occupation of the premises described in the prayer of the petition on the footing and condition that he was to occupy the same only during his continuance in the pursuers' service as their gardener, and as part of his remuneration in that capacity: Finds in law that the defender, having been discharged from the pursuers' service as at Martinmas 1899, was not, and is not, entitled to retain possession of the said premises, and that the defender having refused to remove from the said premises described in the prayer of the petition, the pursuers are entitled to decree of ejection and removing, as prayed for: Therefore decerns against the defender in terms of the prayer of the petition: Finds the defender liable to the pursuers in expenses," &c.

The defender appealed, and argued;—(1) The defender's occupancy of the cottage had been upon a verbal lease for one year from 1st March 1889, renewed annually (after March 1890) by tacit relocation. The direct evidence of the original constitution of the lease was perhaps insufficient, but the circumstances of the case were all in the defender's favour. There was nothing to support the pursuers' contention except their argument in law, which came to this—that a lease could not be part of a servant's remuneration unless the rent was so fixed that it was payable independently of the service, because otherwise, it was argued, if the service terminated before the lease, there would be a lease without any rent. That was an erroneous view. A servant's occupation of a house as part of his remuneration might be *qua* tenant under a lease, or it might be *qua* servant merely, according to circumstances. The general rule was, that if the occupation was necessary to the efficient performance of the service the occupation was *qua* servant merely; if on the other hand the occupation was not necessary to the efficient performance of the service, the occupation was *qua* tenant.[1] The defender's remuneration included not merely the occupation and use of the cottage, but also the occupation and use of the upper garden, and it was difficult to see on what ground it could be maintained that the latter occupation and use was on any other title than that of tenant. The pursuers themselves appeared to think so, for they had not attempted to have the defender removed from the garden. It could not seriously be suggested that the occupation and use, for his own benefit, of the kitchen garden was necessary to the efficient performance by the defender of his duties as gardener. Further, it was difficult to believe that the defender would not only give his services as gardener for a money payment which *per se* was wholly inadequate, but would also expend money and labour on the cultivation of the upper garden, if he was liable to lose the benefit of that money and labour through his services as gardener being abruptly terminated. If then the defender occupied the upper garden *qua* tenant, the questions came to be, was the occupation of the cottage necessary to the efficient cultivation of the upper garden? or, on the other hand, was the occupation of the cottage necessary to the efficient performance of the services of the gardener at Ackergill? On these questions the evidence was all one way. The pursuers had not attempted to prove

[1] Reg. v. Spurrell, 1865, L. R., 1 Q. B. 72; Fraser, Master and Servant, 3d edit. p. 7.

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anything about the cottage, and the defender had proved conclusively that the possession of the cottage was necessary to the working of the upper garden. The upper garden and the cottage in short were a *unum quid*, and if the defender was tenant of the garden he was tenant of the cottage also. The pursuers' whole conduct—or that of their factor—was in the defender's favour. They had sold a horse, van, garden tools, &c., to the defender when he entered into occupation in 1889, which was not a natural transaction in the case of a servant, but was a very natural and ordinary transaction in the case of an incoming tenant. They had advertised the subjects as being "to let" in 1889, and, in advertisements for shooting tenants, as being "let"; they had caused the defender to be entered as "tenant" in the Valuation-roll, with the result that he for nine years had paid the tenant's rates in respect of the subjects. It might be that none of these circumstances proved the constitution of a lease, but they were evidence of the pursuers' belief that a lease had been constituted, and barred them from pleading that there was none. (2) If then the defender was in possession of the cottage upon a lease, had he received the six months' notice to which he was entitled under section 28 of the Agricultural Holdings Act, 1883? The letter on which the pursuers founded as being such notice was no doubt dated 25th August 1899, and the lease terminated on 28th February 1900. But the letter did not bear to be a notice under the Act; it was a notice to remove at the term of Martinmas immediately following, and the pursuers had, quite consistently, followed it up by bringing the present action long before the termination of the lease. It was hopeless therefore for them to maintain that the notice was a notice under the Act. Besides it was a notice to remove from the cottage only, and, the cottage and the garden being a *unum quid*, the pursuers could not at their own hand make a new contract by removing the defender from the cottage while they left him in occupation of the garden. Nothing was concluded by the letters of 8th April 1898, because the pursuers had not accepted the defender's conditions in his letter of that date. (3) In any view summary removing was incompetent.[1]

Argued for the pursuers;—(1) There was here one contract only—a contract of service. Part of the defender's remuneration under that contract was the occupation of the cottage, and when the pursuers terminated the contract of service, the defender's right to occupy the cottage ceased also.[2] He had not an independent lease or tenancy of the cottage entitling him to remain in occupation notwithstanding the termination of his services as gardener. One essential feature of the contract of lease was wanting—there was no rent. So long as the defender performed the services of gardener he had as part remuneration the right to occupy the cottage, but his proposition was that although he had ceased to perform these services he was entitled to remain in occupation of the cottage without paying or doing anything in return. It would have been different if the arrangement between the parties made provision for the rent which the defender would have to pay in the event of his services ceasing. As it was, the defender simply took up the position that he was entitled to continue in occupation *qua* tenant, but without any obligation to

[1] Robb v. Brearton, July 11, 1895, 22 R. 885; Gibson v. Gibson, March 8, 1889, 36 S. L. R. 522.

[2] Young, Ross, Richardson & Co. v. Paton, Dec. 16, 1808, Hume, 582.

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pay rent. No doubt the pursuers had not attempted to have the defender removed from the upper garden, but they had not abandoned their claim to do so, and the fact that they had not pressed to have the defender removed from the garden before he had reaped the full benefit of his labour and expenditure on it could not prevent them from having him removed from the cottage if he had no right to remain in occupation of either subject. Even if he had right to remain in occupation of the garden, that did not give him a right to retain the cottage, which was truly a separate subject from the garden. The cottage was the gardener's cottage of the establishment, and presumably it would not be let in such a way that it might not be available to the gardener for the time being; on the other hand the defender could perfectly well conclude his occupation and use of the garden without having the cottage. As to the entry in the Valuation-roll, that was the act of the factor, who was ignorant of the terms of the arrangement with the defender, and did not bind the pursuers. Even if they were bound by their factor's act, an entry in the Valuation-roll could not control the contract between the parties.[1] The use of the word "let" in the advertisements as to the shootings was of no moment, as accuracy of expression with regard to the garden was immaterial to the purpose of the advertisements. The advertisement of 1889 of the garden as being "to let" proved merely that it was then intended to let the garden. Besides all the advertisements related to the garden, and not, in terms at least, to the cottage. (2) The notice to quit contained in the factor's letter of 25th August 1899 was a sufficient notice. It was at all events a sufficient notice having in view Dunnet's letter of 8th April 1898 and the defender's reply thereto. Further, it was well settled that where the subjects were of small value, forty days' notice, however informal, was sufficient.[2] Neither the Agricultural Holdings Act nor the Market Gardeners Compensation Act applied to cottages.

At advising,—

LORD JUSTICE-CLERK.—It is certain that the defender in this case held the occupation of the cottage from which the pursuers desire to eject him as part of an arrangement whereby, for a certain sum of money annually paid, and for the right to cultivate for his own profit certain garden ground on the Ackergill estate, he undertook to do gardening work in the gardens and policies of the estate. He was dismissed from the service, and the pursuers desire to eject him from the cottage as at the date of his dismissal, while he still remains in possession of the garden ground cultivated for his own profit. Such a case, where the incidents of service and occupation of lands as part remuneration for service go together, must be considered as to its circumstances and surroundings in order to arrive at the conclusion of the question whether there is tenancy or only an absolutely precarious occupation which ceases to be of right whenever the service is brought to an end. The facts are, that when the defender entered to the duties and took over the occupation of the cottage, the tools, flower-pots, and a pony

[1] Rattray v. Leslie's Trustees, June 11, 1892, 19 R. 853.

[2] Brown v. Hill, July 3, 1798, Hume, 563; Morris v. Allan, March 8, 1839, 1 D. 667; Chirnside v. Park, March 8, 1843, 5 D. 864, 15 Scot. Jur. 360; Lambert v. Smith, Nov. 11, 1864, 3 Macph. 43, 37 Scot. Jur. 20.

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and van, formerly used for taking produce to the market for the estate, were taken over at a valuation by him—a proceeding not very consistent with the idea of service, and pointing to a contract which, although involving services, had more in it than a relation of master and servant. It is certain here that to some extent the defender's remuneration was precarious, depending upon successful cropping and a good market. It is, I think, established by the evidence that the cottage from which it is sought to eject the defender is a necessary appanage of the upper garden, in which it is situated, and that without it the defender cannot work the garden properly. Yet, strangely enough, although there is no difference between the tenure of the one and of the other, they being held as under the same bargain, the pursuers appear to hold that he was not truly the tenant of the cottage while he was tenant of the garden. Their position in this matter is not easy to understand. To hold that they are separable is not, in my opinion, possible. He held the cottage as part of his holding of a market garden, which, under the agreement, he was certainly carrying on upon his own account. The two must be taken as going together. These, which are the main circumstances of the case, point with considerable directness to the justice of the defence stated. And there is real evidence under the pursuers' own official's hand that tends strongly to support the view that, in entering into the arrangement, tenancy, and not service occupation, was the true nature of the transaction. For the pursuers have themselves regularly returned the defender in the Valuation-roll schedules as "tenant" as well as occupant, and have thus caused him to be assessed as such, with the result that the tenant's taxes have been taken off the pursuers' burdens and have been exacted from the defender. Thus they have by writing in a statutory return, false statement in which is punishable by law, held him out as being the tenant to their own advantage. This continued from the first year of the occupancy down to 1899, and the defender has been no party to any alteration. Indeed, the change was not made till about the very time when the first step was taken to oust him from his possession. Further, the pursuers themselves, in negotiation writings regarding let of shooting, held the defender out as a tenant, and as such under agreement bound to supply vegetables at market prices to the shooting tenant.

The sole question now before this Court is whether upon the evidence decree of ejection from the cottage was the right of the pursuers when the summons was raised. I hold that the pursuers have failed to prove this, and substantially on the ground stated by the Sheriff-substitute, and therefore that the Court should recall the interlocutor of the Sheriff, and sustain the decision of the Sheriff-substitute.

LORD TRAYNER.—The decision of the question raised by this appeal is, I think, attended with considerable difficulty, but on consideration I have come to the conclusion that the Sheriff-substitute was right, and that the appeal should be sustained. It does not appear necessary to go into any detail of the facts out of which the question has arisen, but I shall state shortly the considerations which have led me to the conclusion I have arrived at.

The application made by the respondents to the Sheriff was for a warrant

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summarily to eject the appellant from a cottage situated on the respondents' property. The appellant had been in the respondents' service as gardener for many years prior to March 1889. He ceased then, however, to be the gardener—that is to say, a servant on monthly or yearly wages, because, as I understand, the mansion-house ceased to be occupied by the proprietor, and was only occupied during the shooting season by the sporting tenant; and a new arrangement was made at the date I have mentioned between the appellant and the respondents' man of business. The arrangement was that the appellant should keep the avenue and policies in good order, and in return should get £20 a year in money (subsequently reduced to £15), the use of the garden, and of the gardener's cottage, which is situated in the garden. The respondents have now terminated this arrangement, and they seek to eject the appellant from the gardener's cottage, on the ground that his occupation thereof was part of his remuneration for service, and that as the service has now ceased, the right to occupy the cottage has also ceased.

Now, I observe at the outset that a warrant for summary ejection is not granted unless it is *prima facie* plain that the occupier is one who has and can pretend no title to the occupation challenged. I think that can scarcely be said to be the case here, for the appellant has at all events stated a case which makes it difficult to pronounce off-hand that he is a mere squatter. He might not be able successfully to resist decree in an action of removing, but it seems to me that the defence he here maintains is sufficiently plausible to prevent decree of summary ejection. But I am disposed to go much further than that, and to hold it made out that the appellant's occupancy of the cottage in question is the occupancy of a tenant as distinguished from the occupancy of a servant, and that for the following reasons—(1) The relation between the parties prior to March 1889 then underwent a change. The appellant was formerly a gardener, who not only took charge of the avenue and policies, but cultivated the garden for his employers' benefit and at his employers' expense; but after March 1889 the service rendered was less, and the cultivation of the garden was for his own benefit and at his own cost. The right to occupy the cottage may reasonably be supposed to have also undergone a change, consequent upon the changed relation between the parties; so that he who had ceased to be gardener (in the ordinary sense), and had become the tenant of the garden, became the tenant of the gardener's cottage—not in respect of his former relation, that is, servant—but in respect of his altered relation, that is, tenant of the garden. (2) When the appellant entered on the new arrangement in 1889, he took over at a valuation and paid for the respondents' horse and van (by which to take the garden produce to market), as well as the garden implements and tools. Now, a servant in the position of a gardener does not supply his own implements and tools—his master supplies them, but a tenant has to supply them for himself. In like manner the gardener does not supply the seeds, &c., each year at his own expense, nor does he receive or take as his own the produce of the garden. A tenant does both. (3) When the respondents thought of terminating their connection with the appellant in 1890 they advertised that the garden in question was "to let"—that is, they advertised for a tenant to take the appellant's place—not

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for a gardener or servant. And, consistently with this, when advertising for a shooting tenant, they intimated that the garden was let to a tenant who would provide the shooting tenant with garden produce at market rates. (4) From Whitsunday 1890 to Whitsunday 1899 the respondents' local man of business returned the appellant's name as "tenant" of the garden, and he was so entered on the Valuation-roll of the county for these years. This involved liability by the appellant for tenant's rates, which he paid. If he was not tenant, but servant, then these rates were properly the obligation of the respondents. The respondents (or their agents) must have known this. I cannot suppose that they allowed the appellant to pay rates for which they were alone responsible, and I can only account for their conduct by holding that the appellant was, in their knowledge and belief, the tenant of the garden.

By this application, however, the respondents do not seek to eject the appellant from the garden—only from the cottage. I think the occupancy was one, and included both cottage and garden. There is abundant evidence to shew that the cottage was and is necessary for the proper working of the garden as a market garden, and I think the one cannot be severed from the other. In the letter of 22d March 1889, which sets forth the terms of what I have called the new arrangement, the return to be made to the appellant for keeping the avenue and policies in order is, *inter alia*, "the proceeds of the garden . . . and a labourer's cottage." We were told at the debate that the labourer's cottage referred to is the cottage in question. Now, there is here no distinction drawn between the cottage and the produce of the garden as being remuneration of different kinds, or to be treated on different principles. Was the produce of the garden to cease to be the appellant's on the termination of service at the employers' pleasure? That will hardly be maintained. If not, why should the use of the cottage?

These are the considerations which seem to me to point somewhat conclusively in favour of the appellant's contention, and in my mind more than outweigh any difficulty arising from the fact that (1) no specific rent was fixed for the cottage, and (2) no definite ish or termination assigned to the tenancy. There was no need for the first if the cottage and garden went together; there need be no dubiety about the second. The appellant says he is a yearly tenant, and that his lease began in March. It will therefore terminate in March. This is not the usual term, no doubt, but it is quite a legal term if the parties like to make it so by their agreement. One question only remains, whether, assuming that the appellant was tenant of the cottage, he had been duly warned to quit. I think he was not. The appellant never got notice to quit the garden, and notice to quit the cottage alone would be ineffectual if, as I think, the cottage and garden formed one subject of occupation.

LORD MONCREIFF.—I regret to differ from your Lordships, but I am of opinion (though not without hesitation, for reasons which I shall afterwards mention) that the Sheriff is right in holding that the defender's occupancy of the gardener's cottage at Ackergill terminated along with his contract of service as gardener at 28th November 1899. The pursuers dismissed the defender as at that date, having given him warning on 25th August 1899

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that his services would not be required after Martinmas, and having also warned him to remove at that term from the gardener's cottage. This process was brought in December 1899 to have the defender summarily ejected and removed from the cottage in question, on the footing that his occupation of the cottage was merely part of the remuneration for his services as gardener.

Now, what is the defence? It is that the defender occupied the cottage and also the upper garden under a separate and independent contract of lease from year to year; that he was therefore entitled to six months' formal notice of removal under section 28 (*b*) of the Agricultural Holdings Act, 1883; and that, as he did not receive such notice six months before 1st March 1900 (the end of the current year), he was entitled by tacit relocation to continue in occupation of the cottage and the garden until 1st March 1901.

If the defender were right in maintaining that he occupied the house and garden under an independent contract of lease, the result would be this—that while he was dismissed—I assume properly—from his position as gardener, he would still be entitled to remain in occupation of the garden and gardener's house of the estate for another year and a half. And if he had died instead of being dismissed, his heir or legatee would, on the same hypothesis, have had the same right.

He would also be entitled to the benefit of the provisions of the Agricultural Holdings Act, 1883, and the Market Gardeners Act, 1897.

Is it to be held that such consequences were in view of the parties when the agreement was first entered into in 1889? I think not. In the first place, I may point out that it is by no means clear that even if the defender had a lease of the upper garden the cottage was let along with it. The cottage was the gardener's cottage of the estate—at least it had been occupied by the defender for many years before 1889 in his capacity of gardener. After the new arrangement was made, by which the defender agreed, as part of his remuneration, to accept the produce of the upper garden, he still continued (also as part of his remuneration) to occupy the cottage as gardener of the estate, although no doubt the cottage was convenient for the purpose of working the upper garden to advantage. And therefore I am not satisfied that the cottage, which is the only subject we have to deal with here, stands in the same position as the upper garden.

But apart from this, the occupation both of the cottage and the garden was given and accepted simply as part of the defender's remuneration. Mr Dalgleish thus states the terms in his letter of 23d March 1889:—"That he (the defender) receives the sum of £20 and the proceeds of the garden, with his cow's keep, as now, and a labourer's cottage, in exchange for his keeping the whole place within the walls and the outside ground from the top of the avenue to the tower, all as at present falling under his duties." It will be observed that the cottage and garden are not here named together. He was to have the garden for a year, he being a yearly servant. It clearly appears from the passage which I have quoted that the use of the garden and the occupation of the cottage and the cow's keep were all simply part of his remuneration.

And this was plainly so understood by him. On two occasions the agree-

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ment nearly came to an end. In February 1890, the defender having been verbally given notice to quit, Mr Dalgleish actually advertised the garden to let. According to the defender's present contention he was entitled as of right to remain in occupation of the garden for another year, but he did not then suggest that he was entitled to formal notice to remove, although the absence of it would have entitled him to remain for another year. On the contrary, he submitted, as a condition of his being allowed to remain, to accept £15 money wages instead of £20, and on that footing to continue from year to year to act as gardener and occupy the cottage and garden till 1899.

Again, in April 1898 he was willing, on certain terms, to remove from the house and garden at Ackergill on one week's notice; and here again he did not draw any distinction between his tenure of those subjects and the duration of his service.

Lastly, if his tenure of the cottage and garden did not terminate at Martinmas 1899, on what terms did he thereafter continue in occupation? Previously the return to his employer for his tenancy, if such it was, consisted of his services as gardener. These ceased at Martinmas 1899. What rent, if any, was thereafter payable? If the defender's estimate of the value of his services is correct, his occupation of the garden was equivalent to at least £35 in money—that is taking the most moderate figure spoken to in the proof, viz., £50 (the defender, I think, says £80), as the value of his services. In the few cases in which a dismissed servant has been held entitled to continue in occupation of a house belonging to his employer after dismissal, there has been not merely a fixed term of occupation but a fixed rent which could at once be ascertained notwithstanding the termination of the contract of service. The lease with all its essentials could stand alone. Here that is not the case.

All these considerations satisfy me that there was no independent lease of the cottage. There are considerations on the other side which deserve notice, although they are not in my opinion sufficient to counterbalance those which I have mentioned. By far the most formidable are the entries in the Valuation-roll. It seems that for ten years—from 1889 to 1898—the witness Mr William Smith, who collected Hempriggs rents for the pursuers, signed the returns for the Valuation-roll; and he returned the defender as tenant of the garden at Ackergill at a uniform rent of £15, and in respect of that entry the defender has paid county rates and poor rates. This is certainly a strong point against the pursuers, and I have been in some doubt whether it was not sufficient to bar them personally from disputing that the defender was an ordinary tenant. If the pursuers are right the defender should have been entered as "inhabitant occupier," and the pursuers must suffer for the carelessness of their official. But when the return is examined, it is far from conclusive. In the first place, it does not refer to the cottage, which in all arrangements with the defender was dealt with as a separate subject. The smallness of the rent inserted indicates this. Secondly, the rent entered, £15, was not, in any view which can be taken, the value which the use of the garden represented in calculating the remuneration to the defender. According to the evidence it was at least £35. And thirdly, although it is true that the defender paid taxes, these in ten years only amounted to £12, 11s. 1d.

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The only other matters of importance are that when the agreement was entered into the defender purchased certain garden tools and a horse and van; and that he claims compensation for manures and plants put by him into the garden. As against this it must be considered that he got the full benefit of the fruit trees and plants which were in the garden when he got the use of it, and also, during a certain time, of the manure. It may or may not be that he has a claim for compensation against the pursuers, although in the view I take of his rights I think this more than doubtful. But from all that I can see of the case I do not think that the defender is much to be pitied. The garden has evidently proved to be a good speculation; and although the pursuers sought to remove him from the cottage summarily they have allowed him to occupy the garden for a full year after he ceased to be in their service. On the whole matter, although I am very much dissatisfied with the way in which the proof has been taken (many matters which could easily have been made clear being left uncertain) and with the carelessness of the returns for the Valuation-roll, I am satisfied that the good faith of the agreement was that the defender's occupation of the cottage and garden was to terminate with the defender's service as gardener.

LORD YOUNG was absent.

THE COURT recalled the interlocutor of the Sheriff, found in fact and in law in terms of the interlocutor of the Sheriff-substitute of 27th February 1900, and assoilzied the defender.

MACKENZIE, INNES, & LOGAN, W.S.—THOMAS LIDDLE, S.S.C.—Agents.

No. 28.

Nov. 27, 1900.
Monaghan v. United Collieries, Limited.

MRS JANE MONAGHAN, Appellant.—*Glegg—W. Thomson.*
UNITED COLLIERIES, LIMITED, Respondents.—*Campbell, Q.C.—Crabb Watt.*

Master and Servant—Workmen's Compensation Act, 1897 (60 *and* 61 *Vict. cap.* 37), *secs.* 1 (1) *and* 7—*Mine—Siding adjacent to and belonging to mine—"On or in or about"—Work extraneous to proper business of employer—Coal Mines Regulation Act*, 1887 (50 *and* 51 *Vict. cap.* 58), *sec.* 75.—The Workmen's Compensation Act, 1897, incorporates the definition of "mine" in the Coal Mines Regulation Act, 1887, under which the term "mine" includes any siding "adjacent to and belonging to the mine."

A colliery company, owners of a coal-mine and siding connecting the mine with a main line of railway, entered into a contract with the owner of a sand-pit situated on the main line to carry sand from the sand-pit in railway waggons to the colliery siding, preparatory to removal by the railway company. The haulage was to be done by an engine belonging to the colliery company, and used in connection with their mine and siding. The siding was about 80 yards in length, and served only the one mine. The sand-pit was 300 or 400 yards from the siding.

In the course of executing this contract the brakesman of the engine, who was in the employment of the colliery company, was killed while uncoupling waggons on the main line at or near the extremity of the siding.

Held (1) that the employment of the deceased was locally "about" a mine in the sense of sec. 7, subsec. (1), of the Workmen's Compensation Act, 1897; and (2) (*diss.* Lord Adam) that a claim for compensation arose although the work upon which the deceased was employed at the time of the accident was not part of the proper business of the colliery.

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1st Division. Sheriff of Lanarkshire.

Mrs Jane Bevis or Slamin, afterwards Monaghan, widow, Craigneuk, Motherwell, brought a claim before one of the Sheriffs-substitute of Lanarkshire at Glasgow (Guthrie), as arbitrator, under the Workmen's Compensation Act, 1897, in respect of the death of her son, James Slamin, against his employers, the United Collieries, Limited.

The arbitrator having disallowed the claim, stated a case at the instance of the claimant to the First Division.

The case set forth:—"1. That the appellant's son, James Slamin, was employed by the respondents as brakesman of a pug-engine used in connection with their collieries at Victoria Pit, near Motherwell.

"2. That the said James Slamin, on 5th March 1900, proceeded with said engine along the siding belonging to the colliery, and was directed by the engine-driver to detach two empty waggons from a train on the line of the Caledonian Railway in order that the respondents' said engine might take them to a sand-hole 300 or 400 yards distant on the said Caledonian line towards Motherwell.

"3. That while the said James Slamin was engaged uncoupling said waggons he was caught between the buffers of these waggons and of the waggons still remaining on the line, and so injured that he died within a few minutes thereafter.

"4. That the respondents had contracted with the tenant of the sand-hole, a Mr Fleck, to remove the sand for him from said sand-hole by their said engine in the railway company's waggons.

"5. That the two waggons in question were to be taken to the sand-hole by said pug-engine, loaded there, brought back to the defenders' siding, weighed there, and thereafter removed by the railway company. The sand-hole traffic had to do with the collieries only in so far as the colliery engine was used by agreement to carry the sand to Caledonian Railway trains, which were made up at or near the colliery siding.

"On these facts I found in law that the work which the said James Slamin was doing at the time of his death was not employment on, in, or about a mine.

"I therefore assoilzied the respondents, and found them entitled to expenses.

"The question submitted for the opinion of the Court is—Whether, in the circumstances, the death of James Slamin, the appellant's son, was caused by accident arising out of and in the course of his employment as a workman with the respondents on or in or about a mine?"

At the hearing counsel for the parties stated that they were agreed that the length of the siding was about 80 or 100 yards, that it served only the respondents' colliery, and that Slamin was injured on the main line of the Caledonian Railway at or near the extremity of the colliery siding.

Argued for the appellant;—Two questions were raised—first, whether the place where the deceased was injured was locally "about" a mine; and secondly, whether, looking to the nature of the work on which he was engaged, he was "in the course of employment" about a mine. It was plain that the first of these questions must be answered in the affirmative. Section 7 of the Workmen's Compensation Act defined "mines" by reference to the Coal Mines Regulation Act, 1887, which, by section 75, declared "mine" to include, *inter alia*, "tramways and sidings, both below ground and above ground, and adjacent to

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and belonging to the mine."* The case of *Turnbull* v. *Lambton Collieries, Limited*,[1] cited by the respondents, was distinguishable. There the siding was twelve miles in length, and connected several collieries with the main line of the North-Eastern Railway. The whole siding here was "adjacent to" the mine, and was thus part of the mine. The accident took place at or near the extremity of the siding, and its *locus* was thus "about" the mine.[2] The cases of *Francis* v. *Turner Brothers*[3] and *Fenn* v. *Miller*,[4] relied on by the respondents, had no bearing. As regarded the second question, it was to be observed that throughout the Act the word "employment" was used to denote various trades with reference to the places where such trades were carried on. Thus in section 7 the employments to which the Act applied were defined as employment "on or in or about" a railway, factory, mine, &c., shewing that what was contemplated was "locality," and not the specific nature of the employer's business. It was not legitimate to add to the words of the section "and engaged on the main work carried on there," as the respondents, for the success of their argument, were compelled to do. What the Act looked at was the class of work usually carried on in such places, and here the man was engaged in just such work as he was usually employed upon, uncoupling waggons "about" the mine.

Argued for the respondents;—In dealing with the first question the proper test was to assume that the deceased was employed on colliery business, and that the accident occurred about 80 or 100 yards from the mine, using the word in its natural sense. In this view the accident could not be said to have occurred "about" the mine.[5] Under the definition of mine the siding was only included so far as "adjacent" to the mine—*Turnbull* v. *Lambton Collieries*.[1] As soon, therefore, as trucks were moved from the pithead in the course of carrying away coal from the mine they ceased to be "adjacent." The class of risks then changed from risks incidental to work about a mine, and became risks incidental to transit. Such transit was not employment about the mine. The second question depended upon the construction of section 1 (1) of the Act, and particularly of the words "arising out of and in the course of his employment" by the undertakers "on or in or about a mine." Here the plant was used for purposes different from mining purposes, and the accident occurred outside the physical limits of the mine. "Employment," as used in the Act, meant "class of work" and not "contract of service." There was nothing illegal in an employer carrying on several different classes of employment, for which he employed the same workmen, but it did not follow that a workman was entitled to compensation when injured in employment to which the Act did not apply merely because

* The section is quoted in full in the judgment of the Lord President, *infra*.

[1] May 7, 1900, 16 T. L. R. 369.

[2] Powell v. Brown, L. R. [1899], 1 Q. B. 157, as distinguished from Bell & Sime, Limited, v. Whitton, June 16, 1899, 1 F. 942.

[3] L. R. [1900], 1 Q. B. 478.

[4] L. R. [1900], 1 Q. B. 788.

[5] Chambers v. Whitehaven Harbour Commissioners, L. R. [1899], 2 Q. B. 132; Bell & Sime, Limited, v. Whitton, June 16, 1899, 1 F. 942; Lowth v. Ibbotson, L. R. [1899], 1 Q. B. 1003; Turnbull v. Lambton Collieries, Limited, May 7, 1900, 16 T. L. R. 369; Francis v. Turner Brothers, L. R. [1900], 1 Q. B. 478; Fenn v. Miller, March 10, 1900, L. R. [1900], 1 Q. B. 788; Lysons v. A. Knowles & Sons, L. R. [1900], 1 Q. B. 780.

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he was also employed, under the same contract of service, at other times in the class of work to which the Act did apply. The case of *Milner* v. *Great Northern Railway Co.*[1] supported this view.

At advising,—

LORD PRESIDENT.—(After stating the facts)—By section 7 (1) of the Workmen's Compensation Act, 1897, it is declared that the Act shall apply only to employment by the undertakers as therein defined on or in or about (*inter alia*) a mine, and by subsection (2) it is declared that "mine" means a mine to which the Coal Mines Regulation Act, 1887, or the Metalliferous Mines Act, 1872, applies.

By section 75 of the Coal Mines Regulation Act, 1887, it is declared that "'mine' includes every shaft in the course of being sunk, and every level and inclined plane in the course of being driven, and all the shafts, levels, planes, works, tramways, and sidings, both below ground and above ground, in and adjacent to and belonging to the mine." The last "and" in this definition appears to be used as equivalent to "or."

From the statements made at the bar, I understood the parties to be agreed that the length of the siding from the Victoria Pit to the Caledonian Railway line is about 80 yards, and that the siding has no connection with and serves no other pit.

If such an accident had happened to Slamin at the place where it did happen when waggons used in the ordinary colliery business of the respondents were being uncoupled or moved into or out of the siding in pursuance of that business, I should not have thought it doubtful that the accident arose out of and in the course of Slamin's employment by the respondents on, in, or about a mine, within the meaning of section 7 of the Act of 1897, and what actually did happen was different only in respect that the waggons were not at the time being used in the proper business of the colliery. Slamin was however working in the employment of the respondents, with their pug-engine, under the orders of their servant, the driver, in a matter outside of the proper business of the colliery, but incidental to that business in the sense that the sand-haulage provided employment for the pug-engine when it was not fully employed with proper colliery work. The proximity of the *locus* to the siding was such that I think it was "about" the colliery in the sense of the statute in so far as local situation is concerned, and I cannot say that the character of the work which was being done could not be reasonably described as incidental to the colliery business, and in that sense also "about" a mine. I suppose the profits of the sand-haulage would be treated as profits of the colliery, though we are not informed as to this.

For these reasons, I consider that the question put in the case should be answered in the affirmative.

LORD ADAM.—(After stating the facts)—It is in these circumstances that we are asked whether Slamin's death was caused by accident arising out of, and in the course of, his employment as a workman with the respondents on, in, or about a mine?

[1] L. R. [1900], 1 Q. B. 795.

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I think that it is clear that, at the time of the accident Slamin was on the line of the Caledonian Railway, and was not on the respondents' siding, or in any part of their collieries; but I think that it is equally clear that he was in the immediate vicinity of the siding, which admittedly is a part of their pit or mine.

I think it also clear that he was not, at the time, employed in any work in connection with the mine. The work that he was employed on was Mr Fleck's work, the removal of sand from the sand-pit.

I think, therefore, that the question in this case comes to be whether because Slamin was injured in the immediate vicinity of the mine, and in that sense "about" the mine, a claim for compensation arises, although he was not at the time engaged in work connected with the mine.

The clauses of the Workmen's Compensation Act which deal with this matter are sections 1 (1) and 7 (1).

Sec. 1 (1) declares that "if in any employment to which this Act applies, personal injury by accident arising out of and in the course of the employment is caused to a workman" his employer shall be liable to pay compensation. Sec. 7 (1) defines the employments to which the Act applies. It enacts that the Act shall apply only to employments by the undertakers on, in, or about a railway, factory, mine, and so on.

Now, it appears to me that the word "employment," as used in the Act, refers to the nature and character of the work at which the workman is actually employed at the time of the accident, and that the accident must have arisen out of and in the course of that employment. The Act, it appears to me, does not concern itself with the contract between the employer and the workman. Nor do I think it material that the respondents were in this case both owners of the mine and contractors for the removal of the sand. The material fact is that, on the occasion in question, Slamin was being employed by them in their character of contractors.

The question, therefore, appears to me to be whether or not the employment, at which Slamin was engaged at the time, and in the course of which he was injured, was one to which the Act applies. Now, the employment at which Slamin was engaged at the time was that of removing sand from Mr Fleck's sand-pit, an employment to which it is not said that the Act applies, and with regard to which it is found in fact that it "had to do with the collieries only in so far as the colliery engine was used by agreement to carry the sand to Caledonian Railway trains, which were made up at or near the colliery siding."

Does then an employment to which *per se* the Act does not apply become an employment to which the Act does apply because the place where the accident occurs happens to be "about" the mine, in the sense only that it occurred near or in the immediate vicinity of it? I cannot accept that construction of the Act, which seems to me to lead to the conclusion that any accident to a workman, in the course of his employment, no matter what the nature of that employment may be, will give rise to a claim for compensation under the Act, provided only the accident occurs near, or in the vicinity of, a railway, factory, or mine.

When the Act declares that it shall apply to employment on, in, or about a railway, factory, or mine, I think it has reference to the nature and

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character of the work carried on at such undertakings, and that by the introduction of the word "about" a railway, factory, or mine, no more is intended than that a workman who is employed in or on a railway, factory, or mine, shall not be excluded from the benefit of the Act, which otherwise he would have had, merely because the accident has occurred outside the area of the railway, factory, or mine.

For these reasons I think the question should be answered in the negative.

LORD M'LAREN.—I concur with the Lord President.

LORD KINNEAR.—The question is one of some difficulty. But I have come to the same conclusion as the Lord President and Lord M'Laren, and for the same reasons.

By the first section of the statute, an employer is liable in compensation to his workmen, only in cases where the workman has been personally injured by accident arising out of and in the course of employment to which the Act applies; and the employments to which the Act applies are enumerated in the seventh section. Reading these two sections together, it seems to be clear that to establish the claim for compensation three conditions must be satisfied:—(1) The injured workman must have been in the employment of persons who answer the statutory description of undertakers. (2) The employment must have been on, in, or about a railway, mine, factory, or engineering work, or on, in, or about buildings in the course of construction under certain conditions. (3) The accident must have arisen out of and in the course of the employment.

(1) The first point creates no difficulty. The deceased was employed by the respondents as a brakesman on a colliery siding belonging to them; the word mine, as used in the statute by the definition includes the siding; and the respondents as owners are beyond question undertakers within the meaning of the statute, in respect of the mine and its siding.

(2) The second point also is, I think, satisfactorily established. In all the cases, so far as I know, in which we have had occasion to construe the words "on, in, or about," they have been held to define the locality at which the injured man must be employed, in order to found his claim for compensation. It may be, as the respondents maintained, that the mere presence of a servant of the undertakers in a mine or factory when an accident happens will not bring him within the scope of the Act, if he is not employed to work in such mine or factory. But in applying that doctrine to the present case, it must be kept in view that it is not necessary that the deceased should have been employed in the mine proper. It is enough that he was employed on the siding, which for the purpose of the statute is just as much part of the mine as the underground workings. Accordingly it is not disputed that if the accident by which the deceased man was injured had happened to him while he was at work on the siding, this condition would have been satisfied, because what the Act calls a mine includes, according to the definition, a siding. On the other hand, it is clear enough that the Caledonian Railway is not on or in either the mine proper or the siding. The question then is whether the particular part of the line where the accident happened is or is not "about" the siding. I

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think it is. In *Powell* v. *Brown*[1] it was held that "about" was an enlarging word, and that as the Legislature had not confined the Act to employment on or in a factory, or on or in the other places specified, the language of the section would be satisfied if the employment were in close proximity to one or other of such places. Was the injury then sustained at a place near enough to the siding to come within the scope of the Act? The Sheriff's statement as to this is not perhaps so distinct and specific as it might have been. But he says enough to make it plain to my mind that the uncoupling of waggons which is the operation out of which the accident arose, took place at a point on the line so close to the siding as to come within the words "in or about" if any force is to be given to these words. The case seems to me in this respect to be very similar to *Powell* v. *Brown*,[1] where a man loading timber into a cart on the street outside the entrance to his master's factory was held to have received an injury "in or about" the factory. On the other hand, it is plainly distinguishable from such cases as the case cited[2] in which a carter was hurt by an accident on the high road more than a mile from his employer's factory, or as *Francis* v. *Turner*,[3] where a workman employed in a factory was sent on his employer's business to another factory belonging to a different person, and was injured there by the fall of an engine shed. In each of these cases the locality of the accident was remote from the place at which the employer carried on his business, and persons frequenting it were exposed to other risks than those for which the statute makes the employer responsible.

(3) The remaining question is whether the accident arose out of and in the course of the employment of the injured man. This is perhaps more troublesome than either of the others; but in my opinion the reasons for the appellant must prevail. There would have been no difficulty if the waggons which the deceased was ordered to uncouple had been intended to carry coals from the pit mouth to the Caledonian Railway, or materials for the use of the colliery from the railway to the pit. But they were intended to be taken to a sand-hole 300 or 400 yards off and there to be loaded with sand, brought back to the respondents' siding and weighed, and thereafter removed by the Caledonian Railway Company; and it is stated that the said "traffic had to do with the collieries only in so far as the colliery engine was used by agreement to carry the sand to Caledonian trains which were made up at or near the siding." This makes it clear enough that the carrying of sand for hire was not part of the proper business of the respondents as a colliery company. But that seems to me to be nothing to the purpose. They are not undertakers in respect of their mercantile business, but in respect of their ownership of the mine and siding, and their employment of workmen in these dangerous places. The question therefore is not what load the waggons were to carry, but whether the making up of a train of waggons in the manner described was work which the injured man was employed by the respondents to do on the siding in respect of which they are undertakers in the sense of the statute? I think

[1] L. R. [1899], 1 Q. B. 157.
[2] Bell & Sime, Limited, v. Whitton, 1 F. 942.
[3] L. R. [1900], 1 Q. B. 478.

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that on the statement before us, the answer must be in the affirmative. The injured man's employment was not to carry any particular load. What we are told is that he was employed as brakesman of a pug-engine. It must be assumed, for there is no suggestion to the contrary, that the order to detach waggons from a train on the Caledonian line and to attach them to his own engine was a lawful order, which the man was bound to obey. In other words, when the accident happened he was acting in obedience to orders, in the discharge of his duty, and in the course of the work he was employed to do. It appears to me irrelevant to inquire what was the contract under which the respondents engaged to carry sand to their siding, or what their reason was for using their engine in that way. They were still undertakers in respect of the siding, they employed the injured man to work upon it, and while he was working on or about it in the ordinary course of his employment he met with the injury which caused his death.

THE COURT answered the question in the case in the affirmative.

CHARLES GEORGE, S.S.C.—ANDERSON & CHISHOLM, Solicitors—Agents.

No. 29.

Nov. 27, 1900. Edinburgh and District Water Trustees v. Clippens Oil Co., Limited.

THE EDINBURGH AND DISTRICT WATER TRUSTEES, Pursuers (Respondents).—*D.-F. Asher—Guthrie, Q.C.—F. T. Cooper.*
THE CLIPPENS OIL COMPANY, LIMITED, Defenders (Reclaimers).—*—Sol.-Gen. Dickson—Clyde—T. B. Morison.*

Water Supply—Right of Support for Pipes laid under Statutory Authority—Compensation—Minerals under and adjacent to Aqueduct—Presumption—Edinburgh Water Act, 1819 (59 *Geo. III., cap. cxvi.*)—*Edinburgh Water Company Act*, 1843 (6 *and* 7 *Vict. cap. lxxxix.*).—By an Act passed in 1819 (59 Geo. III. cap. cxvi.), the Edinburgh Water Company was empowered to lay a pipe for bringing water from the Crawley Spring into the city, and in 1821 a track was opened and a pipe laid, a portion of which passed through the lands of Pentland and Straiton, and water was thereafter brought in continuously by the pipe to Edinburgh.

In 1898 the Edinburgh and District Water Trustees, who were vested in the rights and property of the original water company, raised an action against the Clippens Oil Company, who had come to be the owners of Straiton, and were tenants of the minerals in Pentland, and also against the owner of Pentland, for declarator that the pursuers were entitled to have their pipe or aqueduct in Straiton and Pentland supported so as to serve uninterruptedly as a conduit for the water, and that the defenders were not entitled so to work the minerals as to injure or bring down the pipe, and for interdict.

The defenders pleaded that the pursuers had no right of support for their pipe either under the Act of 1819 or at common law.

A proof was led. It was not established that any compensation had been paid to the owners of Pentland and Straiton in respect of the pipe being laid through their lands, but it was proved that they were cognisant of the pipe being so laid.

Held (1) that the Act of 1819 on a sound construction of it contained clauses under which the owners of lands in whose ground the pipe was laid were entitled to claim compensation for any injury thereby occasioned to them; (2) that after the lapse of seventy years from the date when the pipe was laid, it must be assumed either that compensation had been paid or that the right thereto had been waived; and (3)—following *London and North-Western Railway Company* v. *Evans*, L. R. [1893], 1 Ch. 16—that the statutory right to lay the pipe carried with it a right of support for the pipe, and *interdict granted*.

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Held further, that the Edinburgh Water Company's Act, 1843 (6 and 7 Vict. cap. lxxxix.), did not apply to "works" which had already been executed under the powers conferred by the Act of 1819.

Property—Right to lateral support—Minerals—Right to work minerals to prejudice of adjacent ground—Interdict.—A water company in 1821 under statutory authority constructed an aqueduct through certain lands. In 1825 the owner granted the company a feu-disposition of a strip of ground 25 yards wide (including the minerals) "in which the aqueduct pipe is laid." *Held* that the feu-disponees were entitled to lateral support sufficient not only for the ground acquired by them, but also for the pipe running through it, and to interdict against the disponers so working the minerals adjacent to the feu as to interfere with this right of support.

(ANTEA, June 7, 1899, 1 F. 899.*)

1ST DIVISION. Lord Pearson.

On 27th April 1898 the Edinburgh and District Water Trustees, incorporated under the Edinburgh and District Water-Works Act, 1869, raised an action against the Clippens Oil Company, Limited, and against Major John Gibsone of Pentland, concluding for declarator (*first*) that the pursuers were vested by virtue of their Act of 1869 in all the powers, privileges, and property of the Edinburgh Joint Stock Water Company, incorporated by the Act 53 Geo. III. cap. cxvi. (1819), entitled "an Act for more effectually supplying the city of Edinburgh and places adjacent with water," and of the successors of that company, incorporated by the Water Company's Acts of 1843 and 1856, and that the pursuers as so vested, and more particularly as vested in the Castlehill Reservoir in the city of Edinburgh, "have good and undoubted right to receive in the said reservoir from the Crawley Spring a continuous and uninterrupted supply of water by means of a pipe or aqueduct laid, *inter alia*, in a strip of ground about 1083 yards long and about 25 yards wide," in the parish of Lasswade, belonging to the pursuers, and in the lands of Pentland, from where the pipe emerges from the strip of ground belonging to the pursuers to the boundary of Major Gibsone's property, and thence through the lands of Straiton, belonging to the defenders, the Clippens Oil Company, for 815 yards or thereby, "and that the pursuers have good and undoubted right to have the said strip of ground and the said pipe or aqueduct, in so far as it is laid in the said strip of ground and in the said lands of Pentland and Straiton, supported so that the said pipe or aqueduct may serve continuously and uninterruptedly as a conduit for the water passing from the said Crawley Spring to the said Castlehill Reservoir; and (*second*) that the defenders, the Clippens Oil Company, Limited, as lessees of the minerals in the said lands of Pentland, on both sides of the said strip of ground belonging to the pursuers, and where the said pipe is laid, and as the owners of the lands and minerals of Straiton, are not entitled to work the shale, limestone, and other minerals adjacent to the said strip of ground, and adjacent to or under the said pipe or aqueduct belonging to the pursuers, in such manner as to injure the said strip of ground or bring down the surface thereof, or to injure the said pipe or aqueduct, or to bring it down or affect or interfere with the continuous flow of water through the said pipe or aqueduct from the Crawley Spring to the Castlehill Reservoir in any way."

There were also conclusions that the Court should, "by remit to a

* *Vide* also actions between same parties, Dec. 17, 1897, 25 R. 370, and Feb. 3, 1898, 25 R. 504.

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person or persons of skill or otherwise," fix and determine the limits within which the defenders shall be bound to abstain from working, or otherwise the manner and conditions in and under which the workings may go on adjacent to the feu, and under and adjacent to the pipe, and for interdict against the company working the minerals adjacent to and under the strip of ground and the pipe or aqueduct so as to injure or bring them down, and from working within the limits to be fixed by the Court.

The pursuers averred that their predecessors, the Edinburgh Joint Stock Water Company, were empowered by an Act passed in 1819 (59 Geo. III. cap. cxvi.) to take and use the Crawley Spring, and by section 38 thereof to make the necessary works for conducting the water therefrom to the city, that the company acquired the reservoir on the Castlehill at Edinburgh and also the Crawley Spring, and in 1821 constructed a pipe or aqueduct for conducting the water from the spring to the reservoir. "The said pipe or aqueduct has remained in the same position ever since it was laid in 1821."

The pursuers also averred that the strip of ground mentioned in the summons was acquired by their predecessors from the proprietor of Pentland under feu-disposition dated 3d March 1825;* that the defenders were proprietors of Straiton, and also tenants of the minerals in Pentland; that the defenders and their predecessors had worked the minerals in Straiton and Pentland adjacent to the place where the pipe or aqueduct passed through them; that the operations of the company threatened to deprive the strip of ground and the pipe or aqueduct of support; that the result of such deprivation would be to interrupt the flow of the water to Edinburgh; and that, notwithstanding remonstrances, the company continued to work the minerals near and under the strip and aqueduct.

The pursuers stated further that it was estimated that in order to give adequate support to the strip of ground and aqueduct it was necessary that the minerals should not be further worked for 45 yards on the south or east side of the pipe and 145 yards on the north or west side.

The pursuers pleaded;—(2) The pursuers, under the statutes in virtue of which the said pipe or aqueduct was laid, and at common law, being entitled to have adequate support therefor where it passes

* The feu-disposition proceeded on the narrative that, "considering that by an Act of Parliament passed in the fifty-ninth year of the reign of his late Majesty George the Third, entitled, 'An Act for more effectually supplying the city of Edinburgh and places adjacent with water,' the Edinburgh Joint Stock Water Company constituted by the said Act are, *inter alia*, authorised to make . . . the necessary cuts, trenches, conduits, mounds, or other works for conducting the water thereof to the said city in the line or lines pointed out in the map or plan attached to the said Act of Parliament; and to construct the necessary aqueduct or aqueducts and lay the necessary pipe or pipes for that purpose; and that I agreed to sell to the said company the piece of ground after disponed for the sum of three hundred and fifty pounds fifteen shillings sterling; . . . therefore I have sold and disponed, as I hereby sell, alienate, and in feu-farm dispone from me, my heirs and successors, to and in favour of . . . the present directors or committee of management of the said Edinburgh Joint Stock Water Company, . . . All and Whole that piece of ground of my lands and estate of Pentland through which the aqueduct pipe for conveying the water of Crawley springs to the city of Edinburgh is laid. . . ."

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through the said strip of ground and the lands of Pentland and Straiton, so as to receive through it a continuous and uninterrupted flow of water from the Crawley Spring to the Castlehill Reservoir, decree should be granted in terms of the first declaratory conclusion. (3) The defenders, the Clippens Oil Company, Limited, having no right or title to take away the support from the said strip of ground and pipe or aqueduct where it is laid in the said strip of ground and lands of Pentland and Straiton, or to cause any interruption to or interference with the flow of water through the said pipe or aqueduct from the Crawley Spring to the Castlehill Reservoir, decree should be granted in terms of the second declaratory conclusion.

The Clippens Oil Company lodged defences, in which they pleaded, *inter alia*;—(1) *Res judicata.* (5) The pursuers' averments so far as material being unfounded in fact, the defenders should be assoilzied from the conclusions of the summons. (7) The pursuers having no right of support either under statute or at common law, the defenders should be assoilzied.

After sundry procedure the defenders' plea of *res judicata* was repelled.[1]

Thereafter, on 28th July 1899, the Lord Ordinary allowed parties a proof.

The evidence entered largely into the question of the nature of the operations being conducted by the defenders, and the effect of these operations on the pipe or aqueduct, and also of the kind and efficiency of the support which the defenders—if they were liable to give support to the pipe—maintained could be substituted for the natural strata of the ground in the event of the minerals in the vicinity of the aqueduct being worked out. There was no proof of actual payment of compensation to the defenders' authors at the time the pipe was laid, but it appeared that the latter were well aware that the pipe was being laid in and through their lands.* For the purposes of this report, the effect of the evidence otherwise sufficiently appears from the opinions of the Lord Ordinary and the Lord President.

The statutes referred to are sufficiently quoted in the opinions of the Lord Ordinary and of the Lord President.

On 28th June 1900 the Lord Ordinary (Pearson) pronounced this interlocutor:—"Finds and declares in terms of the first and second declaratory conclusions of the summons: Finds that within the limit after mentioned the shale, limestone, and other minerals adjacent to the pursuers' strip of ground, and adjacent to or under the pursuers' pipe or aqueduct, described in the summons, cannot be wrought out without imminent risk of bringing down the surface of the said strip of ground and the said pipe—that is to say, the limit formed by lines drawn from the points to be supported perpendicular to the plane of the strata on the rise side, and at an inclination of one in five towards the dip: And finds that within said limit the defenders the Clippens Oil Company, Limited, are bound to abstain from working the said

[1] June 7, 1899, 1 F. 899.

* The Treasurer of the Edinburgh and Water District Trust deponed in cross-examination,—"(Q.) And, so far as the books shew, no payment was made to Mrs Gibsone [of Pentland] for, or in respect of, such damages? (A.) That is so. (Q.) So far as the books shew, while you settled with the tenants of Pentland, you made no settlement with the proprietors? (A.) That is so. The same applies to Straiton."

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shale, limestone, and other minerals: Interdicts, prohibits, and discharges the said defenders from working the said shale, limestone, and other minerals within the said limit, and decerns: Finds the pursuers entitled to expenses," &c. *

* "OPINION.—The pursuers of this action, the Edinburgh and District Water Trustees, have two main water pipes, which, on their way to Edinburgh, traverse the lands of Pentland and Straiton. In this part of their course these two pipes lie side by side, a few feet apart, in what is practically the same pipe-track. The one pipe carries the Crawley springs, and was laid in and shortly after the year 1820. The other, which was laid in or about 1876, carries the Moorfoot water.

"Pentland and Straiton are mineral estates, the most valuable seams being shale and limestone. After entering Pentland, the pipes are laid for a little over a thousand yards in a narrow strip of ground, which is held in feu by the pursuers, inclusive of the minerals, and which their predecessors acquired in 1825. With that exception, the defenders, the Clippens Oil Company, are lessees of the minerals in Pentland; and they are proprietors of Straiton, including the minerals.

"The main purpose of the present action is to have the Crawley pipe protected from being brought down or injured by the defenders' mineral workings. . . .

"The pursuers' first contention is that their Crawley pipe was laid, under a statute of 1819, by their predecessors the Edinburgh Water Company, to whose rights they have succeeded; and that these rights include the absolute right of support for this pipe. This depends on the terms of that statute, and what followed upon it.

"The Act is entitled 'An Act for more effectually supplying the city of Edinburgh and places adjacent with water.' It appears that there were two previous Acts having the same object, which apparently vested the management in the Town-Council. For this the Act of 1819 substituted a company, named the Edinburgh Joint Stock Water Company, the members of which were in large part leading citizens of Edinburgh, and included as a member the corporation itself, under the style of the Lord Provost, Magistrates, and Town-Council of the city. It was also provided that the Town-Council should have a substantial representation on the board of directors, as set forth in sec. 15.

"The company were empowered to make and divide profits; but these profits were not to exceed a certain percentage on the amount actually expended by the company.

"The Act was an enabling Act, and a period of ten years was allowed for the completion of the works. I was not referred to any clause of the Act which renders the maintenance of the supply obligatory on the company. Nor does it appear whether any such provision had a place in the previous Acts; although by sec. 34, which transfers the existing waterworks from the corporation, and vests them in the new company, the company are taken bound to free and relieve the corporation 'of all obligations incumbent on them for or in respect of supplying water either to the inhabitants or to any of the public institutions in the city.' A certain limited right to complain of the supply is conferred by sec. 101, which provides that any person thinking himself 'aggrieved by a partial distribution of the supply of water by the said company' may apply to the Sheriff, who shall make such order therein, binding on the company 'for the period of time during which such company shall have contracted and agreed to supply with water the person making such complaint,' as to him shall seem just.

"By sec. 36 the company were empowered to take certain springs, including the Crawley Spring, and the necessary ground adjoining for reservoirs and the like.

"Sec. 38 is one of the more important sections. It deals with two dif-

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The defenders reclaimed, and argued;—The right claimed by the pursuers was one of absolute support for their Crawley pipe. It was admitted that, except for that part of the track which passed through the feu, they had no formal title to the ground. It was further admitted, or if not admitted it had been proved and was the fact, that, apart from the sum paid by them in respect of the feu, they had paid no compensation for the ground occupied by the pipe-track. There was nothing in the Act of 1819 which directly or expressly gave the pursuers a right of support for their pipe. "Support" and "minerals" were not mentioned in the Act at all, nor was there anything which impliedly conferred such a right. The undertaking was not of a public nature. The Water Company might have dissolved at any time without the proposed work ever being completed. There was nothing to suggest a compulsory supply of water to the city, and there was no obligation to maintain the works. In fact, the whole affair was a commercial speculation; the public had no right to the Crawley works. All that the 1819 Act empowered the company to do with regard to property was to contract for the acquisition of land, and there was nothing which put on any private proprietor the obligation

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ferent matters. It empowers the company (1) to 'take and use grounds and premises' for reservoirs at places described in a deposited plan; and (2) to make the necessary cuts, trenches, conduits, mounds, or other works for conducting the water of the springs to the city, in the line or lines pointed out in the said plan, 'and to construct the necessary aqueduct or aqueducts, and lay the necessary pipe or pipes for that purpose, first giving one month's notice of such their intention to the owner or owners, and occupier or occupiers, of such grounds and premises, and making satisfaction to such owner or owners, and occupier or occupiers, in manner hereinafter directed.' And then follows a provision for access to the grounds through which the water may be conducted, for inspection and repair of the 'line or track of the aqueduct,' the company indemnifying the owner or occupier for all damages thereby done.

"Now, in ascertaining the legal position of the pipes so laid, it is of course important for the defenders, if they can shew that the statute draws a distinction between ground taken as for reservoirs and ground used as for a pipe-track; and that the clause as to making satisfaction to owners and occupiers—namely sec. 73—applies to the former case, and not the latter. The language of both clauses certainly lends itself to the defenders' criticism; but I am unable to adopt the construction which they suggest. It is true that by sec. 38 it is the owners and occupiers of 'such grounds and premises' to whom satisfaction is to be made, and that in the preceding part of the clause the expression 'grounds and premises' is used with reference to making reservoirs, and not to laying pipes; and further, that while the power conferred as to reservoirs is 'to take and use grounds,' the expression used as to the aqueducts is simply power 'to make the necessary cuts . . . to construct the necessary aqueduct . . . and lay the necessary pipe or pipes.' It is further pointed out that in the clause as to making satisfaction (sec. 73), the claim to be made by the owners or occupiers is described as 'the sum which they demand as damage or recompense for the ground or other subjects taken, or to be taken, for the purposes of this Act.' Giving all due weight to these considerations, my opinion is that these sections, read as a whole, clearly import the right of anyone through whose lands the pipe passes to make a claim in respect thereof. The case dealt with in sec. 73 as opening a claim for 'satisfaction' is the case of an owner of any grounds or other property required for the purposes of the Act, specified in the schedule thereto, refusing to treat, contract, or

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of claiming compensation when his land was being occupied under the penalty of losing absolutely all right to do so in the future. Section 73 was the only section about making satisfaction, and that section applied only to ground taken for reservoirs. It did not apply to ground taken for the pipe-track. *Evans'* case[1] was distinguishable. Here it was a commercial speculation; there it was a public undertaking. There compensation, however inadequate it had proved, was paid; here no compensation had been paid. Besides the statutes under construction were different, and it was not competent to infer a right from one statute by analogy to another.[2] The company's right was not one of property, but only a statutory licence to open out the ground and put a pipe in, and such a bare right as that could not infer a right of support. At common law the pursuers had no right of aqueduct; there was no express grant of such a servitude, and no prescriptive acquisition of such. Mere occupation of the ground would not found such a right, for that would be attributed to tolerance.[3] Implied grant was out of the question, for the origin of the thing was known. The actings of parties shewed the meaning which they had put on the 1819 Act, which was very much in the position of a contract. The company

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agree to sell the same, 'or to allow the company to enter upon, use, or take the same for the purposes of this Act.' I cannot doubt that this includes the case of ground entered upon and used for a pipe-track; and a reference to the schedule shews that the very ground now in question is therein specified under the general heading of 'Aqueduct from Crawley Spring to the city of Edinburgh.' Then, recurring to sec. 38, the direction as to giving one month's notice to the owner and occupier, and making satisfaction to him, is grammatically connected in the most direct manner with what goes immediately before as to making aqueducts and laying pipes.

"Then it is said that by sec. 75 it is provided that payment is to be a condition precedent to lawful possession by the company; and that there is no proof of payments by the company to the defenders' predecessors in respect of the pipe-track. They take a piece of ground in feu, where the pipe required to be in deep cutting; and they have an express title to that. But as regards the parts where the pipe is simply laid in the ground and covered over, no title is shewn, and no payment proved; and the suggestion is, that this was so trivial an interference with the proprietary right that the statute may well be supposed to have taken no account of it in the matter of compensation. But if the statute uses language which covers the case, as I think it does, it is more natural either (1) to suppose that the proprietors of Pentland and Straiton were ready to waive their claim to compensation for the pipe-track; or (2) to presume after so long a time as eighty years that all claims were settled and paid. Certainly the documents produced, dated in and shortly after 1820, shew both as regards Pentland and Straiton that parties were in active negotiation as to matters arising out of the pipe laying,—such as, the sums to be awarded to the

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[1] London and North-Western Railway Co. v. Evans, L. R. [1893], 1 Ch. 16; *cf.* Roderick v. Ashton Local Board, 1877, L. R., 5 Ch. Div. 328; Metropolitan Board of Works v. Metropolitan Railway Co., L. R., 1869, 4 C. P. 192; *In re* Corporation of Dudley, L. R., 1881, 8 Q. B. D. 86, at p. 93.

[2] Knowles & Sons v. Lancashire and Yorkshire Railway Co., 1889, L. R., 14 App. Ca. 248, at p. 253.

[3] Macnab v. Munro-Ferguson, Jan. 31, 1890, 17 R. 397; Duke of Athole v. M'Inroy's Trustees, Feb. 8, 1890, 17 R. 456; Waddell v. Earl of Buchan, March 26, 1868, 6 Macph. 690, 40 Scot. Jur. 357.

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had consistently treated the Crawley pipe as if it were, in the matter of support, in precisely the same position as the Moorfoot pipe, *i.e.*, liable to have the minerals under it worked out unless notice to take them was given by the Water Trustees. Passing on to the 1843 Act, there was found there a perfectly different code. Compulsory powers were introduced applicable alike to new works and to existing works—those authorised by the 1819 Act. Minerals were for the first time dealt with. The later Act, differing from the earlier, introduced permanency and a working code accordingly. Under that Act the trustees were bound to pay compensation before acquiring any right to the land under their pipe. If, however, a right of support was to be implied, or if the pursuers were held to have a right of aqueduct, the right in neither case was such as to warrant an interdict against working out the minerals unless it were shewn that to do so would annihilate the aqueduct. Now, the evidence shewed that the minerals could be worked out without interfering with the run of the water through the pipe. In any view, the order of the Lord Ordinary went too far. There were many ways of working out the minerals, or at anyrate portions of the minerals, without interfering with the support. In

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tenants for surface damage, the amount to be arranged for with Mrs Gibsone of Pentland, and the quarrying of stone in Straiton for use in the works. It cannot therefore be suggested that the thing was done behind the backs of the proprietors. They must have been quite well aware of what was going on; and the inference I draw is, that payment or 'satisfaction' in respect of the laying of the pipe was either adjusted and settled, or was deliberately waived.

"Now, it is true that the Act of 1819 makes no reference to minerals; and it may be that no one then had sufficient foresight to claim, or at all events to claim adequately, for the loss of available minerals which is involved in the right of absolute support to the pipe. But if such claim was open under the statute, and was either waived or assessed and paid, I do not see how the singular successors of the then owners can take the objection that the claim might have been for a larger amount.

"As shewing the result in law of the view of the statute which I have adopted, the pursuers rely on a series of English cases—*Normanton Gas Company*, 52 L. J., Q. B. 629; *Benfieldside Local Board*, L. R., 3 Ex. Div. 54; *Dudley Corporation*, L. R., 8 Q. B. Div. 86; and (the latest and most applicable to the present) *London and North-Western Railway* v. *Evans*, L. R. [1893], 1 Ch. 16. In the last mentioned case the railway company were owners of a canal, and Evans was owner of minerals under the canal, which he had worked so as to cause a subsidence. The value of the minerals to be left unworked if the right to support was absolute was estimated at £144,000; and the outside cost of repairing the canal, if all the coal were worked out, at £5500. The canal had been made by private undertakers under an old statute which contained no reference to minerals, and under which no conveyances had been granted. The principle on which the Appeal Court proceeded is thus expressed by Lord Justice Bowen:—'Where an express statutory right is given to make and maintain a thing necessarily requiring support, the statute, in the absence of a context implying the contrary, must be taken to mean that the right to necessary support of the thing constructed shall accompany the right to make and to maintain it. More especially would this seem reasonable when the thing to be constructed is one of public advantage and utility, in which the public are to have rights.' Then the learned Judge deals with the presence or absence of a compensation clause as of first-rate importance in construing such a statute; and holding that the statute contained apt words of com-

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regard to the claim for lateral support of the ground held in feu, there was no warrant for imposing on the respondents the burden of supporting more than the land in its natural state, without the addition of a delicate *opus manufactum* which the feuars had themselves introduced into the subjects.[1] In any view, an interdict was not an appropriate remedy where the injury was merely contingent and might never arise.[2] There was no cause of action until the injury arose.

Argued for the Water Trustees;—The Water Trustees had an absolute and unqualified right of support for their Crawley pipe. The right to lay that pipe was conferred by the Act of 1819, and the same Act gave a right to claim compensation to those proprietors whose lands were taken. The enterprise here was not a private commercial speculation; it was a public undertaking; and looking to the nature of the powers given by, and the operations conducted under, the Act, it was obvious that it was intended that for the pipe duly laid in terms of the Act a right of support was conferred. The case was not in any way distinguishable from the case of *Evans*.[3] The Scots law on the subject was the same as the English.[4] The pursuers adopted the con-

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pensation for the right of support, in the expression 'first making satisfaction to the owners of such lands as shall be made use of,' he goes on to say, —'It is true that at the date of the Act the minerals were not thought to be of value, and were not taken into account in assessing the actual compensation exacted. But if the right of support was not substantially measured in the price given for the lands taken and used, it might have been demanded and estimated in the price had the owners been sufficiently prescient; and after this lapse of time, it must be assumed that all was paid for which was capable of calculation or measurement, and which was thought worth claiming by the owners; and that all conditions precedent have been fulfilled which were requisite to give the canal proprietors the right to the necessary support for the maintenance and making of their canal.' I need not stay to point out how closely all this applies to the case in hand.

"One difference there is, namely, that a canal occupies the surface of the ground, while in this case the pipes are beneath the surface. This, however, seems to me to make no difference in the application of the principle which establishes the right of support (see the cases of *Normanton Gas Company*, where the subject was a gas-pipe, and *Dudley Corporation*, where it was a sewer); though it may make some difference in the precise nature of the right which the undertakers have to the ground occupied by their works. I do not think the obligation of support is affected according as that right to the ground is truly property in the highest sense, or is a perpetual and irrevocable right to the exclusive use of the strip or stratum of soil occupied by the pipe. Such a right has nearly all, if not all, the characteristics of property, and is obviously capable of sustaining the consequential right of having the pipe supported at its original level.

"But then, it is said, all this has been changed by subsequent legislation.

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[1] Dalton v. Angus, 1881, L. R., 6 App. Cas. 740.

[2] Hood v. Trail, Dec. 18, 1884, 12 R. 362; Backhouse v. Bonomi, 1861, 9 Clarke's H. L. Cas. 503; Darley Main Colliery Co. v. Mitchell, 1886, L. R., 11 App. Ca. 127; Normanton Gas Co. v. Pope & Pearson, 1883, 52 L. J., Q. B. 629, at p. 634; Stevenson v. Pontifex & Wood, Dec. 7, 1887, 15 R. 125.

[3] London and North-Western Railway Co. v. Evans, L. R. [1893], 1 Ch. 16; *In re* Corporation of Dudley, 1881, L. R., 8 Q. B. D. 86; Normanton Gas Co., 1883, 52 L. J., Q. B., 629; Benfieldside Local Board v. Consett Iron Co., 1877, L. R., 3 Ex. Div. 54.

[4] Caledonian Railway Co. v. Sprot, 1856, 2 Macq. 449.

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struction put upon the Act of 1819 by the Lord Ordinary and his Lordship's reasoning generally. Even if it were held that there was not proof of compensation having been paid, it must—the Act giving the right to claim it—be assumed, after so long a lapse of time, either that it had been paid or that the proprietors had waived their right to claim it. The Act of 1843 in no way derogated from the pursuers' rights under the Act of 1819. The Lord Ordinary was right in his construction of it. Apart from statute, the pursuers had at common law a right to support for their pipe. They had a right of aqueduct, and an incident of such a servitude was a right of support. Having a right to support therefore—whatever its legal quality might be—they were undoubtedly entitled to have the pipe maintained in its present position. Even if the respondents were entitled to substitute artificial support for the natural support of the land and minerals, they had entirely failed to prove that they could do so. As regarded the feu, the pipe was in before the title was granted, and the very purpose of acquiring the feu was, as appeared on the face of the title, to lay the pipe through it. The defenders were bound therefore to support the pipe as well as the feu itself. It was idle to say that the

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The Act of 1819 was referred to and continued by later statutes before it was repealed with saving clauses in 1847. In particular, the Edinburgh Water Company's Act of 1843 (6 and 7 Vict. cap. 89) contains in sections 111-116 a set of mineral clauses which, the defenders contend, must be taken along with the Act of 1819 as furnishing a code applicable to the subjects now in question. It seems to me, however, extremely difficult to adopt that conclusion if the view I have expressed as to the rights of parties under the earlier statute be sound. If, indeed, minerals could be regarded as having been excluded *hinc inde* under the earlier statute, it would be quite reasonable to introduce later a code to regulate the respective rights and obligations in that particular, and to apply it to the existing works as well as to new works. But then I do not regard the earlier statute as having excluded mineral rights from consideration; and I think that so serious an alteration in the rights of parties as to the existing works is not to be imposed unless the construction contended for is a necessary one. As I read the Act of 1843, its mineral clauses do not apply except to the new works thereby authorised, which, it is to be observed, are almost entirely situated in the parishes of Penicuik, Colinton, and Currie, and not at all in the parish of Lasswade, in which Straiton and Pentland lie. It is quite true that the previously existing works are not altogether unaffected by the Act of 1843. Thus, by section 124, the company are taken bound within five years to complete the necessary works for introducing the whole of the water which they were authorised to take 'by the said recited Acts and this Act.' By section 125, it imposes on them the duty of providing and maintaining a meter upon the main Crawley pipe; and by section 141 they are bound to erect and maintain an additional gauge on the Glencorse Burn, below the works at Crawley. These and other enactments shew that the Act of 1843 had the existing works distinctly in view; but I cannot hold that the expression 'the works of the company,' contained in the mineral clauses, applies to the works then in existence, the rights in which had been acquired more than twenty years before.

"The pursuers present an alternative case on this head. They allege a right of servitude, founded on the ownership of the reservoir on the Castlehill, which has been vested in them and their predecessors since before the middle of the last century, and which ever since the Crawley pipe was opened in 1823 has been receiving by it a continuous supply of Crawley water. The proof clearly establishes these facts. In the view I take, how-

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pursuers must wait until damage was done before taking action. Their right was to have interdict against a threatened wrong.[1]

At advising,—

LORD PRESIDENT.—The first question is, whether the pursuers have a right of support for their pipe which conveys water from the Crawley springs to Edinburgh, where it passes through the part of the lands of Pentland in which the pursuers have acquired no right of property, and the lands of Straiton; and the second question is, whether the pursuers have a right of lateral support for a narrow strip of the lands of Pentland, about 1083 yards long and about 25 yards broad, which they hold in feu, and for the pipe which conveys water to Edinburgh from the Crawley springs, where it is laid in that strip of ground. The pursuers, as I understand, base their claim to the support mentioned in the first question upon two grounds—(1) upon the Act of 1819, and (2) alternatively upon their having, as they allege, acquired a servitude of support for their pipe at common law. I shall deal with these two grounds of claim in their order

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ever, of the pursuers' rights, it is unnecessary to follow out this topic. The plea rests, as I understand the pursuers' case, upon implied grant, importing an obligation not to derogate from that grant by letting down the pipe. It seems to me it would be difficult to affirm an implied grant in a case where the origin of the right of aqueduct is perfectly well known, seeing it rests on the statute of 1819. I could understand the contention that the Act of Parliament itself imports a statutory grant of servitude; but there seems to be no room for grafting a common-law servitude upon the statutory enactments.

"The next question is, whether, assuming the right of support to exist, the defenders' operations, if continued, will substantially interfere with that right. By the right of support, I mean the right to have the pipe supported as it lies, and at its present level, whether by the natural strata being left undisturbed, or by means of some substituted structure which will ensure the same result *ab ante*. I put the question thus, because I think that must necessarily be the extent of the right of support, if it exists, and because the parties are not really so far apart on the questions of fact as they appear to be on the proof. The conclusions of the summons do not expressly put the pursuers' case so high as to demand support by the natural strata, and to exclude substituted support. On the other hand, it is, I think, clearly established that a continuance of the defenders' threatened operations will result in substantial lowering of the pipe and imminent risk to the water supply. Further, the pursuers' criticism of the position taken up by the defenders as to substituted support seems to me perfectly sound, namely, that it contemplates not the prevention of subsidences, but their cure. The sits or draws which are assumed by all the witnesses to be practically inevitable as the result of the defenders' operations are to be watched for, and a massive structure of beams or girders is to be applied, from which the pipe is to be slung with chains, with appliances for screwing up the pipe from time to time as the level alters. It appears to me that, even apart from the pursuers' evidence, which is weighty, the defenders' own witnesses (Mr Rankine, Mr Dixon, Mr Scoular, and Mr Armour) shew that the pipe would from time to time over a considerable part of its course be in a condition of peril, would need careful watching, and would be liable at least to 'drawn joints' and consequent

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[1] Trinidad Asphalt Co. v. Ambard, L. R. [1899], A. C. 594; Elliot v. North-Eastern Railway Co., 1863, 10 Clarke's H. L. C. 333.

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—taking first that which depends upon the construction and effect of certain sections of the Act of 1819, especially section 38, and what followed upon it.

The Act of 1819 is entitled "An Act for more effectually supplying the city of Edinburgh and places adjacent with water," and it provided for the establishment of a company to carry out that object. By section 38 of the Act the company—in whose right the pursuers now stand—were empowered to take and use grounds and premises for the purpose of forming a reservoir or reservoirs at the places therein particularly described, provided that the consent in writing of the owners and occupiers of the lands whereon the same were to be formed should be previously obtained, "to compensate" (which, I understand, the parties are agreed means "for the purpose of compensating") owners and occupiers of mills and landowners for the water taken for the purposes of the Act as thereinafter directed. Then follows a power "to make the necessary cuts, trenches, mounds, or other works for connecting the springs and water hereinbefore mentioned

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leakage, if not also to breaks and stoppage of the supply. Add to this, that the pipe in place of being underground, as it is now, would be exposed in considerable sections to atmospheric influences, and might be damaged by frost if the flow were sluggish; and it becomes plain, in my opinion, that the defenders' proposed substituted support is not support at all in the sense in which the pursuers are entitled to it. What they are entitled to have, in the lowest view, is efficient substituted support for the pipe at its present level and in its present situation; and in my view this requirement is not met by any of the proposed alternatives.

"The result is, that in my view recourse must be had to the only possible alternative, namely, to leave a certain area of the minerals unworked for the support of the pipe. The question is, how is that area to be defined? In their summons, the pursuers conclude that the Court should, 'by remit to a person or persons of skill or otherwise,' fix and determine the limits within which the defenders shall be bound to abstain from working, or otherwise the manner and conditions in and under which the workings may go on adjacent to the feu, and under and adjacent to the pipe. The defenders maintain that the words 'or otherwise' are not sufficient to include the determination of the area by a decree following on a parole proof, but this, I think, would be too critical a construction. It might be inexpedient and possibly unfair so to fix it, if the proof shewed serious divergence in point of principle between witnesses of equal skill. But the weight of the evidence seems to me to be all in one direction, possibly because the defenders' purpose on this head is not so much to minimise the area to be left unworked, but rather to shew that none (except a little at the outcrop) need be left unworked if their proposal for mechanical substituted support is adopted. All agree that some of the mineral near the outcrop should remain as it is, the limit being variously stated at from 100 to 200 yards. As to the area traversed by the pipe between that limit and the east end of the feu, the defenders' witnesses, Mr Rankine, Mr Miller, and Mr Armour, practically concede that this could not be worked out without affecting the level and stability of the pipe to the extent at least of causing drawn joints, and their suggestions go to remedy rather than prevention. But on the assumption that these suggestions are inadequate to satisfy their obligation of support, the defenders' witnesses do not really suggest any practical alternative to the rule formulated by the witnesses for the pursuers. All agree that to the rise of the strata the line of safety is to be found by dropping a 'normal' or perpendicular line to the strata from the surface point to be

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to be taken, and also the necessary cuts, trenches, conduits, mounds, or other works for conducting the water thereof to the said city in the line or lines pointed out in the said map or plan, and to construct the necessary aqueduct or aqueducts, and to lay the necessary pipe or pipes for that purpose, giving one month's notice of such their intention to the owner or owners, or occupier or occupiers, of such grounds and premises, and making satisfaction to such owner or owners, and occupier or occupiers, in manner hereinafter directed." There is in this section a sharp distinction between the power to take and use land for the purpose of forming reservoirs, and the power to construct the necessary aqueducts and lay the necessary pipes for the purpose of conveying water to Edinburgh. For the first, the land must be taken or acquired, but it does not appear to me that it was necessary that any land should be taken or acquired for the second, the power conferred by the part of the section quoted being to construct the aqueducts and lay the pipes in land, the property in which was not required to be taken or acquired, but which might remain in the ownership of the persons

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protected. But to the dip, the defenders' witnesses have really no practical suggestion to make as to how the limit of safety is to be ascertained; and their theory, such as it is, does not appear to have ever been adopted in practice—certainly not by the defenders in their plans—and it is contradicted by the evidence of how far actual subsidences extended as noted on the defenders' working plans from time to time. The pursuers' witnesses indeed are not at one either upon this point, but they are substantially so. The evidence discloses a variance between the practice in England and in Scotland. In Scotland the slope or batter left to the dip in the ordinary case is one in four; in England it appears to be a little less, namely, one in five. I see no reason to doubt that the English rule will furnish a sufficient margin of safety; and there being no special circumstances here to suggest that the situation is specially risky, I am prepared to apply that rule in this case.

"Then as to the feu, it is not disputed that the defenders cannot work any further minerals under it, as these belong in property to the pursuers. The controversy therefore turns upon whether the pursuers are entitled in present circumstances to have the limits of safety applied to the boundaries of the feu itself, irrespective of the pipe lying in it; in other words, whether the right to lateral support of land to land entitles them to interdict adjacent workings *ab ante* on proof of danger reasonably apprehended. That there is such reasonable apprehension of subsidence in the surface of the feu if the defenders work out the adjacent minerals in their own ground, is, I think, clearly proved, not merely by the subsidence which occurred there some years ago (for that followed on an encroachment made by the defenders' workings within the feu), but by applying the 'limit of safety' to the feu boundary all round. There is practically the same reason for apprehending subsidence of the feu when that limit is overpast, as for apprehending subsidence of the pipe. But the difficulty I have felt on this part of the case is caused by certain English authorities, of which *Smith* v. *Thackerah* (1866, Law Rep. 1 C. P. 564) is one, and perhaps the strongest. They appear to lay down that the owner must wait until actual damage arises, and that even when the surface has in fact been lowered by the withdrawal of lateral support, no action will lie unless substantial damage has accrued. There may be a distinction between the case where the two adjoining subjects have never been united in one ownership, and the case where (as here) the complainer derives his grant from his neighbour, or his neighbours' predecessor. *Smith* v. *Thackerah* has been doubted in more recent cases, on the ground that if the right of support of land to land has been actually

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to whom it previously belonged. There is no provision in this part of the section for payment of a price, as upon purchase, for the land in which the aqueducts were to be constructed and the pipes laid, but only for "making satisfaction" to their owners or occupiers, which might be materially different from a price paid as upon purchase. It would, of course, materially strengthen the position of the defenders if they could shew that the provisions for making "satisfaction" apply only to cases in which land is "taken," not to cases to which an aqueduct is made or a pipe laid through lands not "taken," but which remains the property of their previous owners, and this they attempted to do by referring to section 73 of the Act. It appears to me, however, that that section applies not only to lands which the company may desire to "take" in the sense of acquiring the property of them, but also to lands which the company only desire to "use," as they did by laying their pipes in the lands in question, while the property in these lands remained in their previous owners. One of the schedules appended to the Act, under the head "Aqueduct from Crawley springs to the city of Edinburgh," contains the names of the owners and occupiers of the lands through which the aqueduct was to pass, including the lands of Pentland and Straiton, to which the present action relates. In the schedule Mrs A. Gibsone is stated to be the owner, and John Allan the occupier, of the lands of Pentland, and James Johnstone is stated to be owner, and John Jamieson the occupier, of the lands of Straiton.

The work was begun in the autumn of 1819, and water was brought to Edinburgh in August 1823 by the pipes laid under the authority of the Act. It is not proved that any payment or other satisfaction was made by the water company to the owners of the lands of Pentland or Straiton through which the pipe was laid in respect of its being laid, though it does appear that the company was in communication with the proprietors of these lands, or their law-agents, at the time, and made considerable payments to them, in respect of matters arising out of the execution of the works. Thus, on 14th February 1820, the company intimated to the law-agent for Straiton that they proposed, by virtue of the powers conferred by the Act of 1819, to quarry stones from Straiton quarry "for the use of the works now carried on by the company for the purpose of conveying Crawley springs and other water to Edinburgh," as they were entitled to do under the Act, and it appears that stones were taken for this purpose from Straiton

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infringed, an action ought to lie at least for nominal damages, even if the damage is not substantial. But if that point is reached, I do not see how in Scotland the remedy of interdict is not appropriate and competent to safeguard the right, on proof of reasonable apprehension of imminent risk of subsidence if the workings are continued past the limit of safety; and, in my opinion, that is established here by the proof.

"It remains to consider the defenders' third plea in law, that the pursuers are barred by their actings from insisting in this action. . . . I see nothing to suggest that the pursuers were aware of the defenders being in course of incurring expenditure for a specific purpose, and wrongfully failed to let them know that the purpose was regarded by the trustees as contrary to their rights.

"In the result, my opinion is that the pursuers are entitled to decree substantially as concluded for."

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quarry, and duly paid for by the company. Again, on 14th July 1820 the company intimated to Mrs Gibsone of Pentland that "they intend soon to take steps with a view to conduct the water-pipe from the Crawley Spring, &c., through your estate to Edinburgh, and mentioned that the company's engineer would be ready to point out the track, "most of which is already on the ground"; that the damage done by the operation and the value of the ground occupied were to be settled by a jury in terms of the Act, if not adjusted privately; and that the directors would be well pleased to agree to a reference, and ready to consider any proposal which Mrs Gibsone might think fit to make with a view to a settlement. There was also correspondence between the company and Mrs Gibsone's agent regarding the acquisition from her of the strip of the lands of Pentland which she afterwards disponed in feu to the company, and to which the second question above mentioned relates. A minute of the committee of management of the company dated 3d August 1820 bears that "the meeting having been informed of the communications from Mrs Gibsone of Pentland respecting the value of her property through which the aqueduct is to run, are quite satisfied with her proposal to have a report of the value of the damages to her property from Mr George Brown, and that she should not be bound by the report unless she thinks fit to accept of his valuation." Another minute of the committee, dated 18th May 1821, bears that "Mr Jardine having laid before the meeting Mrs Gibsone of Pentland's letter specifying the terms on which the stone from the quarry lately discovered on her ground may be had, the meeting authorised Mr Jardine to accept of it, taking care to make the terms of the agreement more precise." Another minute, dated 7th June 1821, directs that in answer to a letter from Mr Train he should be informed that they were ready to have the damage done to his farm of New Pentland ascertained by Mr George Brown, as already agreed upon by "Mrs Gibsone of Pentland and her tenants." There is also contemporaneous documentary evidence that surface damages were paid to the agricultural tenants on the estates of Pentland and Straiton, while certain payments were made to the proprietors, as to the precise nature of which the parties are not agreed. Thus the defenders maintain that a payment of £166, 1s. 11d. made to the proprietor of Pentland "for ground occupied by aqueduct" was in respect of the feu, and it is quite possible that this may be so. The probability seems to me to be that none of the parties were aware that any minerals workable to profit existed in the lands, and that the payments made by the company to the proprietors and their tenants were made and accepted as being in full of all the claims which the proprietors had under the Act against the company. But, however this may be, it is clear that the proprietors of Pentland and Straiton were well aware that the company was making an aqueduct and laying a pipe in their lands as authorised by the Act of 1819, and they made such claims as they considered appropriate to the circumstances. I therefore think that, after the lapse of nearly eighty years, these proprietors must be taken to have received such "satisfaction" by way of money payments or otherwise as they considered themselves entitled to demand from the company.

But it appears to me, *separatim*, that if the company would have acquired an effective and permanent right to support for their pipe upon

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"making satisfaction" by way of payment or otherwise to the proprietors of the lands, it must be held to have acquired a not less effective or less permanent right if, with the assent of these proprietors, it cut its aqueduct and laid its pipe without payment. It must have been manifest to the proprietors that the right which the company acquired was intended to be permanent, and if the proprietors elected (with or without consideration) to abstain from making a separate claim for "satisfaction" in respect of it, I am unable to see that the rights of the company—or the pursuers as now standing in its place—can be less than if "satisfaction," in the statutory sense, had been made.

The defenders maintained that as section 22 of the Act of 1819 requires the committee of management of the company to enter in a book all contracts which they might enter into, and all payments which they might make, and as no contract relative to the acquisition of a wayleave for the pipe, and no payment in respect of it, is entered in any book kept by the company, it cannot now be assumed that the pipe was laid under the authority of the Act, or that "satisfaction" in the sense of the Act was made. It appears to me, however, that even if the requirements of section 22 were not literally complied with, this would not have the effect of preventing the company from acquiring a permanent right, in the nature of a wayleave, for their pipe, or of precluding the proper inferences from being drawn from the proved facts, as to whether "satisfaction" in the statutory sense had or had not been made. I therefore think that, for the purposes of the present question, it must now be taken that the company acquired a permanent right to maintain their pipe in the part of the lands of Pentland which they did not acquire in feu, and also in the lands of Straiton, and further, that it must now be assumed that the claim of the proprietors for "satisfaction" was either met or waived.

With reference to the alternative claim of the pursuers to a common law servitude *aquæductus* with respect to which the pursuers' reservoir on the Castlehill was the dominant tenement, it is sufficient to say that as the foundation of their right to lay the pipe was clearly the Act of 1819, any inference of a common law servitude *aquæductus* is, in my judgment, excluded.

The next question is, Did the exercise of the statutory power to lay and maintain a pipe through the lands infer any, and if any what, right to support for that pipe? It is plain that if no such right of support was acquired, the grant by Parliament of the power to lay and maintain it would have been nugatory, and there is every presumption against this having been intended. I think, however, that, both upon principle and authority, the effect of the grant of such a power is to confer upon the grantees a right to such support as may be necessary for making the purpose of the grant effectual. The case of the *London and North-Western Railway Company* v. *Evans*,[1] is one of the most recent and most apposite authorities to this effect. It was maintained by the defenders that the doctrine of that case does not apply to the present, because the Water Company, which was established under the Act of 1819, was not a

[1] L. R. [1893], 1 Ch. 16.

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public company—inasmuch as it was not directed to accomplish a public object in the sense of the decisions, and there was no security that it would be permanent. It is true that the company was not strictly a municipal undertaking, although it was promoted by leading citizens, and the municipality as then constituted had an important interest in it. The Act of 1819 also came in place of two prior statutes, under which the management of the water supply appears to have been vested in the Town-Council, and an important restriction was imposed by the Act in the public interest upon the amount of profits which the company might make and divide. It is also true that the company was not bound by the statute to give a full supply of water to all the citizens, nor were there under it limits of compulsory supply as that expression is now understood, but important obligations relative to the supply of water were imposed upon the company in the public interest. Thus by section 34 it was, *inter alia*, provided that the company should supply water to the then existing public wells of the city, and perform all lawful contracts previously entered into by the Lord Provost, Magistrates, and Council under the recited Acts, and by section 85 it was declared that all persons who at the time of the passing of the Act had water conveyed to their houses, or other premises, in pipes already laid, should continue to possess and enjoy the same privilege upon making payment to the company of the then present rates and duties until Whitsunday 1821, and of such rates and duties as might after that term be fixed in the manner thereinafter specified. Section 86 conferred upon the inhabitants power, after notice, and with the consent of the company, to lay service pipes to their houses from the company's pipes; and by sections 96, 97, 98, and 99 powers of rating were conferred upon the company. I am of opinion that under these circumstances the statutory power to lay and maintain a pipe in specified lands for conveying such a supply of water, must be held to have carried with it a right to have the pipe supported, whether the claim of the proprietors of the lands for "satisfaction" was met or waived.

The pursuers' claim of lateral support for the strip of land feued by the company from the estate of Pentland and the pipe in it, depends upon somewhat different considerations. If the feu had been taken by private persons before any pipe was laid in it, without any mention of the purpose for which it was to be used, the feuars being proprietors *a cœlo ad centrum*, would have been entitled to lateral support for the feu in its natural state, but not to support for artificial buildings or works erected upon it, whereby the burden on the adjacent lands would be increased (*Dalton* v. *Angus*),[1] but in the feu-disposition of the strip in question by Mrs Gibsone of Pentland to the company, dated 3d March 1825, the Act of 1819 and the powers conferred by the portion of section 38 of that Act above quoted are recited, including the power to make the necessary cuts, trenches, conduits, mounds, or other works for taking the water to the city of Edinburgh in the line or lines pointed out in the map or plan attached to the Act, to construct the necessary aqueduct or aqueducts, and to lay the necessary pipe or pipes for that purpose. The feu-disposition also bears that Mrs Gibsone had agreed to sell to the company the piece of ground

[1] 6 App. Cas. 740.

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described for £350, 15s. sterling, and that she therefore sold and in feu-farm disponed to the company "all and whole that piece of ground of my lands and estate of Pentland through which the aqueduct pipe for conveying water from Crawley springs to the city of Edinburgh is laid, consisting of 4 acres 1 rood 21½ falls," as shewn on a plan therein mentioned. It thus appears that the pipe had actually been laid before the feu-right was granted, and it also appears *ex facie* of the disposition that it was obtained for the purpose of accommodating and, of course, of supporting the pipe. Under these circumstances, I think that the feu-grant must be taken to have implied a right to such lateral support as might be requisite for maintaining the pipe *in situ*, if or in so far as that support was greater than what would have been sufficient for maintaining the strip of ground feued in its natural condition. In this connection I may refer to the case of the *Caledonian Railway Company* v. *Sprot*,[1] which related to a conveyance of land expressed to be granted for the purpose of making a railway upon it. The disponer, however, reserved to himself all mines under the land conveyed, with full liberty to win and work the minerals, and the Lord Chancellor said that "independently of any Parliamentary enactment, the effect of that conveyance was to convey the land to be covered by the railway to the company, together with a right to all reasonable subjacent and adjacent support, a right to such support being a right necessarily connected with the subject-matter of the grant."

What I have now said proceeds upon the assumption that the question as to the right of support claimed by the pursuers depends upon the Act of 1819 and what was done under it, but the defenders maintained that this is not so, and that the rights and obligations of the parties *hinc inde* with respect to minerals, even in the case of lands acquired, or powers originally exercised, under the Act of 1819, must now be governed, not by that Act, but by the Act of 1843, 6 and 7 Vict. c. 89, entitled "An Act to enable the Edinburgh Water Company to bring in an additional supply of water, and to alter and amend the Acts relating to the said company." They contended that, inasmuch as no contract or payment is recorded with reference to the laying of the pipe, it must be presumed that when the Act of 1843 passed, the matter was still open for settlement, and that it must now be settled under the provisions of that Act. They submitted that in so far as that Act relates to works, it applies to all works both past and future, and that as the question relative to mines was not settled under the Act of 1819, it must now be settled under the Act of 1843. They referred especially to sections 17, 70, 73, 111 to 116, 122, and 148 of the latter Act, maintaining that section 17 applies to any claim still remaining unsettled in respect of powers already exercised under the Act of 1819. I think, however, that that section, if, or in so far as it relates to claims arising out of the exercise of powers conferred by the Act of 1819, can apply only to powers still unexercised in 1843, and all the powers to which this action relates were exercised at least twenty years before that Act passed. The defenders further argued that this is a case of an omitted interest under section 70, and that section 73 applies to works or property acquired at any time—

[1] 2 Macq. 449.

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whether prior or subsequent to the passing of the Act. It appears to me, however, that there is in this action no question of an omitted interest under section 70—that section 73 has no application (1) because it relates to land purchased by the company, not to the case where they had acquired a right to lay a pipe in lands not purchased, and (2) that even if, or in so far as, it applies to lands purchased, it does not alter any rights already acquired to this date. The defenders also maintained that sections 111 to 116 effected a reservation of mines under the pipe-track previously acquired, but I consider that this contention is not well founded, and that the Act of 1843 cannot be held to have taken away or impaired a right of support, which, if the views above expressed are sound, had already been acquired by the exercise of the powers conferred by the Act of 1819. In respect of similar considerations, I am unable to accept the arguments maintained by the defenders as to sections 124 and 125 of the Act of 1843.

For the reasons now given, I think that the pursuers are entitled to have declarator substantially in the terms concluded for in the summons, and that the interlocutor of the Lord Ordinary should be adhered to in so far as it finds to that effect. But in the remainder of the interlocutor his Lordship finds that within the limit therein mentioned, the shale, limestone, and other minerals adjacent to the pursuers' strip of ground, and adjacent to or under their pipe or aqueduct described in the summons, cannot be "wrought out" without imminent risk of bringing down the surface of the strip of ground, and the pipe, that is to say, the limit formed by lines drawn from the points to be supported perpendicular to the plane of the strata on the rise side, and at the inclination of one in five towards the dip, and that within that limit the defenders are bound to abstain from working the shale, limestone, and other minerals, and he accordingly interdicts them from working the shale, limestone, and other minerals within that limit. From the expression "wrought out" used by the Lord Ordinary it might have been inferred that his finding merely implied that the minerals could not be fully excavated without imminent risk of bringing down the surface, but this would, or might, be consistent with the possibility of part of them being worked without that result. His Lordship's subsequent finding, however, that the defenders are bound to "abstain from working the shale," &c., seems to imply that they are bound to abstain from any working within the specified limit, although it may be possible that within it some, though not all, or much, mineral could be taken out with safety. It appears to me, however, that it would be inexpedient for the Court to take upon itself the duty of deciding antecedently what part of the minerals can, and what part cannot, be wrought with safety to the strip of ground or the pipe. It might turn out that the mineral which the Lord Ordinary requires to be left for support was either more or less than was necessary for that object. If it was more, some of it might be wrought without injury to the pipe, and if it was less, his Lordship's interlocutor might be held to import a licence to work up to the specified limit, whatever the consequences to the strip of ground or the pipe might be. Again, it is possible that part at least of the minerals which the Lord Ordinary has found must be left unwrought might be worked without injury to the strip or the pipe, if adequate substituted support by way of under-building or otherwise in or upon the property

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belonging to, or held in lease by, the defenders was provided. I am therefore of opinion that it would be better that we should not, while finding substantially in terms of the leading declaratory conclusions of the summons, attempt to define the limits of safe working, but that we should merely grant an interdict prohibiting the defenders from working so as to injure the pursuers' strip or pipe. This appears to have been the course followed in the case of the *London and North-Western Railway Company* v. *Evans*,[1] and in other cases.

LORD ADAM.—I have had an opportunity of reading the opinion of the Lord President, and entirely concur in it.

LORD M'LAREN.—I have also had an opportunity of reading the opinion of the Lord President, and concur in it unreservedly. If I add anything, it is only to make an observation regarding the kind of support which, according to my understanding of the law, the Water Trustees are entitled to have for their pipe. One difficulty in considering cases of this kind is the necessity of giving weight to certain very unqualified judicial opinions regarding the right which the proprietor of the surface has to claim support from the owner of the strata of minerals beneath. In one of the cases cited to us it was even asserted that in the case of land in its natural condition it might be that the owner of the surface was entitled to have the surface maintained in the same plane, or, as it was put by counsel, at the same distance from the centre of the earth, as it was in its natural formation. As I have always considered that in such matters the common law is nothing but the generalised common-sense of mankind, and as no owner of hill or moorland ever supposed that he had such a right or ever made such a claim against a mine-owner, I think we might fairly put the weight and authority due to universal custom against the somewhat unqualified opinions of individual Judges, however eminent, on a matter of that kind. But we are not now considering the right of support which belongs to the owner of the surface as distinguished from the owner of the minerals. The support claimed is the consequence of a statutory privilege to lay a pipe in the land of another person upon making adequate compensation. I agree with the Lord President that under the statute the Water Trustees are entitled to such support for their pipe as is necessary to make the statutory privilege effective, and it is quite possible that such support might be given consistently with some slight variation of the level of the surface. The nature of the support that would be given, for example, to an open aqueduct carried on arches across a valley is very different from the support which is given to a closed pipe where the water by hydrostatic pressure always rises to the same level, notwithstanding deflections in the pipe. Of course I am keeping in view what was strongly argued to us, that even moderate deflections of the surface might be injurious to the pipe by causing it to open at the joints, but I think it is not impossible that the resources of engineering science might be able to cope with that either by making allowance for deflection or by giving artificial support. It is perfectly possible that the Water Trustees might obtain the full measure of their

[1] L. R. [1893], 1 Ch. 16.

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right under the statute without subjecting the owners of the mines to the enormous loss which they would undoubtedly incur if the law as laid down in the Lord Ordinary's judgment were to receive unqualified effect.

LORD KINNEAR.—I have had an opportunity of reading and considering the opinion of the Lord President, and entirely agree with it.

THE COURT "having considered the reclaiming note for the defenders . . . against the interlocutor of Lord Pearson dated 28th June 1900 . . . recall the said interlocutor; find and declare in terms of the first declaratory conclusion of the summons; further find and declare that the defenders the said Clippens Oil Company, Limited, as lessees of the minerals in the lands of Pentland, on both sides of the strip of ground belonging to the pursuers described in the first conclusion of the summons, and where the pipe, also described in the first conclusion of the summons, is laid, and as the owners of the lands and minerals of Straiton, are not entitled to work the shale, limestone, and other minerals adjacent to the said strip of ground, and adjacent to or under the pipe or aqueduct belonging to the pursuers described in the first conclusion of the summons, in such manner as to injure the said strip of ground, or the said pipe or aqueduct, or to interfere with the continuous flow of water through the said pipe or aqueduct from the Crawley Spring to the Castlehill reservoir described in the summons; interdict, prohibit, and discharge the defenders, the Clippens Oil Company, Limited, from working the said shale, limestone, and other minerals adjacent to the said strip, and adjacent to and under the pursuers' said pipe or aqueduct where it is laid in the said lands of Pentland or in the said lands of Straiton, so as to injure the said strip of ground, or the said pipe or aqueduct, or to interfere with the continuous flow of the water through the said pipe from the Crawley Spring to the Castlehill reservoir, and decern; find the pursuers entitled to two-thirds of the taxed amount of the expenses from the beginning of the action," &c.

MILLAR, ROBSON, & M'LEAN, W.S.—J. GORDON MASON, S.S.C.—Agents.

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Nov. 30, 1900. Jamieson v. Welsh.

JAMES JAMIESON, Pursuer (Reclaimer).—*Craigie—D. Anderson.*
JOHN WELSH, Defender (Respondent).—*Campbell, Q.C.—Welsh.*

Sale—Sale of Heritage—"Fixtures and Fittings"—Disposition in part implement of Missives.—The sale of a house "with the fixtures and fittings therein so far as belonging to the proprietor" was completed by missives. A disposition of the house which followed contained no mention of "fixtures and fittings," and no express reference to the missives.

Held (*rev.* judgment of Lord Low) that the missives were not superseded by the disposition in so far as the subjects sold were moveable, and accordingly that the acceptance of the disposition by the purchaser did not discharge his right to delivery with the house of such moveables as fell within the terms "fixtures and fittings."

Opinion by Lord Low that the term "fixtures" meant such articles as would, in the absence of special stipulation, pass to the purchaser of the house, although capable of being removed, while the term "fittings"

applied to such articles as built-in grates, door-plates, and gas-brackets, which, in the absence of a special agreement, the seller would be entitled to remove.

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1st Division. Lord Low.

On 29th March 1899 Alexander Campbell, S.S.C., acting on behalf of James Jamieson, contractor, Musselburgh, wrote to Messrs Welsh & Forbes, S.S.C., offering the sum of £1475 for "the subjects known as Greenhall, Musselburgh, as advertised, with entry at Whitsunday, when the price will be paid, with the fixtures and fittings therein so far as belonging to the proprietor." To this offer Messrs Welsh & Forbes appended a written acceptance of the same date.

By disposition dated 16th May 1899 Mr John Welsh, therein designed "as heritable proprietor of the subjects and others hereinafter disponed," in consideration of the sum of £475 instantly paid to him by James Jamieson, and also in consideration of Mr Jamieson freeing and relieving him of the sum of £1000 in the bond and disposition therein mentioned, disponed to and in favour of Mr Jamieson and his heirs and assignees, heritably and irredeemably, "All and Whole that house of two storeys, or floors, and garrets, called Greenhall, and two smaller houses at the west end thereof, with 23 falls, 4 ells of ground or thereby, belonging thereto," together with "the teinds, parsonage and vicarage, and whole parts, pendicles, privileges, and pertinents of the subjects above disponed." The disposition did not bear to be in implement of any previous contract, and contained no mention of "fixtures and fittings," nor did it purport to convey any corporeal or other moveables.

On 30th October 1899, Jamieson raised an action against John Welsh and against Thomas White, Moredun, Liberton, for the value of certain articles which he alleged passed to him along with the house in virtue of the missives, and which he averred had been removed by the defenders. The pursuer averred that while the heritable subjects were feudally vested in Welsh at the time of the sale, the feudal title was qualified by a back-letter under which the beneficial interest as owner remained in White, who had conveyed the subjects to Welsh in security merely. Defences were lodged for Welsh, but no appearance was entered for the defender White.

The articles, the value of which was claimed by the pursuer (as set forth in Cond. 3), consisted (*a*) of ordinary built-in grates, gas-brackets, finger-plates, &c., and (*b*) of a kitchen range and boiler, and window opening rods and handles in the greenhouse. He averred,—(Cond. 3) "The fitting and fixtures mentioned in this article were the property of the defenders or of the defender John Welsh, and they were fixtures and fittings belonging to the proprietor of the subjects sold in the sense of the missives." The value placed upon these articles was £50.

The compearing defender denied that the articles above specified were ever his property or had been removed by him. He pleaded;—(3) The defender, not having removed any of the articles condescended on from the said subjects sold to the pursuer, ought to be assoilzied, with expenses. (4) The disposition granted to the pursuer being the sole measure of his right, he is not entitled to any of the articles claimed, and this defender is entitled to absolvitor. (5) In any event the said articles not being of the nature of fixtures, the defender should be assoilzied.

On 14th July 1900, the Lord Ordinary (Low) pronounced the following interlocutor:—"Finds (1) that the pursuer having

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accepted a disposition of the subjects at Greenhall, Musselburgh, purchased by him from the defenders, the said disposition is the sole measure of the rights and liabilities of the parties; (2) that under and in terms of the said disposition the pursuer has right to all articles in the said house and cottage, and in the grounds annexed thereto, which are in law fixtures in a question between seller and purchaser, but that he has no right to articles which, in the absence of express stipulation to the contrary, a seller is in law entitled to remove; and (3) that the articles enumerated in article 3 of the condescendence (with the exception of the kitchen range with high-pressure boiler, and the opening rods and handles of the greenhouse) are not fixtures, and that the pursuer has no right thereto: Before further answer allows the pursuer a proof as to the nature and construction of the said kitchen range and boiler and the said opening rods and handles, and as to the manner in which the same are attached to the dwelling-house and greenhouse respectively, and to the compearing defender a conjunct probation," &c. *

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* "OPINION.—In the missives of sale the pursuer's offer is to purchase Greenhall House and Greenhall Cottage 'with the fixtures and fittings therein so far as belonging to the proprietor.'

"I do not think that the mention of 'fixtures' adds anything to the offer, because the ordinary meaning of the word, when used in reference to such a transaction, is such articles as, in the absence of special stipulation, pass to the purchaser of the house, although capable of being removed.

"The word 'fittings,' however, is in a different position, and presumably means such things as ordinary grates or gas-brackets, which in the absence of a special agreement the seller would be entitled to remove.

"If, therefore, the question raised in this case depended upon the construction of the missives, I should be disposed to hold that the articles enumerated in the condescendence (Article 3) were included in the sale.

"The pursuer, however, has accepted a disposition in which there is no mention of fixtures and fittings. That disposition will carry all those things which the law regards as part of the building in a question between seller and purchaser, but will not carry anything more, and I think that it is settled that articles which are so slenderly affixed to the building, as grates and gas-brackets, and which can be removed without injury to themselves or to the building, are not part of the building, and do not pass to a purchaser under a disposition of the building.

"The question therefore is, whether it is competent for the pursuer to go behind the disposition and to found upon the missives of sale? I am of opinion that that question must be answered in the negative. There were not here two contracts, one in regard to the heritable subjects and the other in regard to the fittings. There was only one contract, and the disposition was intended to give effect, and was accepted as giving effect, to that contract. It is the disposition alone, therefore, which regulates the rights of parties, and it is not said that the disposition is in any way ambiguous. The pursuer accordingly is entitled to everything which is embraced within the dispositive clause, and to nothing more.

"Now, most of the articles enumerated in the condescendence appear to me not to be fixtures. Grates which are built in in the ordinary way, and which can be removed without injury to themselves or to the walls, are not fixtures, and it is not said that there is anything peculiar in the way in which the grates in the house in question are built in. Again, gas-brackets and finger-plates, which are merely affixed by screw-nails, are not fixtures.

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The pursuer reclaimed, and argued;—The Lord Ordinary regarded "fixtures" as heritable, and "fittings" as moveable; he was therefore wrong in treating the missives as containing one and the same contract with the disposition. The missives constituted a contract for the sale of the heritage, and also a contract for the sale of moveables, while the disposition only dealt with heritage. A conveyance was appropriate only as a mode of carrying out the contract to sell heritage. So far as the sale was a sale of moveables, the missives alone were sufficient to make it effectual, or if anything further was needed, it was delivery. The acceptance of the disposition could not therefore be held to operate as a discharge of the seller's obligation in regard to the moveable subjects transferred by the missives. The cases of *Lee* v. *Alexander*[1] and *Orr* v. *Mitchell*[2] had no application where a disposition did not cover the same subject-matter as the missives.

Argued for the respondent;—The Lord Ordinary was wrong in treating "fixtures" and "fittings" as different things. They were co-extensive terms, and referred to things so attached to the heritage as to pass without special stipulation under a disposition as part of the heritage. The disposition therefore exhausted the subject-matter of the contract in the missives and superseded the missives. But the principle of *Lee* v. *Alexander*[1] and *Orr* v. *Mitchell*[2] went further than this, and precluded any reference to the missives after a disposition had been tendered and accepted. Such acceptance implied a discharge of the obligations in the missives in consideration of the disposition. Here this view was confirmed by the fact that the price stipulated in both was the same.

At advising,—

LORD PRESIDENT.—I fully accept the doctrine laid down in the House of Lords in the case of *Lee* v. *Alexander*[1] that "the execution of a formal conveyance, even when it expressly bears to be in implement of a previous contract, supersedes the contract *in toto*, and that the conveyance thenceforth becomes the sole measure of the rights and liabilities of the contracting parties," and in the *dictum* of Lord Watson in the case of *Orr* v. *Mitchell*[2] that "when a disposition in implement of sale has been delivered to and accepted by the purchaser, it becomes the sole measure of the contracting parties' rights, and supersedes all previous communings and contracts, however formal"; but it appears to me that that doctrine does not apply to the present case. The contract in this case related

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There are, however, two of the articles enumerated in regard to which I am doubtful. There is a kitchen range with high-pressure boiler, and I think that very probably that may be a fixture. Then in the principal greenhouse opening rods and handles are said to have been taken away. I assume that it is admitted that the greenhouse is a fixture, and if the opening rods and handles were attached to a moveable part of the framework of the greenhouse whereby it could be opened or shut, I am inclined to think that they would form part of the structure, although they might be removeable merely by unscrewing a nut.

"I therefore think that as regards the kitchen range and the greenhouse fittings I must ascertain the precise facts."

[1] Aug. 3, 1883, 10 R. (H. L.) 91.

[2] March 30, 1893, 20 R. (H. L.) 27.

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to two separate and distinct classes of things—(1) the proper heritable subjects, which I shall for the present assume with the Lord Ordinary would include such "fixtures" as would pass with a conveyance of the house; and (2) the "fittings," which would not pass under such a conveyance, and which, for the purposes of the present question, are to be treated as moveables. The subjects of the contract were thus (1) the heritage, and (2) certain corporeal moveables, viz., the "fittings." It is quite in accordance with principle that where a disposition bears to be in implement of a contract mentioned in it, or where the kind of property to which a contract related has been made the subject of a disposition, this should conclude all question as to the meaning of the contract in so far as it relates to that property, as, for example, the extent or incidents of it, but I am unable to see any ground upon which it could be held to conclude all question in regard to property which it does not purport to convey, *e.g.*, corporeal moveables, merely because the two kinds of property were dealt with in one contract, especially as such corporeal moveables would not be made the subject of a conveyance, but would pass by delivery as the appropriate mode of transferring them. If, for example, a contract was entered into for the sale of a house, and of all the furniture and plenishing, including pictures, silver-plate, china, and the like, in it at the date of the contract, these articles would not be made the subject of any conveyance or assignation, but would be transferred by delivery and by possession of them being taken, while the house would be conveyed by a disposition which would make no mention of the moveable articles. I am unable to see any principle upon which it could be held that an acceptance of a conveyance of the heritable estate, for the transfer of which conveyance is the appropriate mode, should be held to imply a surrender of the right of the purchaser to corporeal moveables, of perhaps as great or greater value, purchased under the same contract, but for the transfer of which no written title was either required or appropriate. The parts of the contract relating to the heritage and the moveables respectively were as separate as if they had been expressed in different instruments. In this connection it is to be kept in view that, as already pointed out, the disposition does not bear to be granted or accepted as in implement of any contract, so that its terms do not import that the contract is discharged in so far as it related to anything not conveyed by the disposition.

It was, however, maintained by the defender that, even assuming that this would have been so if separate prices had been stipulated to be paid for the heritage and the moveables respectively, the result should be different where, as in the present case, a *cumulo* price was stipulated to be paid for the heritage (including the fixtures) and the fittings. But I am unable to see how this can make any difference if the views above expressed are correct. The obligation would still remain to deliver the corporeal moveables unless the claim to them had been discharged by accepting delivery of the conveyance of the separate heritable estate, which, for the reasons already given, I think it could not be.

I am, therefore, of opinion that the Lord Ordinary's interlocutor should be recalled, and that a proof should be allowed to the parties of their respective averments.

LORD ADAM concurred. No. 30.

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LORD M'LAREN.—I concur, and will confine myself to an illustration of the difficulty of applying the Lord Ordinary's principle without considerable reserve.

Take, for example, a contract of sale for an interest in heritable estate and an interest in ships. This might take place in the sale of the business of a commercial company carrying on trade on the sea, or in the case of the sale of a landed estate with a yacht. It would be impossible to carry out the Lord Ordinary's principle in such a case. Gas-brackets, or a horse and cart, might perhaps be included in a deed of conveyance of land, though this would be a clumsy way of giving delivery. But it would not be possible to make an effective transfer of a ship in a conveyance of land, because by Act of Parliament ships have to be transferred in a special manner, viz., by bill of sale registered in a special register.

The Lord Ordinary's proposition would be sound if qualified to this extent, that it is not competent to go behind a deed of conveyance which exhausts the subject-matter of the contract, but in the case of a deed which either bears to be in part performance, or can be shewn by comparison to be only a part performance, the contract subsists until performance is complete.

LORD KINNEAR.—I agree with your Lordship. It is, perhaps, to be regretted that in a case of this kind we should be compelled to allow a proof which may involve the parties in expenses out of all proportion to the value of the matter in dispute. But that is for them to consider. We must determine the legal rights of litigants, and must leave it to themselves to consider whether it is wise to carry on a costly litigation about matters of little importance.

I am unable to assent to the Lord Ordinary's view of the question at issue. He says the question is whether it is competent for the pursuer to go behind the disposition and to found on the missives of sale. He answers this question in the negative, but it seems to be very doubtful whether he has carried out that answer to its logical conclusion, because after having decided that he cannot go behind the disposition he proceeds to decide the case upon a construction of the missives of sale. He says there is one contract, not two, and on that ground he holds that the disposition was merely intended to carry into effect the previous contract. I do not advert to this as mere criticism of the Lord Ordinary's judgment, because I think it enters into the essence of the whole question between the parties. If a disponee tables a disposition, and says it is in itself conclusive of the contract between him and the disponer, he is in a very strong position; but when he says, compare the disposition with an independent contract, and you will find that the contract contains nothing which is not dealt with in the disposition, and, therefore, that the contract is superseded, his position is totally different. That cannot be determined without interpreting both instruments. I, therefore, cannot agree with the Lord Ordinary's statement that the rights of parties depend entirely on the disposition. There is no doubt as to the soundness of the proposition, that

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when a disposition has been delivered and accepted in performance of a contract for the sale and purchase of land, it is final and conclusive as the expression of intention of the parties in regard to all rights which it is intended and adapted to carry. But a disposition is not a habile mode of transferring corporeal moveables, except such as have been so attached to the soil as to be made part of it, and, accordingly, where there is a sale of land and of separate moveables together, the proper method of completing the purchaser's right, according to our former practice, was to execute a conveyance of the land and to deliver the moveables, and if in any such case the property of the moveables must now be held to pass without delivery, still, where anything beyond the contract itself is required to transfer the right, it is quite certain that it cannot be transferred and the moveables cannot be delivered by conveyance and infeftment. Accordingly, a sound conveyancer in framing a disposition for carrying out such a sale will not think it necessary to insert a futile conveyance of the moveables which would carry nothing. It seems to follow that the mere omission to mention moveables in this disposition affords no indication of a departure by the purchaser from his right to obtain delivery of any moveables he was entitled to under the missives. But then it was said that there is more than mere omission, and the argument is deserving of consideration. It is said that the disposition conveys the land and fixtures for a price of £475 which has been paid; and when the previous contract is looked at, we find that exactly the same price in a lump sum is agreed to be paid for the subjects included in the missives, and that, accordingly, it would seem to follow that the subjects conveyed by disposition are all that the purchaser was entitled to under the missives. I am not prepared to say that this argument is sound on other grounds, but the true answer to it is, that it is a mere inference of fact, which must yield to the actual fact as ascertained by the contract which, *ex hypothesi* of this argument, is the proper record of the transaction. Nor will it do to say that this contract cannot be looked at because of the subsequent disposition, because it is only by looking at it that the argument arises at all; and secondly, because, for the reasons stated by your Lordship, the disposition does not supersede the contract in this matter. The disposition is a written instrument for its own purposes, and has nothing to do with the sale of corporeal moveables, as to which the rights of parties must depend on the terms of the original missives which constitute the contract, and which are the only writings having any bearing on this part of the subject-matter.

THE COURT recalled the Lord Ordinary's interlocutor, and allowed both parties a proof of their respective averments.

ALEXANDER CAMPBELL & SON, S.S.C.—WELSH & FORBES, W.S.—Agents.

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Nov. 30, 1900. Stevenson v. Sneddon.

WILLIAM STEVENSON, Pursuer (Respondent).—*R. V. Campbell—R. S. Horne.*

ROBERT SNEDDON, Defender (Appellant).—*Campbell, Q.C.—Chree.*

Expenses—Liability for—Dominus Litis.—Stevenson and Bennett were the respective proprietors of two immediately adjoining feus, holding of the same superior, Stevenson's feu-disposition having been granted in 1887 and

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Bennett's in 1894. Under the feu-dispositions Stevenson had a servitude of way over a portion of a private road on Bennett's feu. Shortly after Bennett had obtained his feu-disposition Stevenson brought an action in the Sheriff Court against Bennett for interdict against certain encroachments by Bennett, alleged to interfere with Stevenson's exercise of the servitude. Stevenson obtained interdict in the Sheriff Court, with expenses, and on appeal this judgment was affirmed, with additional expenses. Bennett having become bankrupt without payment of these expenses, Stevenson brought an action for the expenses against the common superior, alleging that the superior had been the true *dominus litis* in relation to the defence in the action for interdict.

It was proved that the dispute out of which the action for interdict arose originated between Stevenson and the superior before Bennett had obtained his feu; that Bennett did not wish to make the encroachments complained of or to defend the action, and that he made the encroachments and defended the action only because he was urged to do so by the superior, and because he understood that the superior undertook responsibility for all expenses; that the defences were entered in Bennett's name by the superior's agents and on the superior's instructions; that while the action was in the Sheriff Court the superior was consulted as to the various steps of procedure; that the superior gave instructions for the appeal to the Court of Session (in Bennett's name) without the authority or knowledge of Bennett; that when Bennett was informed that an appeal had been taken, he intimated that he did not wish to appeal, and he allowed his name to be used only on receiving a written guarantee from the superior undertaking responsibility for the whole expenses of the action; and that thereafter the action was conducted entirely on the instructions of the superior (who ultimately paid the whole expenses of the defence), without any interference on the part of Bennett.

Held (1) that the superior was acting in his own interest in taking the appeal to the Court of Session, and had the entire control of the proceedings in connection with the appeal, Bennett having neither interest therein nor control thereof, and that the superior was the true *dominus litis* of the appeal, and was liable to Stevenson for his expenses in opposing the appeal; but (2) (*dub.* Lord Moncreiff) that the superior was not liable to Stevenson for his expenses incurred in the Sheriff Court:—*diss.* Lord Young, who held that the superior was not the true *dominus litis*, and was not liable for any part of Stevenson's expenses, in respect that the superior had not a direct interest in the subject-matter of the litigation, and, through such an interest, a right to control the conduct of the litigation as he pleased without regard to the wishes of the nominal litigant.

Mathieson v. *Thomson*, 16 D. 19; *Fraser* v. *Malloch*, 23 R. 619; and *Kerr* v. *Employers Liability Assurance Corporation, Limited*, 2 F. 17, *commented on.*

2D DIVISION.
Sheriff of Lanarkshire.

BY feu-disposition, dated 9th July 1887, William Jardine and Alexander Weir, as proprietors of the lands of Dykehead, in the parish of Shotts, Lanarkshire, feued out a piece of ground, one rood in extent, part of these lands, to William Stevenson junior, ironmonger, Dykehead. The ground feued was described as "lying in the south side of the public road leading from Stane to Shotts Kirk, and immediately to the east of the road or entrance into Dykehead farm-steading"; and as bounded, *inter alia*, "on the north by the south side of the said public road . . . on the west by the present fence dividing the ground hereby disponed from the said entrance into Dykehead farm-steading . . . together with the right to use the said road or entrance into Dykehead farm-steading to the extent of 11 feet in breadth and 65 feet backwards from off said

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public road and of forming a gate or access in said west boundary for carts and carriage traffic only within the limits of said 65 feet back from the said north boundary, . . . and we . . . grant warrandice, excepting always the current tacks or leases and the rights of the proprietors of the minerals in terms of their titles thereto."

After obtaining this feu-disposition Stevenson erected a building on the ground feued, and he also made a gate in the fence forming the west boundary, which gate became the access from the public road, over the Dykehead farm road, to the back part of Stevenson's building.

In January 1894 Robert Sneddon, who had come to be proprietor of the lands of Dykehead, including the superiority of Stevenson's feu, entered into negotiations with Alexander Bennett, miner, Dykehead, for a feu to Bennett of a piece of ground immediately to the west of Stevenson's feu.

On 18th January 1894 Messrs Motherwell & M'Murdo, Stevenson's law-agents, wrote to Sneddon that they had been informed by Stevenson "that you have feued, or are about to feu, the road between Dykehead Farm and Mr Stevenson's feu, which road Mr Stevenson is entitled to use, in terms of his title. We have to intimate that if any attempt is made to build on or otherwise block up this road, an action of interdict will be raised."

On 19th January Messrs Brown, Mair, Gemmill, & Hislop, Sneddon's law-agents, replied that their client "has no intention of building by himself or feuars on the 11 feet road running along the side of Mr Stevenson's feu. Mr Sneddon, however, informs us that the strip of ground on which Mr Stevenson under his title has right of way, is 11 feet broad and 65 feet long. Instead of putting his gate, as he was bound to do, within 65 feet from the northern boundary, it appears that Mr Stevenson has gone 12 feet farther back, thus making the road 77 feet long. Our client cannot permit this encroachment to continue, and unless you can assure us by Wednesday first that he will remove his gate from its present position, and bring it northward within the 65 feet limit, our client will immediately take steps that will effectually prevent further encroachment."

A correspondence then ensued, in which the agents respectively maintained the positions taken up in the foregoing letters.

The question in dispute depended on the breadth of the public road at the point where the Dykehead farm road branched off. Stevenson maintained that the public road at this point was about 12 feet broader, and consequently that the entrance to the farm road was 12 feet further south, than according to Sneddon's contention was the true state of the facts.

By feu-disposition, dated 21st March 1894, Sneddon disponed to Bennett a piece of ground specified immediately to the west of Stevenson's feu. This ground included the *solum* of the Dykehead farm road, in so far as *ex adverso* of Stevenson's west boundary. With reference to this road Bennett's feu-disposition contained the following clause:—"And reserving further to me and my successors and the said William Stevenson and me and my foresaids, other feuars and tenants and any other party on whom I or my foresaids may confer the same, a servitude of free ish and access over the strip of ground on the south-east of the ground hereby feued and included in the foresaid measurement of 11 feet in breadth at the narrowest point, and extending along the said south-east side from the said public

road for a distance of 65 feet backwards, which strip of ground . . . shall remain unbuilt on in all time coming." The warrandice clause was in these terms:—"And I grant warrandice."

Before he had obtained the feu-disposition Bennett had commenced building operations on the ground, and in doing so he had treated the *solum* of 12 feet of roadway, which was the subject of dispute in the foregoing correspondence, as if it were under no restriction in favour of Stevenson. He deposited soil and other material on that part of the roadway, thereby hindering the traffic to Stevenson's feu, and he erected his building so as to encroach somewhat on the ground in dispute. This he did on the authority and at the suggestion of Sneddon.

In October 1894, after Bennett had completed the building of his house on his feu, and when he proposed to erect a fence on the disputed 12 feet, which would completely obstruct the entrance from the Dykehead farm road to Stevenson's feu, Stevenson brought an action in the Sheriff Court at Airdrie against Bennett praying to have him interdicted "from erecting a fence upon the entrance 11 feet in breadth and 65 feet in length backwards from the public road along the western boundary of the pursuer's property at Dykehead . . . which entrance is common property to the pursuer and the defender, and from laying down soil or other material thereon," and for decree ordaining the defender "instantly to remove all soil and other material laid down by him, and also to take down and remove the building already erected upon the said common entrance, and . . . to restore the said common entrance to the same conditions as it was before the same was interfered with by the defender."

In this action defences were lodged. The pursuer Stevenson did not insist in the prayer to have the building removed, and *quoad* that the action was ultimately dismissed. *Quoad ultra* the Sheriff-substitute (Mair) being of opinion that the 12 feet in question formed part of the 65 feet from the public roadway, pronounced an interlocutor on 31st July 1896, granting interdict, and ordaining Bennett to remove the soil from the 12 feet of roadway, with expenses. On 19th March 1897 the Sheriff (Berry) adhered, with additional expenses. On appeal the Second Division, on 2d July 1897, affirmed the judgment, with the expenses of the appeal.

Stevenson's expenses, as taxed, amounted to £82, 9s. 1d., of which £42, 13s. 4d. were the expenses of the appeal to the Court of Session.

Bennett having been sequestrated without having paid Stevenson any part of his expenses, Stevenson brought the present action in the Sheriff Court at Airdrie against Sneddon for payment of £82, 9s. 1d.

The pursuer, after describing his own and the defender's titles, and also that of Bennett, and giving a narrative of the proceedings in the former action, averred,—(Cond. 5) "In that action the said Alexander Bennett was not the real defender. The real *dominus litis* was the said Robert Sneddon. He acted as principal, and the said Alexander Bennett acted as his agent. Although directed only against the said Alexander Bennett, the said action seriously affected the said Robert Sneddon. It decided whether or not it was *ultra vires* of him to grant a disposition such as he did to the said Alexander Bennett. Accordingly when said action was raised, the said Alexander Bennett requested the defender to free and relieve him of all expenses con-

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nected therewith. This the defender did by granting to the said Alexander Bennett a letter of guarantee. In so doing he authorised the said Alexander Bennett to defend said action, and during the whole period of its dependence defender's real attitude to it was that of *dominus litis*. Through his interest in it he had the full control and direction of said action, and therefore power to retard or push it on or put an end to it altogether. Never during its dependence did he abandon the attitude of *dominus litis* which he had taken up or quit himself of the responsibility he had incurred in granting said letter of guarantee. Had he done so, his agent, the said Alexander Bennett, would have ceased to defend said action."

The defender denied the averment quoted, and stated (Stat. 1) that shortly after the action for interdict was raised, he, "being desirous of protecting his feuars as far as possible," agreed to relieve Bennett "to the extent of one-half of any expense which he might incur in opposing the said action of interdict"; that he ultimately became responsible for the whole expenses of the defence, but that he had no personal or pecuniary interest in the result of that action, and no control over the proceedings therein.

The pursuer pleaded, *inter alia*;—(2) The defender being the real *dominus litis* in said action, and, as such, liable to pursuer in the sum sued for, decree therefor should be granted against him, with expenses, as craved.

The defender pleaded;—(1) The pursuer's averments are irrelevant and insufficient to warrant the conclusions of the action. (2) The pursuer's statements, so far as material, being unfounded in fact and law, the defender is entitled to absolvitor, with expenses.

On 10th June 1898 the Sheriff-substitute (Mair) allowed a proof before answer.

The facts already narrated were established by the evidence led at the proof. The rest of the evidence was to the following general effect, certain further details, including quotations from the evidence, written and parole, being given in the opinions of the Court, particularly in the opinion of Lord Moncreiff:—

Bennett personally had no wish to interfere with Stevenson's use of the 12 feet in question of the Dykehead farm road. He deponed that he interfered with that part of the road only because Sneddon urged him to do so, telling him that it was within his right. The correspondence between Motherwell & M'Murdo and Brown, Mair, Gemmill, & Hislop regarding Bennett's operations, which was initiated by the letters, above quoted, of 18th and 19th January 1894, was continued down to the raising of the action for interdict in October 1894, but there was nothing in that correspondence to suggest that, after the granting of the feu-disposition to Bennett on 21st March 1894, Brown, Mair, Gemmill, & Hislop had ceased to act for Sneddon, or that they were acting for Bennett. When the action for interdict was served on Bennett, he took the service copy of the petition to Sneddon. Bennett deponed that he did not wish to defend the action, and that he did so only because Sneddon told him that his (Bennett's) name was necessary, and because Sneddon agreed to be responsible for the whole expenses—according to Sneddon's evidence he undertook, in the first instance, to pay one-half only of the expenses. Sneddon took the service copy of the petition to his agents, Brown, Mair, Gemmill, & Hislop (who had also done some

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work for Bennett), and instructed them to enter appearance,* which they did. During the progress of the action in the Sheriff Court, Sneddon was consulted as to the various steps of procedure, and as to the witnesses to be examined, but he did not attend the proof; Bennett was examined as a witness. On 19th March 1897, the day on which the Sheriff affirmed the Sheriff-substitute's judgment, Brown, Mair, Gemmill, & Hislop wrote to Sneddon advising an appeal. On 31st March Sneddon instructed Brown, Mair, Gemmill, & Hislop to lodge an appeal, which they did on the following day. Bennett did not authorise, and knew nothing about, the taking of the appeal before it was taken. He was on 7th April informed by Brown, Mair, Gemmill, & Hislop that the case had been appealed in his name.† He said that he did not wish to appeal, and he agreed to allow his name to be used only on condition of receiving a written guarantee from Sneddon undertaking all liability for expenses. On 9th April, Brown, Mair, Gemmill, & Hislop sent Bennett the letter of guarantee which is quoted below.‡ This letter Bennett gave back to Sneddon in June following, prior to the hearing in the Court of Session. The appeal in the Court of Session was conducted throughout on the instructions of Sneddon, and without any interference on the part of Bennett. Sneddon paid the whole expenses of the defence, both in the Sheriff Court and in the Court of Session.

On 17th January 1900, the Sheriff-substitute (Mair) pronounced this interlocutor in the present action:—"Finds that the defender was the *dominus litis* (of the defence) in the action mentioned in the petition, and is liable in the expenses to which the pursuer was therein found entitled: Finds that these expenses, as taxed, amounted to £82, 9s. 1d., for which sum, with interest thereon, decerns against

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* The following entry occurred in the business account rendered by Brown, Mair, Gemmill, & Hislop to Bennett:—"1894, Oct. 11. Attendance with Mr Sneddon, receiving instructions to defend action raised against you by W. Stevenson jr., . . ."

† Letter, Brown, Mair, Gemmill, & Hislop to Sneddon, dated 7th April 1897:—

"Dear Sir,—As suggested in your letter, we wrote Mr Bennett to call, and we have seen him to-day. He says that he has no objections to the case being taken by you in his name to the Court of Session, but on the understanding that whether it is won or lost, you pay the whole costs incurred, or that may be incurred, by him in the case, or for which he may be found liable. We explained to him that he need not be nervous on this point, as we quite understood that you, and not he, were to pay all expenses, but we impressed upon him that he should not say you were appealing, or reveal to Stevenson or others your connection with the case. He finally stated that, 'as the expenses of a Court of Session case are very considerable, I would like you to get a letter from Mr Sneddon relieving me'; and to satisfy Mr Bennett we will be glad that you send us this in course. . . ."

‡ Letter, Brown, Mair, Gemmill, & Hislop to Bennett, dated 9th April 1897:—

"Dear Sir,—We have now seen Mr Sneddon as to the expenses of this action, and he instructs us to write you and state that, on the understanding that you allow him to appeal the case in your name to the Court of Session, he will relieve you of all the expenses of the action and of all expenses for which you may be found liable in the event of the case being decided against you. We have, accordingly, instructed the appeal, and will let you know what the judgment is, when received.—Yours faithfully."

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the defender in terms of the prayer of the petition: Finds the pursuer entitled to expenses," &c.

On appeal the Sheriff (Berry), on 24th May 1900, adhered.

The defender appealed.

The nature of the arguments sufficiently appears from the opinions of the Court.[1]

At advising,—

LORD JUSTICE-CLERK.—The defender in this case is alleged by the pursuer to have been the true *dominus litis* in a litigation between the pursuer and one Bennett, which related to certain rights of the owners of feus given off by the present defender to the pursuer and to Bennett. The pursuer in this action was successful in the litigation in the Sheriff Court, and the case was carried by appeal to this Court. While the case was in the Sheriff Court the defender gave Bennett assistance in carrying on the case, and it is clear upon the evidence that he took a great interest in the litigation, and undertook to assist Bennett with funds to enable him to carry it on. Up to this point I do not think that he had taken up such a position as that it could be said of him that he was the *dominus litis* in the proceedings. Anyone is entitled to aid a litigant with funds to carry on his case, and as long as he confines himself to thus supporting with funds a litigant who is in truth carrying on the case himself, he incurs no responsibility to the opposite party. And, therefore, up to the date of the case being concluded in the Sheriff Court, I am of opinion that the defender in this case cannot be made liable for the pursuer's expenses.

But a distinct change took place from that day forward. It appears from the evidence that Bennett, the party to the litigation, had never instructed any appeal to be taken, and declined to take it, being satisfied that there was no case which he could successfully maintain. But the defender took up the case himself. He instructed an appeal to be taken out in Bennett's name, and took up and conducted the case, Bennett having nothing further to do with it, and indeed advising the present defender to give up the appeal, being satisfied that it was untenable. The defender took the whole proceedings into his own hands. Although Bennett asked him to withdraw the appeal, he was resolved to go on, and did go on, and the only action taken by Bennett was the negative action of not interfering, and so allowing the case still to go on in his name. On the other hand, the defender instructed the appeal, being advised by his own agent that he had an interest in the case. He took the whole charge of the case without regard to Bennett, the party to the suit. But for his orders the appeal would neither have been taken nor carried on. In these circumstances I think that the defender was the actual litigant in the appeal, and that accordingly he is liable in the expenses of the respondent in the appeal, he

[1] *Authorities cited.*—Mathieson v. Thomson, Nov. 8, 1853, 16 D. 19, 26 Scot. Jur. 24; Fraser v. Cameron, March 8, 1892, 19 R. 564; Fraser v. Malloch, March 12, 1896, 23 R. 619; Kerr v. Employers' Liability Assurance Corporation, Limited, Oct. 20, 1899, 2 F. 17; Bradlaugh v. Newdegate, 1883, L. R., 11 Q. B. D. 1; Cujacius, ix. 1065; Gaius, iv. 101.

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having been unsuccessful in maintaining the appeal in this Court. In the language used in the judgment in the case of *Kerr*,[1] he was the person who caused the expense to be incurred in this Court. I would therefore propose that the interlocutors in the Court below should be altered, and the defender found liable to the pursuer in the expenses of the appeal to the Court of Session in the case at the present pursuer's instance against Bennett.

LORD YOUNG.—I have from the first regarded this as an important case raising questions of law of considerable interest.

The defender's first plea in law is a plea to relevancy. The Sheriff-substitute, disregarding that plea, allowed a proof before answer, and his judgment proceeds on the proof thus allowed. The Sheriff has simply affirmed the Sheriff-substitute's judgment. At the commencement of the debate I called attention to the fact that both the learned Sheriffs have disregarded the Act of Sederunt, which requires every Sheriff, in giving judgment on a proof, to pronounce distinct and separate findings in fact and in law, and I indicated my view that we ought to follow the course which we have taken in some cases, and remit to the Sheriff-substitute to find the facts as he was prepared to find them on the evidence, and on which his findings in law were based. Your Lordships did not take that view, and I did not see any necessity to press it. So that we have here a judgment proceeding on a proof, but without any findings in fact.

I take the law on the subject from the decision in *Mathieson* v. *Thomson*,[2] and from the judgment of Lord Rutherfurd in that case, where he says at p. 23 of the report,—"There may be some difficulty in defining exactly what is a *dominus litis;* but I confess that I very much agree with what has been laid down by your Lordship, and with the definition quoted from the civil law by Lord Ivory, that he is a party who has an interest in the subject-matter of the suit, and through that interest a proper control over the proceedings in the action. Now, it will not make a person liable in the expenses of an action that he instigated the suit, or told a man that he had a good cause of action, and that he would be a fool if he did not prosecute it, or though he promoted it by more substantial assistance. It will not make him liable in the expenses of the suit, that while he does both of these things he shall have some ultimate consequent benefit in the issue of that suit. But when you go a step further and find a party with a direct interest in the subject-matter of the litigation, and through that interest master of the litigation itself, having the control and direction of the suit, with power to retard it or push it on, or put an end to it altogether, then you have a proper character of *dominus litis*, and though another name may be substituted, the party behind is answerable for the expenses." I take that as a good definition of the facts which will constitute *dominus litis*, and I do so all the more readily because it was taken as a good definition in the last case in this Court on this subject, which occurred in the other Division—I mean the case of *Kerr* v. *Employers' Assurance Corporation*.[1] Lord Adam says this,[3]—"I have always understood the definition given by

[1] 2 F. 17. [2] 16 D. 19. [3] 2 F. at p. 23.

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Lord Rutherfurd in the case of *Mathieson* v. *Thomson*[1] to be the sound definition of what a *dominus litis* was, and I understood Mr Campbell to approve of that definition. In that case it is laid down that a *dominus litis* is 'a party who has an interest in the subject-matter of the suit, and through that interest a proper control over the proceedings in the action.'" In both these cases direct interest in the subject-matter of the suit was taken as the sound definition of *dominus litis*. I take Lord Rutherfurd as giving a definition of *dominus litis*—as stating those facts without which you cannot have a *dominus litis*—and not as stating a case in which liability as *dominus litis* had been established, for on the evidence which was before the Court in the case of *Mathieson*[2] it was held that liability as *dominus litis* had not been established. That being so, we have to consider whether a relevant case of liability as *dominus litis* has been stated here, and if we have a relevant case, we have then to consider whether that case has been established by the evidence.

The suit, for the expenses of which the pursuer seeks in this action to have the defender found liable as *dominus litis*, was an action by the present pursuer against a man named Bennett. In that action the pursuer prayed the Court to interdict Bennett from erecting a fence upon the entrance 11 feet in breadth and 65 feet in length backwards from the public road along the western boundary of the pursuer's property at Dykehead, "which entrance is common property to the pursuer and the defender," and from laying down soil or other material thereon, and for decree ordaining the defender to remove all soil or other material laid down, and also to take down a building already erected by him upon the said common entrance, and to restore the said common entrance to the same condition as it was in before it was interfered with by the defender. In that action the pursuer succeeded but only partially, for he did not get a decree to have the house removed, but he was found entitled to expenses, and it is for these expenses that he sues the present defender Sneddon in this action on the ground that Sneddon was truly the *dominus litis* as regards the defence in the former action. Now, what are the grounds on which the pursuer says that Sneddon was the *dominus litis* of that action? I proceed to consider the pursuer's statements on record here with reference to the plea on which no judgment has been pronounced—the plea to relevancy.

The pursuer begins by stating that the defender was the proprietor of the subjects which became the property of Bennett, and that he disponed these subjects to Bennett by a feu-disposition in 1894, but there is not a word said which implies that, as the seller of the subjects to Bennett, any liability attaches to the defender. It is just an ordinary disposition by a seller to a purchaser. It is no doubt a disposition under which the purchaser was to hold of the seller as superior, but there is no suggestion that liability attaches to Sneddon as superior any more than as seller. I can understand the case of a seller granting a conveyance in such terms as to make him liable to the purchaser in the event of the purchaser being unsuccessful in a litigation with a third party regarding the subjects. In such a case if the seller actively intervenes and assists the purchaser in the litigation, it may

[1] 16 D. 19.

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well be that he may be held liable as *dominus litis*. But there is no averment of that sort here. Neither the fact that Sneddon was the seller to Bennett nor the fact that he was Bennett's superior is alleged to have any bearing on the question.

I come now to the 5th article of the condescendence, for the case for the pursuer does not seem to me to begin to be stated until that article is reached. It is in these terms (his Lordship read cond. 5). That contains in my opinion the whole statement in support of the proposition on which this action is founded—that Sneddon was the *dominus litis* of the former action.

Now, I am, I must say, clearly of opinion that the averments which I have just read do not contain a relevant case for holding that Sneddon was *dominus litis* of the former action. In the averments no distinction is drawn, or is attempted to be drawn, between Sneddon's relation to that action before it was appealed to the Court of Session, and his relation to it after it had been appealed. Your Lordship is of opinion that Sneddon was not *dominus litis* before the case came to the Court of Session, and I am of that opinion also. But I further think that there is here no relevant statement that he was *dominus litis* even after the case had been appealed. I think that there is no relevant statement that he had a direct interest in the subject-matter of the action, and through that interest a proper control of the action. In the case of *Mathieson*[1] both Lord Rutherfurd and Lord Ivory point out that there may be very substantial interests which do not amount to interests giving a control of an action. For example, a man of business who, from motives of pure charity, undertakes the case of a poor person who himself cannot afford to defend or prosecute a claim; or a speculative agent, who is of opinion that, with probable advantage to himself if successful, he may undertake to conduct a litigation for a poor person; in such cases the agent has an interest in the litigation, but it is not an interest of a kind which will constitute him the *dominus litis*. In the same way an action is frequently taken up by a trade or profession, who promise to see the pursuer or the defender, as the case may be, through with it to the very end from the Sheriff Court or the Outer-House to the House of Lords, if need be; but neither in that case is there an interest in the subject-matter of the suit. The trade or profession plainly enough has an interest in having the case decided in the one way or the other, but an interest in the subject-matter of the suit does not mean an interest in having the case decided in one way or the other—it means an interest in the suit itself.

Now, are there any averments here shewing that Sneddon was interested in the subject-matter of the suit? I do not think so. What is required is not a mere general averment that Sneddon was interested in the suit. It will not do just to say that. You must point out in some detail what the nature of his interest is, and how he came to have it. I put the question more than once—was it intended to say that Sneddon had an interest as the seller of the subjects or as the superior? and the answer I got was that it was impossible to say that he had an interest either as the seller or as the superior. Your Lordship, I suppose, thinks so too, because it is your Lord-

[1] 16 D. 19.

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ship's opinion that Sneddon had no interest in the suit up to the date of the appeal. Now, what does Sneddon's anxiety as to prosecuting the appeal shew? It shews, I should suppose, merely this—that he was anxious to make plain his *bona fides* in expressing the belief that Bennett was in the right. I should infer that Sneddon desired an appeal, and advised an appeal to be taken, merely because he thought that Bennett had the right on his side. I do not think that there is any averment here implying that there was anything more. There is no doubt the guarantee to pay the expenses, but as to that I must say that I am unable to see the bearing of it. It is just the case of a poor litigant with a friend who comes forward and undertakes responsibility for the litigant's expenses. When a person interposes in this way with his assistance there is nothing, I think looking either to authority or to the reason of the thing which should require us to hold that the person who has so come forward has been constituted the *dominus litis*. In a sense of course he has an interest in the litigation, and he also, through the litigant whom he is befriending, may have a certain control of the proceedings, but that is not the kind of interest nor the kind of control which are required to make a man the *dominus litis*. The control must be control through a direct interest in the subject-matter of the litigation, entitling the person having the interest and the control to deal with the litigation as he pleases without any regard to the will and disposition of the person who is nominally the party to the action—that person being, in so far as the action is concerned, a name and nothing more.

My opinion therefore is that the defender's plea to relevancy should be sustained, but if the case is to be determined on the facts disclosed by the proof, I should reach the same practical result. I should hold that it has not been proved that the defender had any direct interest in the subject matter of the suit, from which it follows that he had no proper control of the proceedings, and consequently that he was not the *dominus litis*.

Lord Trayner.—I think it may fairly enough be represented that, according to some authorities in our law, the distinctive marks of a *dominus litis* are, an interest in the subject-matter of the suit, and control of the action. It has not been determined, so far as I know, how much or how little interest in the subject-matter of the suit is necessary or sufficient to constitute the *dominus litis;* and as to the control, I think it is settled that that need not be absolute. But I think the later authorities have countenanced a somewhat wider view, and laid down a principle or rule upon the subject which is easier of application and altogether less technical than the rule which I have said is that recognised in the older cases. I shall advert to this, the newer principle, immediately; but think it right first to notice shortly the facts out of which the present question has arisen.

The defender is the proprietor of lands in the neighbourhood of Shotts, part of which he feued to the pursuer with a right of access to his feu over a certain road. The defender subsequently granted a feu of part of his lands in favour of Alexander Bennett, which included in its

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measurement the foresaid road, but reserved Stevenson's servitude over it. The pursuer, having some reason to believe that Bennett proposed in his building operations to encroach upon the road, intimated to the defender that such a proceeding, if adopted, would be an invasion of his rights, and that he would, if necessary, bring an interdict to prevent it. The defender's reply to this practically was that what Bennett proposed to do was within his right, and that the road to which the pursuer's complaint referred was not the road reserved to the pursuer; but that the pursuer had himself encroached on the defender's rights by placing his gate in such a position as to increase the length of the road in question, an encroachment which the defender said he would take steps to prevent by having the pursuer's gate removed from where it then stood. The result was that the pursuer brought his action of interdict against Bennett, in which he was successful, and Bennett was found liable in expenses. That action was appealed to the Court of Session, where the judgment of the inferior Court was affirmed, and Bennett again found liable in expenses. It is for the expenses in that action that the pursuer now seeks decree against the defender. I think the following facts have been clearly established:—(1) That Bennett personally had no desire or interest to encroach upon the road. (2) That he was incited to persist in his encroachment by the defender. (3) That the defender undertook to keep Bennett free of expense in connection with the encroachment, and the action of interdict. (4) That the defender was kept duly informed of the different steps of procedure which were taken in the action in the inferior Court by the agent therein, who acted for and in name of Bennett, and was also the defender's law-agent. (5) That when the decision in the inferior Court was pronounced, the defender, without the authority of Bennett, and contrary to his desire, instructed an appeal to this Court, where the appeal was conducted entirely on the instructions and at the expense of the defender; and (6) That he paid the expenses of the appeal, as well as the expenses incurred in the inferior Court, to the agents who acted for him, although acting nominally for Bennett. Now, if to this state of facts be applied what I have referred to above as the later or newer doctrine, there can be no doubt of the defender's liability for the claim now made upon him by the pursuer, at all events to some extent. In the case of *Kerr*[1] the Lord President said—"What is the ground on which a *dominus litis* is made liable in expenses? As I take it, it is simply the ground on which everybody is made liable in expenses, and it is stated thus by Lord Jeffrey in *Kirkpatrick* v. *Irvine*[2]—'If any party is put to expense in vindicating his rights, he is entitled to recover it from the person by whom it was created'—that is to say, by whom the expense was created. The person who ultimately holds a judgment in his favour is held to be the person who has the right, and if that right is challenged by anybody, and expense caused by the challenge, against the person causing the expense is the right to recover expenses." In like manner Lord Adam[3]—"The principle, I think, is that the party who has occasioned the expenses in the proceedings must refund

[1] 2 F. 17, at p. 22.

[2] Jan. 18, 1848, 10 D. 367.

[3] 2 F., at p. 24.

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these expenses." The other Judges in the Division concurred. I find the same views indicated, although not expressed with the same precision, in the case of *Hepburn* v. *Tait*.[1] No doubt the cases of *Kerr*[2] and *Hepburn*[1] were different in many respects from the present, but the opinions I have referred to were delivered as expressing a general principle, not affected by the specialties which distinguish those cases from this one. I concur in the opinions so delivered. The person who without just cause puts another to expense in vindicating his rights is the person who ought to pay the expense.

In the case of *Fraser* v. *Malloch*,[3] Lord Kyllachy, in an able and very interesting judgment, arrives at the conclusion that the liability of a *dominus litis* depends upon whether it can be affirmed that the nominal pursuer or defender was merely the agent acting for an undisclosed principal. I reserve my opinion upon this view. But assuming it to be sound, I think the application of that rule also would involve the defender in liability for the expense, at least, incurred by the appeal to the Court of Session. For in that appeal Bennett simply lent his name to the defender at the defender's request. Bennett thought that in the case with the pursuer he (Bennett) was in the wrong, and wanted to give up the case before judgment was pronounced by the Sheriff. He certainly never appealed against that judgment. So entirely did the defender know this, that after he had (without authority) taken the appeal, he asked his agent to apply to Bennett for leave to use his name as appellant, as Bennett (in his opinion) was more likely to give his consent if asked by the agent than if asked by himself (the defender). Bennett did consent to his name being used on being guaranteed that the present defender would keep him free of expense as well as relieve him of any expense for which he might be held liable. That guarantee the defender gave. I think, therefore, it cannot be doubted that in the appeal to this Court Bennett was merely a nominal appellant acting merely as agent for and at the request of the present defender.

But even applying the old and narrower ground of liability, I think the defender has incurred some liability for expenses as *dominus litis*. The old requirements were, as I have stated, interest in and control of the suit. Had the defender no interest in the action between the pursuer and Bennett? His law-agent (examined as a witness in the case) says that the defender had a "real interest in the action," and explains this to consist in questions which might arise on his warrandice to one or other of his vassals. If the law-agent had that opinion, he doubtless so advised the defender, and the defender therefore had, or thought he had, a "real interest" in the question which the pursuer's application for interdict raised. That he did think so appears from his statement in this case, where he explains (stat. 1) that he assisted Bennett from a desire to protect "his feuars." I do not suppose he came to Bennett's assistance merely because Bennett was being oppressed by a neighbouring feuar. He would probably have allowed Bennett to fight his own battle had there not been behind his own interest as superior to look to. He had not only an interest in the case, but he had also the control, and

[1] May 12, 1874, 1 R. 875. [2] 2 F. 17. [3] 23 R. 619.

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the entire control, of the appeal. He instructed it, he called it his appeal, was present at its discussion, paid for it, and could certainly have departed from it just as he had taken it, without consulting Bennett or any other person. It was remarked in the course of the debate that he had not the control of the appeal, because Bennett could at any moment have disclaimed or withdrawn it. Well, perhaps he could. So could any nominal pursuer or defender. But so long as that is not done the control lies with the *dominus*—and it remained in fact with and was exercised by the defender in this case down to the final judgment of this Court.

On either of the views, therefore, whether the older or more modern, on which the liability for expenses as *dominus litis* may be founded, the liability of the defender here seems to be made out. I have had no difficulty in coming to that conclusion. The only difficulty I have felt is, whether the defender's liability is for the whole expenses incurred, or only the expenses of and connected with the appeal to the Court of Session. I think there is room for holding as I do (although I have reached that conclusion with some difficulty), that while the action was pending in the Sheriff Court, the connection which the defender had with it, although he had then as later a real interest in the case, was or might be thought to be that only of encouraging Bennett to resist the pursuer, and assisting him to do so by agreeing to pay the expenses incurred to his own agent. On that ground I am of opinion that the defender is not liable to the pursuer in the expenses incurred by the pursuer in the Sheriff Court. But in regard to the appeal the case stands in a very different position. In the appeal the defender was the true *dominus litis*, and for the reasons I have already given, I think he is liable to the pursuer in the whole expenses of and connected with that appeal. To that extent and effect I would affirm the interlocutor appealed from.

I have not adverted at all to the terms of the guarantee given by the defender to Bennett after the appeal to the Court of Session was taken, because, in my opinion, the defender's liability to the extent I have mentioned seemed sufficiently established without reference to the guarantee. I may just add, however, that the terms of that guarantee afford important evidence of the fact that in the appeal the defender was the true *dominus litis*, and Bennett in the strictest sense a mere mask or name under cover of which the defender acted.

LORD MONCREIFF.—I agree with the Sheriffs that in the former process between the pursuer and Alexander Bennett the present defender Sneddon was the true *dominus litis*. He caused the litigation; he instructed the defence; he financed it; he controlled it from first to last; and in consequence of his persistence, both in the Sheriff Court and in this Court, the pursuer, although successful in both Courts, has been saddled with expenses amounting to upwards of £80, which he is unable to recover from Bennett, who is bankrupt.

The facts which I have summarised are fully established by the proof and correspondence; but as the case is somewhat special, I shall advert in some detail to one or two points which seem to me to be of importance.

It is of importance to note that the dispute arose between the pursuer

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and the present defender before the feu was granted to Bennett. In January 1894 the pursuer suspected, and suspected rightly, that Sneddon intended, by himself or under cover of a feuar, to encroach upon an access to the pursuer's ground to which the latter is entitled under his feu-disposition. The access is described in his title as being a "road or entrance into Dykehead farm-steading to the extent of 11 feet in breadth and 65 feet backwards from off said public road." Accordingly, by letter of 18th January 1894, the pursuer's agents intimated to Sneddon that if any attempt were made to build on or otherwise block up this road an action would be raised.

In reply Sneddon's agents wrote a letter, dated 19th January 1894, which I quote in full, because it shews that at that time Sneddon maintained his right (wrongly, as appears from the subsequent decision) to encroach upon the pursuer's access—"Dear Sirs,—Mr Sneddon of Hillhouseridge has handed us your two letters of yesterday with instructions to reply. With reference to Mr Stevenson's feu we are to state that our client has no intention of building by himself or feuars on the 11 feet road running along the side of Mr Stevenson's feu. Mr Sneddon, however, informs us that the strip of ground on which Mr Stevenson under his title has right of way is 11 feet broad and 65 feet long. Instead of putting his gate, as he was bound to do, within 65 feet from the northern boundary, it appears that Mr Stevenson has gone 12 feet further back, thus making the road 77 feet long. Our client cannot permit this encroachment to continue, and unless you can assure us by Wednesday first that he will remove his gate from its position, and bring it northward within the 65 feet limit, our client will immediately take steps that will effectually prevent further encroachment.—Yours truly."

From this letter it will be seen that the dispute was not as to the width of the access, but as to its length, Sneddon alleging that the pursuer had encroached 10 or 12 feet beyond the 65 feet allowed by his feu-right. Off the piece in dispute the pursuer's only access opened.

In a letter dated 23d January the pursuer's agents accurately described the pursuer's position, which was afterwards held to be well founded, that his gate was within the 65 feet, and on 24th January 1894 Sneddon's agents reiterated their contention, and added,—"We must ask that your client desist from putting any gate beyond the limit of this 65 feet."

On 21st March 1894 Sneddon granted a feu to Bennett of the ground over which the access ran. The terms of the feu-disposition are unobjectionable, because in reserving the pursuer's right to the access it simply echoes the words in the pursuer's title—that is, it describes the right as being a right to use the road or entrance into Dykehead farm-steading to the extent of 11 feet in breadth, and 65 feet backwards from off said public road. But then—and this is the important matter—Sneddon instructed Bennett to build upon and obstruct the existing access so as to shut up the pursuer's gate. This is the account which Bennett gives,—"Before the feu was actually granted, and before any buildings were commenced, the defender said to me to go on with the building, that he would see it all right, or something to that effect. He told me that he had received a letter from the pursuer's agents with reference to the entrance,

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and that they had threatened, in the event of that entrance being blocked up, an action for interdict would be raised. After this conversation the defender authorised me to go on with the building, as the ground was his, and he said that I would be all right, that he would stand responsible for anything that would happen between pursuer and me. He was aware that the buildings were being erected; he saw them every day. Besides erecting the buildings I laid down soil on the entrance in question, and while I was doing so the pursuer checked me for putting the soil down—that I encroached on his gateway. Pursuer told me that I was encroaching too far, and I stopped at that time. I told him that I was only obeying orders. He asked me who gave me the orders, and I told him that it was Mr Sneddon, the defender. In consequence of the amount of dirt which was laid down, it was not very easy for a cart to go in; it was nearly half-way over the gate. I remember of a lorry coming from the railway station to deliver goods. The lorry could not get in, and the dirt was shifted at the time. I sent word to the defender about this; I was still to continue putting on the dirt—that the ground belonged to me. This was shortly before I was served with a summons for interdict." I may here note that this account, as far as I know, is not contradicted by Sneddon in his evidence.

The pursuer's agents on 22d September 1894 complained of Bennett's operations, stating that he was about to erect a fence which would prevent the pursuer getting entrance to his feu, and adding,—"We also find that, notwithstanding your letter to us of 19th January last, your client (that is Sneddon) has allowed Bennett to build on the 11 feet road." They added,—"Our client has no wish to adopt legal proceedings if these can be avoided, and we would suggest that a meeting upon the ground should take place *at once*, where we could more easily explain the position of matters, and when some arrangement might be come to."

The reply, 25th September 1894, is,—"We are not prepared to make any arrangement in the meantime in this matter." And on 3d October, long after Bennett had obtained his feu-charter, Messrs Brown, Mair, Gemmill, & Hislop, as agents for Sneddon, write,—"Referring to Mr M'Murdo's call to-day, we have seen Mr Sneddon, who says that he has undoubted evidence that the fence is on the line of the old hedge except at one point, where it slightly encroaches on the 11 feet of reserved ground. You had better, therefore, raise your action. We are," &c.

I have dwelt upon this part of the case because it shews that the dispute originated with the defender, and not with Bennett; that Bennett acted on the defender's instructions, and that even after the feu was granted to Bennett, Sneddon accepted the position of being the real contradictor, and challenged an action. The truth is that Bennett had no real interest to encroach upon this disputed 10 or 12 feet of ground; while the effect of the encroachment was to deprive the pursuer of his existing and only access.

Accordingly, when the process of interdict against Bennett was raised, it is not surprising to find that it was Sneddon and not Bennett who instructed Brown & Company to defend the action (see entry in business account under date 11th October 1894 [1]). Bennett's account of his position

[1] Quoted *supra*, p. 187, note.

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after defences were lodged is this—"When I got the summons I took it to the defender. I told him about getting it, and he said, in regard to that, that the thing was right enough, that he would stand responsible, and fight the battle to the end. I would not have fought the action if I had known that I was to pay the expenses, and would not have interfered with anything of the kind. It was on the distinct understanding from the very beginning that he was to pay all the expenses that I went on with the case. He told me that the case could only proceed in my name; that was in consequence of my desiring to have my name taken out of it; I did not want anything to do with it at all. I thought it was a matter I had nothing to do with. Mr Hislop, writer, Glasgow, took charge of the case; I suppose he was the defender's agent. It was not I who instructed Mr Hislop with reference to the defence in the action; I never gave him any instructions to go on with the case. I did not give instructions for the case being appealed to the Sheriff-principal, Glasgow, after it was decided by the Sheriff in Airdrie; and after it was decided by the Sheriff-principal I did not give any instructions for it being appealed to the Court of Session."

And again—"I asked him to withdraw the case and be done with it; even after the diet of proof in Airdrie, I told him when I went home that I thought he had the worst of the case, but he said he would not give it up, and that he was prepared to spend £100 on it, and more if it was required."

Although during the progress of the case in the Sheriff Court Sneddon kept in the background, he was in constant communication with the agents as to the conduct of the case, as the business account shews. I need not go over the items which instruct this. The most significant fact of all in judging who had control of the defence is that on the Sheriff affirming the Sheriff-substitute's judgment we find Brown & Company writing to Sneddon—"We are much disappointed that the Sheriff has not reversed in the case of Stevenson against Bennett, and would advise an appeal to be taken to the Court of Session. We have not written Mr Bennett, but perhaps you would communicate to him the nature of the Sheriff-principal's judgment, and let us have *your* views in course as to what should be done"; and in their business account this entry appears under date 31st March 1897—"Attendance with Mr Sneddon, who instructed us to appeal"; and accordingly on 1st April 1897 an appeal was taken to the Court of Session without communicating with Bennett.

Of course it was necessary that Sneddon should have the use of Bennett's name, and that was obtained on Sneddon giving Bennett a guarantee that he would relieve him of all the expenses of the action, and of all the expenses for which he might be found liable in the event of the case being decided against him.

The Sheriff's judgment against Bennett was pronounced on 19th March 1897. The appeal was noted on 1st April 1897. After the judgment, but before the appeal was taken, Brown & Company, on 25th March 1897, wrote to their Edinburgh correspondents, Macpherson & Mackay, a letter in which they ask the latter to advise them as to the prudence of appealing to the Court of Session. It contains this very suggestive passage—"The action is born of feeling and concerns a trumpery piece of garden ground not worth 20s. in all, but the parties have fought it as keenly as if it con-

cerned a large estate." It may fairly be asked between whom was the feeling and who were the parties who fought so keenly. As far as I can observe from the proof I can detect no signs of feeling or keenness on the part of Bennett.

I refer to, but shall not read, Brown & Company's letter to Sneddon of 7th April 1897, and their letter to Bennett of 9th April 1897, which contained the guarantee.* From that time forward Bennett was not communicated with at all during the course of the appeal, and it was insisted in solely by Sneddon. So thoroughly did he identify himself with the case that when the appeal was dismissed he was anxious to bring a declarator at his own instance in the Court of Session.

It only remains to add that before judgment was pronounced Bennett, as Sneddon well knew, was hopelessly insolvent. Bennett himself says that Sneddon "urged on me being a bankrupt to let the debt fall on me, and he said in these circumstances I would be clear of it. I was not bankrupt at the time the proceedings were going on in the Sheriff Court."

And Macpherson & Mackay writing on 1st June 1897 say,—"Mr Sneddon has just been with us. He fears Bennett is on the eve of bankruptcy, and has urged us to press on the case." The reply is, "Yes, Bennett seems to be in difficulties, and we would like to see the decision before the smash comes."

I have said that Sneddon financed the defence. He did so by paying the agent's expenses in full. Mr Hislop, his agent, says,—"So far as I was concerned I looked to the defender as my client and for payment of our account. The defender has paid not only our account, but also the Edinburgh agent's account in connection with the whole action."

These being the facts, I think it is clear that the defence was lodged and persisted in, not for the benefit of Bennett, who had no interest that has been suggested to shut up the pursuer's gate, but to enable Sneddon to justify the position which he took up at the outset, and to defeat the pursuer.

It remains to be seen whether the law of Scotland provides no remedy for the serious loss which has been inflicted on the pursuer through the defender's actings.

The decisions in our Courts on the question of *dominus litis* are neither numerous nor exhaustive. I agree with Lord Kyllachy in what he says on this point in the case of *Fraser* v. *Malloch*,[1]—"Coming next to the Scots authorities, there is no doubt that these recognise the proposition that a party outside an action may in certain circumstances become liable for the expenses awarded to the successful party, and may be sued for those expenses as here by separate action. There is also no doubt that this liability has been said to depend on the interest which the outside party has in the subject-matter of the suit, and on the control which he possesses and exercises over the course of the suit. But the practical question always is as to the kind and degree of interest and of control which shall be sufficient for the purpose. And I am afraid that none of the decided cases formulate or ascertain the principle on which that question must be decided."

* These letters are quoted *supra*, p. 187, note.

[1] 23 R. 619.

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I do not think that Lord Rutherfurd's definition of *dominus litis* in *Mathieson* v. *Thomson*,[1] "that he is a party who has an interest in the subject-matter of the suit, and through that interest a proper control of the proceedings in the action," is, or was intended to be, an exhaustive definition. His Lordship himself says there may be some difficulty in exactly defining what is a *dominus litis;* and I regard the definition and also the illustrations which his Lordship gives as being more illustrative than exhaustive. But it is of importance to note how widely different were the circumstances of the case in which Lord Rutherfurd's remarks were made from those of the present case. They will be found stated with great accuracy and detail in Lord Cowan's interlocutor,[2] but they are summarised clearly and shortly in the following passage[1] in Lord Ivory's opinion:—"Now, keeping in view the principle to be gathered from these and other sources, I do not think the circumstances of this case establish such an interest in or control over either the suit or its subject-matter on the part of this person as to impose upon him a liability for the expenses of process. This is not an action for his benefit. It was begun for no end of his, nor at his instigation. The summons had been raised and an agent employed before he had at all interposed. After he did interpose, it was to a very special and limited effect, and entirely in the interests and for the objects and purposes of the pursuer. And his interference had altogether ceased long before the litigation came to an end; so that it stands a fact in the case that even the agent ultimately employed had not a claim against him for the expenses incurred by the pursuer." The facts in the present case differ in every particular from those noted by Lord Ivory. It cannot be said that the defence was not instigated by Sneddon; nor that it was begun for no end of his; nor that he did not interpose until the defence had been lodged and an agent employed; nor that when he did interpose it was to a limited effect and in the interests of Bennett; nor that his interference ceased long before the litigation came to an end. We have not the advantage of knowing what would have been the opinion of Lord Rutherfurd and Lord Ivory in such a case as we have here; but it will be seen that the facts with which they were dealing were widely different. The two points of importance, however, in all such cases seem to be, for whose ends was the litigation truly carried on, and who had the control of it? In most of the reported cases the alleged *dominus litis* was, or was said to be, the owner of, or the person having the sole interest in, the subject-matter of the suit, who clothed a man of straw with the formal title and put him forward to fight his battle. Those, though clear and typical cases, I regard as merely examples of the rule. It is only right that any more extended application of the doctrine of *dominus litis* should be carefully scrutinised so as to guard against interference with legitimate advice and assistance given to a poor or inexperienced litigant. Where there is an independent litigant, advice and pecuniary assistance given by an outsider will not be enough to infer liability for expenses. But where the ostensible litigant has no wish, and no real interest, to sue or defend, and no money to litigate with, and no real control of the suit, but simply allows

[1] 16 D. 23. [2] 16 D. 20.

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the man behind him to use his name, in order, it may be, to gratify some personal grudge, why should the latter, if he is unsuccessful, escape liability for expenses?

It is said that Sneddon had not control of the litigation, because Bennett could at any time have pressed it on or abandoned it. But the same might be said in any case in which the question of *dominus litis* arises. It is enough if the alleged *dominus* had, as here, the practical control of the suit.

In the case of *Bradlaugh* v. *Newdegate*,[1] Lord Coleridge quotes with approval a passage from Chancellor Kent (adopting Blackstone's definition, which is founded on a passage in Hawkins) which seems to me peculiarly apposite. It is to the effect that it is "a principle common to the laws of all well-governed countries that no encouragement should be given to litigation by the introduction of parties to enforce those rights which others"—that is, those whose rights they are—"are not disposed to enforce." And in dealing with the case in hand, Lord Coleridge says in regard to the defendant Mr Newdegate—"But, undoubtedly, he drove on to sue Mr Bradlaugh for a penalty, and he supported and maintained in involving Mr Bradlaugh in protracted and expensive litigation, a man who admitted that he would have never brought the action but for Mr Newdegate, who would never have gone on with it but for Mr Newdegate's bond, and who could himself pay no costs if the action failed."

The English doctrine of maintenance has no exact counterpart in our law, but it seems to me that the principle which underlies the passages which I have quoted is appropriate to this case, and in accordance with the spirit of our law, which is, that where a man is obstructed and put to expense in vindicating his legal rights, he should be reimbursed by the person who has truly caused the expense.

The matter therefore stands thus: If to involve liability interest is essential, it is sufficient that this was Sneddon's own quarrel, begun at a time when he had the *plenum dominium* of the ground of which he is still superior.

If interest is not essential, he is liable as an intermeddler in the dispute of another man who had no wish and no real interest to litigate.

In my opinion the defender has been most justly found liable in the pursuer's expenses. For myself I should not have been disposed to distinguish between the expenses of the appeal to this Court and those in the Sheriff Court. No doubt the defender's liability is clearer as to the former, because he granted a written guarantee for Bennett's expenses, and his control was no longer disguised, there being not even a pretence of consulting Bennett in regard to the conduct of the appeal; but even as regards expenses in the Sheriff Court, I should have been prepared to hold on the evidence that Bennett had no real control, and that Sneddon could have made him abandon the defence at any moment.

At the same time I appreciate the difficulty which your Lordship in the chair and Lord Trayner feel in regard to that part of the case; and as the judgment proposed is, looking to the division of opinion on the Bench, the only one possible in the circumstances, I do not dissent.

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[1] L. R., 11 Q. B. D. at p. 6.

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THE COURT pronounced this interlocutor:—"Recall the interlocutors of date 17th January and 24th May 1900 appealed against: Find in fact (1) that in October 1894 the respondent raised an action in the Sheriff Court against Alexander Bennett, praying, *inter alia*, for interdict against the said Alexander Bennett laying down soil or other material, and from erecting a fence, all or part of which obstructed the free use by the respondent of a road or footpath by which he had by his title a right of access to his ground feued by him from the appellant; (2) that the said Alexander Bennett did not desire to defend said action, but was urged and incited thereto by the appellant, who agreed and undertook that he would pay any expense incurred in so defending said action, in respect of which undertaking the said Alexander Bennett did appear in said action and defended the same; (3) that the defence stated by the said Alexander Bennett was repelled and interdict granted in said action by the Sheriff-substitute on or about the 31st day of July 1896, which was affirmed by the Sheriff on or about 19th March 1897; (4) that on or about 1st April 1897 the appellant, without the knowledge or authority of the said Alexander Bennett, appealed against the judgments mentioned in the preceding finding to the Court of Session, which appeal was ultimately dismissed, and the appellant therein found liable in expenses; (5) that in taking such appeal to the Court of Session the appellant was acting in his own interest, and had the entire control of the proceedings in connection with said appeal, and that the said Alexander Bennett had no interest in or control thereof; (6) that the appellant has paid the whole expenses incurred by Bennett in the Sheriff Court to his own agent, and has also paid the expenses incurred by himself to his own agent in connection with said appeal; (7) that the appellant was the true *dominus litis* in said appeal; and (8) that the respondent incurred expense in opposing said appeal to the extent of £42, 13s. 6d., as the same was taxed by the Auditor: Find in law that the appellant is bound to pay to the respondent the said sum of £42, 13s. 6d.: Therefore decern against the appellant for payment of the said sum of £42, 13s. 6d. to the respondent, with interest: Find the appellant liable in expenses both in this Court and in the Sheriff Court," &c.

DRUMMOND & REID, S.S.C.—ALEX. MORISON & CO., W.S.—Agents.

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MRS EUPHEMIA MORRISON LANG OR CUNLIFF AND ANOTHER (R. S. Cunliff's Trustees), First Parties.—*Adam.*
MRS EUPHEMIA MORRISON LANG OR CUNLIFF, Second Party.—*Lorimer—Younger.*
WILLIAM MALLOCK AND OTHERS, Third Parties.—*Clyde.*

Fee and Liferent—Company—Conversion of profits into capital—Issue of new shares in respect of capitalisation of profits.—A limited company which had power to capitalise profits duly passed the following resolutions:—"(1) That the board may apply £60,000 of the moneys standing to the credit of the reserve fund by way of dividend, distributable amongst the members in proportion to the amount paid up on each of their shares, and that such

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dividend be distributed as provided in the next resolution. "(2) That the board may pay said dividend by the distribution of paid-up shares of the company in manner following—that is to say, the board shall allot such new shares *pro rata* amongst the existing members according to the number of shares of which they may, on the 14th day of June 1899, be registered as holders, in the proportion of two new shares to thirteen existing shares, or as near thereunto as may be, and that the dividend to which each member is entitled under the preceding resolution be applied in payment of the shares falling to him."

The directors, in the exercise of the powers thereby conferred upon them, allotted the unissued shares among the shareholders, and applied the £60,000 in paying for them.

In a question between the liferenter of certain original shares and the fiar as to the right to the new shares, *held* that the operation was not a payment of dividend by the issue of paid-up shares, but was an addition to the capital of the company by the conversion of profits into capital, and that the new shares did not belong to the liferenter, but to the fiar.

1ST DIVISION.

THIS was a special case relating to the trust-disposition and settlement of the late Richard Shotman Cunliff, formerly engineer and shipbuilder in Glasgow, who died on 8th January 1879. The first parties were the acting trustees, the second party was the truster's widow, and the third parties were the representatives of the truster's eldest son (who survived the truster, but died on 15th February 1896), and nine surviving children of the truster.

The following narrative is taken from the opinion of the Lord President:—

"The questions in this case are (1) whether Mrs Cunliff, the liferentrix of nine-tenths of the residue of the estate left by her husband, the truster, is entitled to have 352 shares in the British and African Steam Navigation Company, Limited, which were issued under the circumstances after mentioned, transferred to her as part of the revenue of the estate; or (2) whether she is entitled to payment of the sum of £3524, the amount of the dividend on the original shares applied, to the extent of £3520, in payment of the new shares; or (3) whether the first parties, the truster's testamentary trustees, are entitled and bound to retain and administer the 352 shares as part of the capital of his trust-estate.

"The following are the circumstances under which these questions arise:—Mr Cunliff, the truster, died on 8th January 1879, leaving a trust-disposition and settlement and relative codicil, dated respectively 28th July 1871 and 31st August 1875, under which the first parties are the acting trustees. By that trust-disposition and settlement the truster directed his trustees to hold nine-tenths of the residue for behoof of his spouse—the second party—in liferent for her liferent use only, and he gave directions with respect to the capital which it is unnecessary to consider.

"At the time of his death the truster held shares in the British and African Steam Navigation Company, Limited, and the residue of his estate liferented by the second party consisted, *inter alia*, of 2290 shares of £10 each fully paid in that company, part of the truster's holding which the first parties were empowered to retain.

"By special resolution of the company passed at an extraordinary general meeting held on the 1st March 1899, and confirmed at another extraordinary general meeting held on the 22d of the same month, new articles of association replacing the old ones were adopted.

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These new articles provided and declared, *inter alia*, by article 3, that the capital of the company then stood at £450,000, divided into 45,000 shares of £10 each, of which 39,000 shares had been issued, which were, or were deemed to be, fully paid up, and that the remaining 6000 had not been issued; and, article 4, that 'the unissued shares shall be under the control of the board, who may issue such portion thereof as they may consider advisable, and allot or otherwise dispose of the portion they resolve to issue, to such persons, on such conditions, and either at par or at a premium, and at such times as the board may determine.'

"Under the original articles the directors were empowered to set aside out of the profits of the company such sums as they might think proper (1) as a reserve fund to meet contingencies, or for equalising dividends, or for repairing and maintaining, renewing and replacing and increasing the number of the vessels belonging to the company, or for any other purpose connected with the business of the company or any part thereof, or for discharging any of the liabilities of the company, or otherwise as the directors should think reasonable; and (2) such sum as they might think proper as an insurance fund; and they were empowered to invest the sums so set aside as they might think fit.

"By articles 122 and 123 of the new articles large powers were conferred upon the board of setting aside out of the profits of the company, before declaring a dividend, (1) such sum as they might think proper as a reserve fund; and (2) such sum as they might think proper as an underwriting account or insurance fund. The board were also vested with a large discretion as to the investment of these funds.

"For many years the company had, besides writing off largely from the book values of their ships for depreciation, kept, in terms of the articles, an underwriting account or insurance fund, crediting it with premiums in respect of the insurance of the ships, and debiting it with the amount of the losses.

"In December 1893 an account called 'reserve fund' was opened, and large sums were carried to the credit of that account from the profits of the preceding year, and of certain subsequent years, the balance at the credit of the account at 31st December 1897 amounting to £65,000. At the same date the balance at the credit of the underwriting account was £99,000, and the company held £200,000 in cash and liquid assets. Its liabilities to the public were of small amount.

"By article 124 of the new articles, the board were empowered 'from time to time (with the authority of a general meeting), to apply any of the moneys or investments then standing, or which may thereafter stand, to the credit of any reserve fund, or of the underwriting account or insurance fund, for the time being, by way of dividend, distributable amongst the members in proportion to the amount paid up, or held to be paid up, on each of their shares; and that such dividend may be distributed wholly or partly in cash, or in specific assets as provided in the following article,' and by article 125, it was declared that the board might (with the authority of a general meeting) 'pay any dividend wholly or in part by the distribution of specific assets, and, in particular, of paid-up shares of the company'; and that when any difficulty arose in regard to the distribution, they might settle the same as they might think

expedient, and, in particular, might issue fractional certificates, and fix the value for distribution of such specific assets or any part thereof in order to adjust the rights of all parties. On 5th June 1899, the directors called a general meeting, to be held on the 14th of that month, for the purpose of considering, and, if so resolved, passing two resolutions, '(1) That the board may apply £60,000 of the moneys standing to the credit of the reserve fund by way of dividend, distributable amongst the members in proportion to the amount paid up on each of their shares, and that such dividend be distributed as provided in the next resolution'; and (2) 'that the board may pay said dividend by the distribution of paid-up shares of the company in manner following,—that is to say, the board shall allot such new shares *pro rata* amongst the existing members according to the number of shares of which they may, on the 14th day of June 1899, be registered as holders, in the proportion of two new shares to thirteen existing shares, or as near thereunto as may be; and that the dividend to which each member is entitled under the preceding resolution be applied in payment of the shares falling to him, and that cases involving the allotment of fractional parts of a share be adjusted by a cash payment of £1 for each fractional part, that is, £1 for each thirteenth part, the value of the shares being taken as equal to £13 per share, and that the board dispose of the fractional parts, so as to provide the funds for such payment.'

"Along with the notice calling the meeting, a circular was sent to the shareholders reminding them that, at the extraordinary general meeting of shareholders held on the 1st March then last, the chairman intimated that the board had had under consideration whether it might not be desirable 'at some time to convert a portion of the reserve fund into capital, and issue it to the shareholders in that form. The board having further considered the matter, have now resolved to carry this out, and the meeting on the 14th inst. is called for the purpose of giving effect to the resolutions.'"

The resolutions were duly passed, and the directors, in exercise of the powers thereby conferred upon them, allotted the unissued shares among the shareholders, and applied the £60,000 in paying for them. The shares were allotted without any application being made from the shareholders. 352 shares were issued to the first parties, and they received at the same time a cheque for £4 for the fractional parts of the allotment.

After the shares were allotted, the £60,000 were transferred in the company's ledger, by a journal entry, from the reserve fund to the credit of the dividend account, the account out of which all the dividends were paid. The dividend account was then debited in the cash-book with the amount due to each shareholder in respect of the dividend, the capital account being at the same time credited with the amount required to pay up each allotment, and the difference between the amount of dividend credited to each shareholder and the amount required to pay up his allotment being paid to him in cash. The sum entered in the dividend account as due in respect of the first parties' holding was £3524.

On 14th June the shares of the company were, as quoted in the official list of the Glasgow Stock Exchange, at 14½, this being *cum* the new shares. Thereafter the shares were not quoted till 27th July, when the quotation was 14, this being *ex* the new shares.

The second party contended that the shares issued as above

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mentioned should be treated as revenue, and be paid or transferred to her as liferentrix; or, alternatively, that she was entitled to the sum of £3524, the amount of the dividend on the original shares held by the first parties, applied to the extent of £3520 in payment of the new shares. The third parties contended that the shares formed part of the capital of the trust-estate, and ought to be retained and administered by the first parties as such.

The case contained this statement:—"16. At the date of the allotment of the shares the amount of cash and liquid assets belonging to the company was approximately equal to the combined amounts of the underwriting account and the reserve fund, the liabilities to the public being small. The combined amount of the underwriting account and the reserve fund as at 31st December 1898 was £164,000, and was at the date of the allotment of the new shares somewhat larger. The dividend could have been paid in cash."

The questions submitted to the Court were:—"1. Is the second party entitled to have the said 352 shares transferred to her as part of the revenue of the estate liferented by her? or 2. Is she entitled to payment of the said sum of £3524? or 3. Are the first parties entitled and bound to retain and administer the said shares as part of the capital of said trust-estate?"

Argued for the third parties;—This case fell within the principle of *Bouch* v. *Sproull*.[1] That case decided that a conversion validly made by a company of its profits into capital was binding on all parties interested as shareholders, and accrued to the benefit of a fiar as against a liferenter, where the shares were destined to, or held in trust for, a liferenter and fiar. In this case it was clear that a conversion had been validly effected, the capital being represented by the new issue of shares paid for by the dividends taken from the reserve fund.

Argued for the second party;—The articles of association which the House of Lords had to consider in the case of *Bouch* v. *Sproull*[1] were different from those of the British and African Steam Navigation Company now in question. This applied particularly to articles 124, 125. By these articles the only distribution of the reserve fund which could competently be made was a distribution by way of dividend. There was an authority to pay dividends by shares, but no authority to convert dividends into capital, whether in the form of shares or not. It was as a payment of dividend that new shares might be issued. In *Bouch* v. *Sproull*,[1] the profits could not have been paid or distributed in cash; they had been invested in buildings, and there was thus a *de facto* conversion into capital. The present case was thus distinguished in two respects from *Bouch* v. *Sproull*[1] (1) that there was no authority to distribute the reserve fund otherwise than by payments of dividend; and (2) that the assets to be distributed consisted not of corporeal moveables, ear-marked as capital, but of cash. This case was more analogous to the cases where it had been held that there was no conversion.[2] The alternative contention for the second party was supported by the case of *In re Northadge*.[3]

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[1] 1887, L. R., 12 App. Cas. 385.

[2] Bridgewater Navigation Co., L. R. [1891], 2 Ch. 317; Malam v. Hitchens, L. R. [1894], 3 Ch. 578.

[3] 1891, 60 L. J., Ch. 488.

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LORD PRESIDENT.—(After the above narrative)—The questions which require to be considered are (1) Had the company power to capitalise the profits which had gone to make up the reserve funds? (2) If it had this power, did it, in intention and effect, exercise it? and (3) If it did exercise it, do the shares form part of the capital of the trust-estate, or are they payable to the second party as income of that estate?

I do not understand it to be disputed that the company had power to capitalise profits, thereby increasing the capital, and in this essential particular the present case differs from *Brander* v. *Brander*,[1] and *Irving* v. *Houstoun*,[2] which related to the stock of the Bank of England and stock of the Bank of Scotland respectively, neither of which had by its constitution any power to increase its capital.

Then as to the second question, it appears to me that the company validly exercised the power to convert the money in question into capital.

If this be so, it would *prima facie* appear that the shares of capital created by capitalisation would, like other shares of capital, in such a question as the present, form part of the estate falling to be held by the trustees, and would not be payable to the liferentrix as income. But the second party maintains that a specialty is introduced by the terms of articles 124 and 125 of the new articles, as well as of the resolutions of 14th June 1899, and these require careful attention. By article 124 the board were authorised to apply any moneys standing at the credit of any reserve fund by way of dividend, and it was declared that such dividend might be distributed in cash or in specific assets, and by article 125 the board were empowered to pay any dividend by distribution of specific assets, "and in particular, of paid-up shares of the company." It appears to me that if the power thus far recited had been exercised *simpliciter*, and according to its terms, *i.e.*, by the Board first declaring a dividend and then resolving that it should be paid in paid-up shares, there would have been strong grounds for holding the second party, as liferentrix, entitled to the shares. But what was actually done seems to me to have been essentially different. While by the second resolution of 14th June 1899, the board were empowered to pay the dividend by distribution of paid-up shares in the manner therein mentioned, it was also thereby declared that the dividend to which each member was entitled under the resolution should be applied in payment of the shares falling to him, and in the accompanying circular the shareholders were reminded that at the meeting of 1st March the chairman had intimated that the board had had under consideration "whether it might not be desirable at some time to convert a portion of the reserve funds into capital, and issue it to the shareholders in that form. The board having further considered the matter, have now resolved to carry this out, and the meeting on the 14th instant is called for the purpose of giving effect to the resolution." This appears to me not to be a resolution to pay dividends by shares, but instead of paying dividends, to capitalise the amount which would have been required to pay them, and issue the shares in payment of which that amount was applied, with all the qualities and

[1] 1799, 4 Ves. 800. [2] 1803, 4 Paton App. 521.

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incidents attaching to shares of capital. The statement in the case as to the manner in which the operation was carried out is in entire accordance with this view.

The true principle upon which such questions should be solved appears to be that which was stated by Lord Hatherley (when Vice-Chancellor) in *In re Barton's Trust*.[1] "The dividend to which a tenant for life is entitled is the dividend which the company chooses to declare. And when the company meet to say that they will not declare a dividend, but will carry over some portion of the half year's earnings to the capital account and turn it into capital, it is competent for them, I apprehend, to do so, and when this is done, everybody is bound by it, and the tenant for life of those shares cannot complain."

The case of *Bouch* v. *Sproull*[2] is, in my judgment, *a fortiori* of the present case, as it related to a "bonus dividend," and the House of Lords held that looking at all the circumstances, the real nature of the transactions was that the company did not pay, or intend to pay, any sum as dividend, but intended to appropriate, and did appropriate, the undivided profits as an increase to the capital stock; that the bonus dividend was therefore capital of the testator's estate, and that the life tenant was not entitled to the bonus of the new shares. In the present case the act of the company was not ambiguous—it was unequivocally a creation of capital in exercise of an express power to do so.

The cases of *In re Bridgewater Navigation Company*,[3] and *In re Malam*,[4] were relied upon by the second party, but neither of them appears to me to be at variance with the views which I have just expressed.

In the former case it was held that all the three reserve funds in question represented undrawn "profits," uncapitalised, and were therefore to be treated as income to which, subject to the preferential dividend for a broken financial year, the ordinary shareholders were exclusively entitled, and not as "capital" or "assets" distributable among both the ordinary and the preference shareholders, but this conclusion was arrived at upon a state of facts essentially different from that which exists in the present case.

In the latter case it was held (first), upon the evidence that the company intended to distribute its profits as dividend, not to capitalise them, and (second), that the tenant for life was only entitled to so much of the value of the new shares as represented the dividend applied by the trustees in taking them up, the balance of such value forming part of the capital of the estate. For the reasons already given, I consider that in the present case the company intended to convert, and did convert, the part of the profits in question into capital.

I am therefore of opinion that the first and second questions should be answered in the negative, and that the third question should be answered in the affirmative.

LORD ADAM concurred.

LORD M'LAREN.—I concur, and have little to add. The principle on

[1] L. R., 5 Eq. 244.
[2] L. R., 12 App. Ca. 385.
[3] [1891], 2 Ch. 317.
[4] [1894], 3 Ch. 578.

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which the case must be determined is that when a company has power to apportion its profits by distributing so much as income or dividend to shareholders, and adding so much to its capital, everyone becoming a member of the company, either originally or by purchase of shares, is bound by his contract to accept as income or dividend so much as the company declares to fall under that denomination. That is the essence of Lord Hatherley's statement which is the foundation of the law upon this point. I think there are two consequential propositions following on this. First, that where shares are held by two persons in liferent and in fee, or where one is entitled eventually to the capital of shares held by trustees and another to the income, when once it has been ascertained what share of the profits is income, and what is capital, that is binding on the persons holding such shares just as in the case of an individual having the full property of the shares. But again it seems to me that it can make no difference whether the portions of profits which a company adds to its capital are paid into the capital account, thus increasing the value of existing shares, or whether these are kept apart and formed into additional stock divided into shares. I cannot see that such a circumstance affects the interests of the liferenter and the fiar, or of any person holding a qualified interest in shares. The views stated by your Lordship seem to me sufficient for the decision of the case, and I would only add that it would be difficult to apply any other rule, by attempting to go outside the determination of the company. I may suggest by way of illustration the case of a company which every year sets apart a portion of its profits not into a reserve fund, but as irrevocably applied to capital or extension of its business; everyone must admit that such money cannot be regarded as anything but capital, and so too if there is such application at regular intervals of two or three years. But it would be vain to seek for any criterion distinguishing between additions made to capital at regular and at irregular intervals. Another difficulty in a different relation would be to distinguish between cases in company law and what might be done in private partnerships, because in the first case the powers of the company are regulated by their articles of association, while in the second there is a greater latitude given to the partners in dealing with their shares. I do not, however, elaborate that point. I do not think that our decision necessarily determines the case of bonus dividends. I desire to reserve my opinion on that point, because in an English decision the two cases are apparently treated as illustrating each other. If a bonus means an extraordinary dividend, our decision would not be in point.

LORD KINNEAR concurred.

THE COURT pronounced the following interlocutor:—"Answer the first and second questions in the case in the negative, and the third question in the affirmative, and decern."

ARTHUR ADAM, W.S.—WEBSTER, WILL, & Co., S.S.C.—Agents.

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JOHN FALCONER, Pursuer (Appellant).—*Orr*—*Munro*.
P. & J. M'CABE, Defenders (Respondents).—*M'Clure*.

Reparation—Negligence—Master and Servant—Person entrusted with Superintendence—Employers Liability Act, 1880 (*43 and 44 Vict. cap.* 42), *sec.* 1, *subsec.* 2, *and sec.* 8.—The Employers Liability Act, 1880 (sec. 1), enacts that a workman shall have right to compensation who is injured "(2) By reason of the negligence of any person in the service of the employer who has any superintendence entrusted to him, whilst in the exercise of such superintendence."

By sec. 8 "The expression 'person who has superintendence entrusted to him' means a person whose sole or principal duty is that of superintendence, and who is not ordinarily engaged in manual labour."

A firm of stevedores employed two squads of dock labourers in loading a steamer, at the same hatch, one squad being under the superintendence of M'Neilly its foreman, who acted as hatch-mouth man for the lowering of goods from a shore crane, and the other under the superintendence of its foreman Murray, who acted as hatch-mouth man for the conveying of goods from the ship's winch. Falconer, one of M'Neilly's squad, who was injured by the fall of a piece of wood from the ship's winch, raised an action under the Employers Liability Act, 1880, against the stevedores as responsible for Murray, through whose fault he alleged the accident happened.

It was proved that Murray was generally employed by the defenders as a labourer, but that he was occasionally selected to act as a hatch-mouth man—that at the time of the accident his duties were to superintend the lowering of goods into the hold and to take the chain of the winch ashore and to attach the hook to the goods—that he had complete control over his squad, and could dismiss any members of it, and that he was paid by the hour, but received higher wages than the men under him.

Held (*diss.* Lord Young) that Murray was a person ordinarily engaged in manual labour, and could not be regarded as a person having superintendence entrusted to him in the sense of the Act.

2D DIVISION. Sheriff of Lanarkshire.

ON 13th May 1899 John Falconer, quay labourer, was working in the employment of P. & J. M'Cabe, stevedores, Glasgow, in the lower hold of a hatch of the s.s. "Clan Mackenzie." When engaged along with his squad in slinging the dome of a boiler to the fall of a crane on the quay in order to remove it to make room for other cargo, the ship's winch was in the act of lowering an iron girder into the same hold. In the sling along with the girder was a piece of wood about a yard long by 2 feet thick, which had been put into the sling for the purpose of tightening it. When the girder was slung off the deck over the open hatch the plank of wood slipped out of the sling and fell into the hold. It struck the pursuer on the head, with the result that he was severely injured.

Falconer then brought an action of damages in the Sheriff Court at Glasgow against Messrs M'Cabe, at common law and under the Employers Liability Act, 1880.

The pursuer, *inter alia*, averred;—(Cond. 8) "Said accident was due to the fault of the foreman, Thomas Murray, whose principal duty was that of superintendence, and not manual labour, and who was at the hatch-mouth, and whose duty it was to see that each load sent down the hatch was properly slung. The girder and wood were improperly slung in this instance. . . . He was also in fault in not calling out 'Stand clear,' to the men below, and in permitting the sling-load to clear the deck before seeing that the men below were standing clear. Murray was a foreman or superintendent in the

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sense of the Employers Liability Act 1880. Pursuer was bound to conform, and was at the time of the accident conforming, to Murray's orders."

The defenders' answer was,—"Admitted that it was part of the duties of the 'ganger,' Thomas Murray, to see that each load was properly slung before being lowered into the hold. *Quoad ultra* denied. . . . If there were any fault other than pursuer's, such was that of a fellow-servant or fellow-servants with him, for whom the defenders are not responsible. . . . The said Thomas Murray was ordinarily engaged in manual labour."

The pursuer pleaded;—The pursuer having been injured whilst in defenders' employment, through the fault and negligence of defenders, or of those for whom they were responsible under the Employers Liability Act, 1880, is entitled to decree, with interest and costs, as craved.

The defenders pleaded, *inter alia;*—(5) *Separatim*, if there were any fault other than pursuer's, such was that of a fellow-servant or servants with him, for whom the defenders are not responsible, and they should be assoilzied.

Proof was allowed and led. In the course of the proof the following evidence as to Murray's duties as hatch-mouth man was adduced by the pursuer:—James Farrell, secretary of the Dock Labourers Union, deponed,—"The hatch-mouth man employs the men, discharges them, determines the number of hours they will work, and superintends their work. They are absolutely subject to his orders. The foreman is in full control of the hatch and all that is done in it. Nothing can be done without his consent. I know M'Neilly. He is the same kind of foreman as I have been describing. (Q.) It has been suggested that this hatch-mouth man or foreman is engaged in manual labour; isn't it the case that with very many kinds of cargo the stage man or hatch-mouth man or foreman, or whatever he may be, never leaves the stage? (A.) He should not. It is the case that in some employments, for the sake of economy, the hatch-mouth man, although foreman, is forced to carry the sling ashore. It is the case that in well regulated employment the stage man or foreman never leaves his hatch. There is a man for the purpose of carrying the sling ashore. . . . A hatch-mouth man gets 7s. a day, and an ordinary man 5s. 10d. . . . . In the Clan Line a hatch-mouth man like Murray has to take the fall of the winch and carry it ashore. . . . He has to take it ashore whether it is the heavy iron chain of the winch or a rope sling. He attaches the hook to the goods that are coming aboard, and then gives the signal to the winchman. He stands on the stage to see that the thing is properly slung and lowered. He guides it and steadies it going up the stage. When the ship is high he has to push it over the hatch mouth and see that it goes down straight. Practically Murray is the leader of the squad; they are under his control. . . ."

Thomas Dillon, stevedore, deponed,—"With regard to cargo steamers, we appoint a hatch-mouth man. I consider him both a labourer and a foreman. He is a man whom we entrust with the superintendence of the hatch; he starts his own men, and is responsible for them. He superintends them, and they are bound to conform to his orders. He can discharge any man that does not suit him. The hatch-mouth man takes the fall to the end of the planks,

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and hooks on the stuff, and follows it in. It is only occasionally that that has got to be done. That is all the labour he has got to do. . . ."

Murray, the hatch-mouth man, adduced by the defenders, deponed,—"I remember the accident to pursuer on the 13th of May last. . . . There were two gangs working that morning, and I was ganger of one squad and M'Neilly ganger of the other. The ship's winch was working in connection with my gang and the shore crane with M'Neilly's. These two gangs worked one in the fore end of the hatch and the other in the rear end. Pursuer was in the forward part of the hatch. I was at the stage end when pursuer was injured. I am called a sub-boss. It is not known as a hatch-mouth man. There is such a thing as a hatch-mouth man and sub-boss; I do both duties. I had to signal to the winchman when to raise and lower the fall of the winch into the hold. I had also to shout to the men in the hatch to stand clear when goods were being loaded; that is part of my duty. I take the fall of the winch and carry it ashore down the staging. I attach the hook of it to the goods and assist to sling the goods. I also assist to put the goods on the truck if they are heavy. After we get the goods made fast at the end of the stage I signal to the winchman to heave, and I walk up behind the goods. I steady them sometimes if it is required. . . . I am paid by the hour, and dock labourers are paid by the hour. An ordinary dock labourer gets 7d. an hour. When I am sub-boss I get 7s. for the day. That is calculated by the hour. I am paid off with the ordinary dock labourers. . . . I work all over the harbour. I am employed by the hour just the same as ordinary dock labourers. . . . When I was running the sling and hooking on the goods and doing that work in the shed, there was nobody at the hatch-mouth. The chain goes right into the sheds; the sheds are quite close to the ship. I am running back and forward to the shed all day long." Cross-examined.—"I was at the ship's winch. I walk ashore with the sling for the goods in order to hand it to the man on the shore end of the stage to sling the goods. That is the only reason. Where they are working with the shore crane they can swing the thing ashore, and we don't require to leave the ship at all. I was a sub-boss; I was in full charge of my squad at the hatch. I superintended in every way. They are subject to my orders, and can do nothing without my consent, as regards the work. If they don't obey me I can put them ashore. When I am working with defenders, and if there be a vacancy for a sub-boss, I am one of the men who is selected. I am rather favoured in that respect. Defenders don't keep any sub-bosses, and pay them weekly. . . . They employ sub-bosses when they require them. I know that with certain companies at the harbour, the hatch-mouth man has never to leave the hatch. There is another man employed for carrying the fall ashore. With defenders, in order to save this other man, the hatch-mouth man has to do the other man's duty. On many occasions, when I take the fall ashore, I sling the goods, and on other occasions I assist in slinging. If I choose, I don't do either. I make the man at the truck do it. It is to further the work that I do it, to push on the stuff. It is usual for the hatch-mouth man, when he is standing idle, to give the other men assistance. . . . (Q.) When you were calling down the hatch before the accident, were you calling to both crowds to stand clear? (A.) I was calling to stand clear, and

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it might apply to either or both. When M'Neilly was calling down the hatch, he was also calling to both sides to stand clear. . . ."

On 9th March 1900 the Sheriff-substitute (Strachan) found that there was fault on Murray's part, and that the defenders were responsible, and awarded the pursuer a sum of damages.*

The defenders appealed to the Sheriff (Berry), who, on 12th June 1900, found "that the said injury was not caused by the fault of the defenders, or of any one for whom they are responsible: Therefore recalls the interlocutor appealed against: Assoilzies the defenders: Finds the pursuer liable to them in expenses." †

The pursuer appealed, and argued;—Murray was a person having

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* "NOTE.— . . . What, then, was the duty of the hatch-mouth man? He engages the men, directs and controls their operations; they are bound to obey him, and act according to his instructions, and he has the power of dismissing them at will. His pay is at least one shilling per day more than that of an ordinary workman. Why, then, is he not a superintendent in the sense of the Act? It is said that the hatch-mouth man in this case took the chain which came up from the hold, and carried it on his shoulder to the quay, and attached it to the sling which was ready to be taken on board. But was this the principal part of his duty? Very far from it. His principal duty was to superintend and control the men working under his instructions, and the carrying of the chain was a very small and subsidiary part of his work. It was not for that that he received higher wages than the ordinary workman. It was not even an ordinary part of his duties. It is proved that according to the usual practice the hatch-mouth man does not leave the hatch, and that another person is employed to carry the chain and attach it to the sling. In the present case this practice was, I think, improperly disregarded for the mere sake of economy, and the hatchman had to do work which did not fall within the ordinary scope of his duties, and which should not have been imposed on him. Besides, the carrying of the chain in this case was a pure accident. The hatch-mouth man of the other gang, standing at the other side of the hatch, did not require to carry the chain, as it was swung ashore along with the derrick to which it was attached, so that his wholy duty was superintendence. It would, certainly, be a curious result, if it depended on which side of the hatch the hatch-mouth man was standing, whether he was a superintendent or a workman. It has, in my opinion, been clearly proved that, in the words of the Act of Parliament, the hatchman was 'a person in this case whose whole or principal duty is that of superintendence, and who is not ordinarily engaged in manual labour,' and that the defenders are consequently liable for fault or negligence on his part. . . ."

† "NOTE.— . . . It is certainly with reluctance that, on the question regarding Murray's position, I have come to take a different view from that of the Sheriff-substitute. My conclusion, however, is that Murray was not a person who had superintendence entrusted to him within the meaning of that expression as defined by section 8 of the Act. By that definition the expression is declared to mean 'a person whose sole and principal duty is that of superintendence, and who is not ordinarily engaged in manual labour.' It seems clear from the proof that superintendence was not Murray's sole duty, and I am not satisfied that it was even his principal duty. But, at all events, I am unable to hold that he was not ordinarily engaged in manual labour. Murray, as the proof shews, worked sometimes as an ordinary dock labourer, but on the morning of 15th May, when the accident happened to the pursuer, he was employed by the defenders as foreman or ganger of a squad engaged along with another squad in loading iron and machinery into one of the hatches of the steamship 'Clan Mackenzie.' . . ."

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superintendence in the sense of the Act. His sole or principal duty was superintendence, and if, as here, an accident resulted from his negligence, it was not enough to relieve his employers of the consequences, that while performing that duty he had also voluntarily undertaken some manual labour.[1]

Argued for the defenders;—Murray was a person ordinarily engaged in manual labour.[2]

At advising,—

LORD JUSTICE-CLERK.—In this case the Sheriff-substitute and the Sheriff have come to opposite conclusions. My consideration of the case leads me to agree with the Sheriff. The pursuer was injured by a piece of wood used to secure some pieces of iron slung in a crane sling, which, while the load was descending into the hold of a vessel, fell out, and struck him when he was in the hold.

The duty of seeing that the material was properly slung before it was brought over the hold lay upon the hatch-mouth man, and it is alleged that it was through his fault that the accident happened. Now, whatever his fault might be, it would not entitle the pursuer to prevail, unless the hatch-mouth man, who was a fellow-servant of the pursuer, was in a position which would make the master of both liable under the Employers Liability Act. A consideration of the evidence leads me to the conclusion that the hatch-mouth man was not in such a position. He was the foreman, or, as some of the witnesses call him, the sub-boss under the inspecting superintendent, of a number of men brought by him to work at the loading of a ship. His own duties appear to have been to look after those in the hold, to see that the hatch was cleared when goods were going down, and to look after the men slinging the goods on the quay; he practically superintends the whole work at the hatch. But he had also to work himself. His duties are described by one of the witnesses, a witness for the pursuer himself:—"He has to take the fall of the winch ashore whether it is the heavy iron chain of the winch or a rope sling. He attaches the hook to the goods that are coming aboard, and then gives the signal to the winchman. He stands on the stage to see that the thing is properly slung and lowered. He guides it, and steadies it going up the stage. When the ship is high, he has to push it over the hatch-mouth, and see that it goes down straight."

Accordingly, another stevedore, who is examined, speaks of such a man as "both a labourer and a foreman." The description given by the particular man in question in this case, Thomas Murray, gives practically the same account of his duties and work, adding that where goods are to be put on a truck, he assists at that if they are heavy, a thing which another witness who does the same work describes as "part of his duty" to help to load the stuff on to the truck.

Such being the nature of the hatch-mouth man's employment, I am unable to hold that he was a superintendent for whom the defenders are responsible. I think he is shewn to have been a man who had ordinarily to work himself, while at the same time looking after others, as dis-

[1] Osborne v. Jackson, 1883, L. R., 11 Q. B. D. 619.

[2] Shaffers v. General Steam Navigation Co., 1883, L. R., 10 Q. B. D. 356; Kellard v. Rooke, 1888, L. R., 21 Q. B. D. 367.

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tinguished from a man whose sole or principal duty is to superintend others, not being ordinarily engaged in manual labour.

I am, therefore, of opinion that the decision of the Sheriff was right, and ought to be adhered to.

LORD YOUNG.—I agree with the Sheriff-substitute. I think it is clearly established that Murray was entrusted with superintendence, and that in the very matter which is proved to have led to the accident. I think further that this accident would not have happened if the girder had been properly slung. It was Murray's duty to see that it was properly slung, and I think it was substantially his sole and certainly his principal duty. It is said that Murray took the chain, carried it to the quay, and attached it to the sling. I agree with the Sheriff-substitute that this was a very subsidiary part of his work, and that his principal duty was to superintend the men who were working under his instructions. I am not surprised that the Sheriff reached a different conclusion with regret—a conclusion which allows the employer, who from economy had not provided a sufficient staff, to escape liability.

LORD TRAYNER.—I agree with the Sheriff. I think the man Murray was not a person who had superintendence entrusted to him within the meaning of the Act. On the contrary, he was a man ordinarily engaged in manual labour, who was engaged to perform, and did perform, manual labour, as part of the very work in the course of which the pursuer was injured.

LORD MONCREIFF concurred with the LORD JUSTICE-CLERK and LORD TRAYNER.

THE COURT dismissed the appeal, finding in terms of the interlocutor of the Sheriff, of 12th June 1900.

PATRICK & JAMES, S.S.C—SIMPSON & MARWICK, W.S.—Agents.

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Buchanan v. Main.

ANDREW BUCHANAN AND ANOTHER, Pursuers (Appellants).—*Ure, Q.C.—Younger.*
JOHN MAIN, Defender (Respondent).—*Salvesen, Q.C.—F. T. Cooper.*

Payment—Appropriation—Bank—Cautioner.—By letter of guarantee dated in 1894 five persons jointly and severally guaranteed to a bank "due payment of all sums for which the U. Company, Limited, are or may become liable to you, the amount which we are to be bound to pay under this guarantee not to exceed £12,500," it being declared that the bank might at their discretion grant time or any other indulgence to the U. Company without discharging the liability of the guarantors; and further, "that this guarantee shall apply to and secure any ultimate balance of the sums that shall remain due to you after applying any dividends, compositions, and payments you may receive, . . . and shall be without prejudice to any other securities or remedies you may have for the general obligations or any particular obligation of the U. Company."

In January 1896 Main, one of the guarantors, intimated to the bank that he withdrew from the guarantee. The bank on receiving this intimation closed an account-current which the U. Company had with them, and which was then overdrawn to the extent of £12,000. Immediately thereafter the directors of the U. Company called up its remaining capital, the call being payable at the bank. In all £6000 was paid into the bank in respect of

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the call, and was entered by the bank in a special account headed "Call Account." This was a credit account only. This was done in accordance with the intention of the company that the £6000 should be available for its business. Shortly afterwards the bank opened a new account-current with the U. Company. This account-current did not contain any reference to the earlier account-current.

In May 1896 the U. Company went into liquidation. The new account-current was then overdrawn to the extent of £2300. The respective debit and credit balances shewn on the old account-current and the call account were undiminished. Ultimately a dividend of 10s. in the £1 was paid in the liquidation.

The bank then called on Buchanan and Brown, two of the guarantors, to pay £4300 as being the sum due under the guarantee. In bringing out this sum the bank had applied the £6000 of call money in reduction of the general indebtedness of the U. Company to the bank. Buchanan and Brown paid £4300 to the bank, and then brought an action against Main for payment of his share thereof. Main contended that the £6000 of call money ought to have been applied exclusively to the reduction of the overdraft of £12,000 existing when he withdrew from the guarantee.

Held that the defender had no right to require that the call money should be applied exclusively to the reduction of the £12,000 overdraft, and that he was liable for his share of the sum paid by the pursuers.

Cautioner—Joint Cautioners—Relief—Measure of cautioners' liability inter se—Insolvency.—Five persons jointly and severally guaranteed to a bank payment of all sums for which a company might become liable to the bank. The company having gone into liquidation, the bank called on two of the cautioners to pay the balance due under the guarantee. They did so, and then brought an action against another of the guarantors for relief to the extent of one-third of the sum they had paid. The pursuers averred, and led evidence to prove, that the two remaining guarantors were insolvent. The defender denied that the insolvency of either of the remaining guarantors had been proved, and pleaded that he was liable in relief to the extent of a fifth only of the sum paid by the pursuers.

Held that, whether the two remaining guarantors were insolvent or not, the pursuers were not bound to bear the whole risk of their insolvency, and therefore that the defender was liable in relief to the extent of one-third of the sum paid by the pursuers.

2D DIVISION. Sheriff of Lanarkshire.

BY letter of guarantee, dated 18th May 1894, Andrew Buchanan, William Stevenson Brown, John Main, and two other persons, all being the directors of the United Gutta-Percha and Rubber Company, Limited, Glasgow, jointly and severally guaranteed to the Bank of Scotland "due payment of all sums for which the United Gutta-Percha and Rubber Company, Limited, Glasgow, are or may become liable to you, the amount which we are to be bound to pay under this guarantee not to exceed £12,500 sterling, with interest from the date or dates of advance. We agree that you shall be entitled to make calls on us, or any of us, from time to time, in respect of our said guarantee, for such sums as you may fix. And we further declare that you may at any time or times, at your discretion, grant to the said The United Gutta-Percha and Rubber Company, Limited, or to any drawers, acceptors, or indorsers of bills of exchange or promissory-notes received by you from them, or on which they may be liable to you, any time or other indulgence, and compound with them or with the said drawers, acceptors, or indorsers respectively without discharging or satisfying the liability of us or any of us; and that this guarantee shall apply to and secure any ultimate balance of the sums that shall remain due to you after applying any dividends, compositions, and

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payments which you may receive. And it is further declared that this guarantee is to remain in force until recalled by us or our heirs or executors in writing, and shall be without prejudice to any other securities or remedies which you have or may acquire for the general obligations or any particular obligation of the said The United Gutta-Percha and Rubber Company, Limited. In witness whereof," &c.

On 28th January 1896 Main, who had on 30th October 1895 resigned his office of director, and who had also ceased to be a shareholder of the company, intimated to the bank that he withdrew from the guarantee. One of the two guarantors not above named did the same.

On receiving these intimations the bank closed the company's account-current with them at their Glasgow office. This account was then overdrawn by the company to the amount of £12,283, 5s. 3d.

Immediately thereafter the directors of the company called up the remaining uncalled capital of the company. The call was made payable at the Glasgow office of the bank. Sums amounting in all to £6387, 10s. were paid into the bank in respect of the call, and were entered by the bank in an account headed "United Gutta-Percha and Rubber Company, Limited, No. II. Call Account." This account was a credit account only.

On 30th March 1896 the bank opened a new account-current for the company. This account contained no entry of the debit balance on the former account-current, and made no reference to that account.

On 30th May 1896 the company went into liquidation. At that date the new account-current was overdrawn to the extent of £2349, 9s. 6d. A dividend of 10s. in the pound was ultimately paid in the liquidation.

In October 1898 the bank called on two of the guarantors, Buchanan and Brown, to pay the sum of £4306, 17s. 11d., as being the amount due under the letter of guarantee.

In bringing out this sum the bank had, *inter alia*, proceeded on the ground that the sum standing at the credit of the company in "No. II. Call Account" (which, with interest, had come to be £6433, 15s. 6d.) was not appropriated to the reduction of the overdraft on the first account-current, and the bank had consequently applied it in reduction of the company's general indebtedness to the bank. This indebtedness amounted to £15,669, 7s., being the total of the two overdrafts, which, with interest, had come to be respectively £13,021, 13s. 5d. and £2647, 13s. 7d.

Buchanan and Brown having paid the sum of £4306, 17s. 11d. to the bank, called on Main to relieve them to the extent of one-third of the sum so paid, viz., £1435, 12s. 8d.; Main disputed liability.

Buchanan and Brown then brought an action against Main in the Sheriff Court at Glasgow for £1435, 12s. 8d.

The questions raised in the action were, *inter alia*, these:—(1) As to whether the sum of £6433, 15s. 6d. standing at the credit of the company in "No. II. Call Account" ought to be applied exclusively to the reduction of the overdraft on the first account-current. The defender maintained that it ought, and that if it were, it would (with the dividends and certain other sums to which the company was entitled to credit on an accounting with the bank) either extinguish the liability of the guarantors to the bank, or at least reduce that liability to a much smaller sum than £4306, 17s. 11d. (2) As to

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whether the liability of the defender in relief to the pursuers was a liability to the extent of one-third of such sum as might be found to be due to the bank under the letter of guarantee, as the pursuers claimed, or was a liability to the extent of one-fifth only of that sum, as the defender maintained. On this question the pursuers averred that the estates of one of the two remaining guarantors (who was dead) were insolvent, and that the other "maintains that he is unable to pay."

A proof was allowed. There was no direct evidence that the company had instructed the bank to close the first account-current on the defender intimating his withdrawal from the guarantee, or that they had directed the bank not to place the call money to the credit of that account. Leggatt, the accountant at the Glasgow office of the bank, deponed that the bank had acted as they did "because it is always our practice to do so when we receive intimation from cautioners; that is, to leave their account alone, and not to apply moneys received in reduction of that debt. As a rule we do that." Brown, one of the pursuers, and the only other witness examined on the point, deponed,—". . . There was no intention of placing the money received from calls to account of the old overdraft. If that had been done we would have had no funds to work the company—no funds to meet other liabilities. . . . I was not conversant with the manner in which the bank accounts were kept at the bank till near the stoppage. I was aware that a call account had been opened by the bank. . . . I did not call at the bank. . . . I did not write the bank; I think any communication there was was sent through the secretary. . . . Personally, I did not give any instructions to the bank in regard to the bank account. . . ." No written evidence on the point was produced.

A judicial factor under section 164 of the Bankruptcy Act, 1856, had been appointed on the estates of the guarantor who had died. The managing clerk of the judicial factor deponed that the appointment was not made on the ground of insolvency, but that on investigation it had turned out that the estates would probably not realise more than a dividend of 3s. in the £1.

As regarded the remaining guarantor, the liquidator of the company deponed that he had compromised a claim by the company against this guarantor for 2s. 6d. in the £1, because he believed the guarantor to be insolvent at the time.

The defender deponed that he believed the last-mentioned guarantor to be solvent, and that when he intimated his withdrawal from the guarantee he believed the other guarantor to be a rich man.

On 21st May 1900 the Sheriff-substitute (Fyfe) pronounced an interlocutor decerning for £566, 15s. 9d. against the defender. The Sheriff-substitute reached this sum by, *inter alia*, giving effect to the defender's two contentions above stated.

The pursuers appealed, and argued;—(1) The defender relied on the rule in the case of *Clayton*,[1] but that rule had no application in the circumstances here. If there had been a single continuous account-current instead of, as there was in fact, two separate accounts-current, and if the call money had been placed to the credit of that account, the case of *Clayton*[1] would have applied, unless the bank, in following the method of accounting supposed, had violated the instructions of the company. *Prima facie*, the right to appropriate a

[1] Clayton, 1816, 1 Merivale, 572.

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payment into bank was with the person making the payment; if he made no appropriation, the bank was entitled to make an appropriation, subject to the recognised rules and practice of bankers; failing which the law made an appropriation in accordance with the rule in the case of *Clayton*.[1] Here on the evidence it was clear that the company did not intend the call money to be appropriated in reduction of the overdraft on the first account-current; the bank's method of accounting, which prevented such an appropriation, was thus in accordance with the intention, if not the result of the positive instructions, of the company, and was consequently conclusive in favour of the pursuers, unless the defender was entitled to require the call money to be applied exclusively to the reduction of the first overdraft. The defender's right depended on the construction of the letter of guarantee, and on this question of construction the case of *In re Sherry*[2] was very close to the present. The letter of guarantee there was in its essential features identical with the letter of guarantee here, and on the construction of the letter there the Court of Appeal held that the guarantor was not entitled to require that sums paid into the bank to the credit of the customer in an account-current opened after the simultaneous closing of the guarantee and of an overdrawn account-current should be applied exclusively in reduction of the overdraft on the last-mentioned account. That decision was sound, and ought here to be followed. (2) The defender was liable in relief to the extent of one-third of the sum due to the bank, and not to the extent of one-fifth merely. That was in accordance with the general rule.[3] Even if the insolvency of the two other guarantors had not been established, there was a reasonable possibility that they would not be able to pay their share in full. That being so, there was neither authority nor principle for holding that the pursuers should bear the whole of this risk. Of course, the defender if he paid one-third would have the same remedies as the pursuers against the two other guarantors.

Argued for the defender;—(1) There was here truly only one account-current, and the call money ought to have been paid into the credit of that account. If that were so, the call money would have reduced *pro tanto* the overdraft on the so called first account-current—strictly speaking, it would have extinguished or reduced the earlier items of that overdraft.[4] It was clear on the evidence that the company had not instructed, or even authorised, the method of accounting which the bank had adopted, and the unauthorised act of the bank could not affect the rights of the parties. It was true that the money was derived from a special source—the payment of calls, and it might be, as Mr Brown deponed, that the company did not intend it to be applied to reduce the existing overdraft, but *quoad* the bank it was simply money paid in to the credit of the company, and as such the bank ought simply to have placed it to the credit of the company. The bank was not entitled, without instructions, to earmark it in any way. (2) The defender was liable in relief to the extent of one-fifth

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[1] Clayton, 1 Merivale, 572.

[2] *In re* Sherry, 1884, L. R., 25 Ch. Div. 692.

[3] Bell's Com. i. 372; Kames' Prin. of Equity, B. i., p. 1, sec. 3; Kames' Elucidations, art. 29.

[4] Clayton, 1 Merivale, 572; Cuthill v. Strachan, Feb. 16, 1894, 21 R. 549.

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only of the sum due to the bank under the letter of guarantee, and paid by the pursuers. The liability in relief was *pro rata*, except where one or more of the guarantors was insolvent.[1] Here neither of the two guarantors in question had been proved to be insolvent, and they must therefore be assumed to be solvent.

At advising,—

LORD TRAYNER.—(After dealing with another branch of the case)—There remain two questions. These questions are—(1) What is the amount for which the pursuers, defender, and two others were liable to the Bank of Scotland under their guarantee dated 18th May 1894? and (2) What is the proportion of the amount which the defender is bound to pay the pursuers? The facts are not disputed, and admit of being shortly stated. The United Gutta-Percha and Rubber Company being in need of financial assistance was allowed an overdraft by the Bank of Scotland on the guarantee I have referred to being granted. The guarantors were the parties to this action, and two others, all directors of the company, and their guarantee was limited to the sum of £12,500. On or about 28th January 1896 the defender and another of the guarantors intimated to the bank that they withdrew from the guarantee, and thereupon the bank closed the account on which the overdraft had been allowed. When that account was so closed there was due to the bank something over £12,000—the exact figure is not material. Immediately thereafter the directors of the company made a call on the shareholders, which they were requested to pay into the Bank of Scotland, and this call realised a sum of over £6000. The sum so received by the bank was entered in a new account, and against this sum the company operated by drafts which were entered in another account still. There were thus three accounts on the bank's books—(1) the guaranteed account closed in January 1896, (2) the call account which was entirely at the credit of the company, and (3) a new account-current between the company and the bank, which contained no entry of the debit balance on the guaranteed account or any reference to that account. The company went into liquidation in May 1896, at which time a large balance was due to the bank. It is unnecessary to follow out the accounting; it is enough to say that the pursuers have been called on to pay, and have paid, to the bank under the said guarantee the sum of £4306, 17s. 11d. The defender denies his liability for any part of this sum, because on a just accounting any balance due on the guaranteed account has been discharged. The defence is based upon the view that the £6000 paid into bank on the call account should have been placed as it was paid in to the credit of the guaranteed account. If that had been done, and all the other sums for which the bank gives credit had been added to it, then the balance on the guaranteed account would have been wiped out. I think this defence cannot be sustained. I accept the principle, frequently laid down, that when you have an account-current the payments on the credit side of that account (there being no specific appropriation of such payments) are held to extinguish the items on the debit side of the account in the order of their date. But that principle is, in my opinion, inapplicable here. The amounts

[1] Anderson v. Dayton, June 26, 1884, 21 S. L. R. 787.

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paid into the bank by the shareholders of the company under call made by the directors were not paid in to the guaranteed account at all, and it was not intended either by the shareholders who paid the call nor by the company that they should be. That account was closed before the calls were received, and stood so closed until the liquidation. Further, the calls were not paid into the bank as payments to account of the company's debt, nor as a payment towards any balance then due on any account-current, but as deposits to lie subject to the company's orders. It lay therefore with the company, in the first place, to appropriate the sums thus deposited for its behoof, and they did so, not by paying the same into the guaranteed account which had been closed, so as to extinguish *pro tanto* the balance due on that account, but appropriated it as a fund towards the present necessities of the company, against which they operated by way of draft as occasion required. The directors who so appropriated the call fund, in appropriating it as they did to the then present necessities of the company, did the defender no wrong. They were plainly using the call fund for the very purpose for which it had been paid. I am therefore of opinion that the defence fails in so far as it is founded on the defender's alleged right to have the call fund appropriated to the extinction of the balance due on the guaranteed account. This view seems to be in accordance with the decision in the case of *In re Sherry*[1] to which we were referred.

The pursuers have paid to the bank the whole balance due on the guaranteed account. What portion of that are they entitled to claim from the defender? The pursuers claim a third—the defender maintains he is only liable for one-fifth. There were five guarantors all jointly and severally liable. Two of these guarantors, as the pursuers say, and, as I think, have fairly established, are insolvent, in which case the defender must bear with the pursuers the whole claim under the guarantee. But whether the other two guarantors are insolvent or not, I think the same result follows. The pursuers are no more liable than the defender; he must therefore share their burden, with the same rights and the same risk as the pursuers of obtaining relief from the other two guarantors of the amount due by them.

I think therefore the interlocutor appealed against should be recalled and decree pronounced as concluded for.

LORD JUSTICE-CLERK.—That is the opinion of the Court.

LORD MONCREIFF was absent.

THE COURT recalled the interlocutor of the Sheriff-substitute of 21st May 1900 and found in fact, *inter alia*, "that after crediting all dividends received from the company's estate and securities held by them, there remained due to the bank upon the said guaranteed account the sum of £4306, 17s. 11d.; that upon demand made by the bank the pursuers each paid to the bank" the sum of £2153, 9s.: "Find in law that the pursuers are entitled to payment from the defender of one-third of the sums so paid by them," with interest from the dates of payment: "Therefore decern against the defender in terms of the conclusions of the petition."

CAMPBELL FAILL, S.S.C.—MILLAR, ROBSON, & M'LEAN, W.S.—Agents.

[1] L. R., 25 Ch. D. 692.

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PETER M'CAULL AND ANOTHER (James M'Caull's Trustees), First Parties.—*Craigie—Bartholomew.*
PETER M'CAULL AND OTHERS, Second Parties.—*Macfarlane.*
ALEXANDER M'CAULL AND ANOTHER, Third Parties.—*Clyde—Wilton.*
JOHN M'CAULL, Fourth Party.—*Younger.*

Succession—Election—Legitim—Clause of Forfeiture—Effect of parent's repudiation of liferent on children's right of fee.—A testator, who was survived by six children, directed his trustees to divide the residue of his estate into six equal shares, one share to be paid to his son "Peter and his heirs," one share to his daughter Mary Ann and her heirs, one share to his son James and his heirs, and, "with regard to the three remaining shares," one share to be held and applied for behoof of each of his three other children, John, Alexander, and Duncan, and their children, whom failing, their other next of kin as thereinafter directed. The testator thereinafter, with reference to "the share" which the trustees were directed to hold for "John and his foresaids," directed his trustees to pay the annual income thereof to John for his liferent use allenarly, and on John's death (until which event no vesting was to take place) to pay the principal or capital to John's lawful children, whom failing to his other next of kin. Similar directions were given in regard to the shares of Alexander and Duncan.

The testator further provided and declared that in case any of his children repudiated the settlement and claimed their legal provisions, "then such child or children shall forfeit all right to any share or shares of that part of my estate and effects, heritable and moveable, that I may freely dispose of by law, and they shall have right only to their legal provisions, and the share or shares of such child or children shall in that event accresce and belong or be held for behoof of my other children equally who shall abide by this settlement and accept of the provisions herein contained, the surviving issue of predeceasing children taking equally the share to which their parent, if alive, would have been entitled as aforesaid and providing and declaring that any share accrescing in virtue of this clause for behoof of my sons, John, Alexander, and Duncan, shall be retained and held by my trustees for their respective behoofs, for their liferent use allenarly, and for behoof of their respective foresaids in fee, in the same manner and for the same ends as are applicable to the other shares hereinbefore provided for their behoof."

John declined to accept the provision made for him, and claimed legitim. In a special case, *held* (*dub.* Lord M'Laren) that on a construction of the whole settlement the word "share" was throughout used in the sense of an aliquot sixth part of the residue, and that John by his repudiation forfeited not only his own rights under the deed, but also those of his issue or other next of kin.

1ST DIVISION. JAMES M'CAULL died on 20th November 1884, survived by six children, Peter, Mrs Mary Ann M'Caull or Robertson, James, John, Alexander, and Duncan.

Mr M'Caull left a trust-disposition and settlement by which he conveyed his whole estate to trustees.

The fourth purpose of his settlement was as follows:—"(Fourth) After my trustees shall have realised and converted into money my whole estate, heritable and moveable, they shall as soon as convenient divide the free residue and remainder thereof into six equal shares, and shall dispose of said shares as follows, viz.—one share shall be paid to my said son Peter and his heirs, under deduction of the sum of £100 formerly advanced by me to account of his legitim and share of my estate; one share shall be paid to my daughter Mary Ann M'Caull or Robertson, wife of David Robertson, Allanhill House, Dunblane, and her heirs, under deduction of the sum of £160 formerly

advanced by me to account of her legitim and share of my estate; one share shall be paid to my son James and his heirs, under deduction of the sum of £100 formerly advanced by me to account of his legitim and share of my estate; and with regard to the three remaining shares the following provisions shall have effect, viz., my trustees shall hold and apply one of said shares for behoof of my son John, and his lawful children or their lawful issue, whom failing his other next of kin or their representatives as hereinafter directed, under deduction of the sum of £500 formerly advanced or expended by me to account of his legitim and share of my estate: my trustees shall hold and apply another of said shares for behoof of my son Alexander, and his lawful children or their lawful issue, whom failing, his other next of kin or their representatives, as hereinafter directed, under deduction of the sum of £500 formerly advanced and paid by me to account of his legitim and share of my estate."

A similar provision was made in favour of Duncan.

By the fifth purpose the testator directed his trustees to divide the *cumulo* amount of the deductions into six equal shares and to dispose of them in the same way as was provided with regard to the six original shares of residue, "and it is hereby declared with reference to the whole of the shares hereinbefore provided, that if any of my said children shall predecease me leaving lawful issue, such issue shall be entitled to the share or shares, original and accruing, which their parent would have taken by survivance, and the share of any child predeceasing me without leaving lawful issue shall be divided among, or held and applied for behoof of, my surviving children and their foresaids respectively, in the same manner and to the same effect as is provided in clause fourth with reference to the original shares, and the lawful issue of such children as may have died leaving such issue, in equal shares *per stirpes*."

The sixth purpose was as follows:—"(Sixth) And with regard to the shares which my trustees are by the two immediately preceding clauses, fourth and fifth, directed to hold and apply for behoof of my son John and his foresaids, including the portion of any share which may accrue through any child predeceasing me without leaving lawful issue, and also the portion of any share accruing through any child repudiating this settlement and claiming his or her legal provisions, it is hereby provided and declared that my said son John is to be entitled to receive only the free annual income and revenue thereof, and that for his liferent use allenarly, and my trustees are directed to pay the said free annual income and revenue to him accordingly at such times and in such portions as they may think fit, but my said son is to have no right to the principal or capital of said shares, original or so accruing, or to assign, convey, or bequeath the same, and my trustees are hereby directed to hold the said principal or capital until the expiry of the liferent hereby provided to my said son, and at his death (until which event no vesting shall take place), or at my death should he predecease me, to pay or make over the said principal or capital to his lawful children then surviving jointly with the then surviving issue, if any, of such of his children as may have died leaving issue, equally among them *per stirpes*, whom all failing, to his other next of kin then in life jointly with the lawful issue of any predeceaser who had he or she survived would have been amongst said next of kin, such issue succeeding equally among them to the share to which their parent would have been entitled if alive."

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Then followed similar provisions with reference to the shares of Alexander and Duncan.

The deed contained these further clauses:—"And it is hereby declared that the sums hereby provided to my children are and shall be in full satisfaction to them and each of them of legitim, bairn's part of gear, and all other claims competent to them by or through my decease in any manner of way: And further, I do hereby provide and declare that in case any of my said children shall repudiate this settlement or question or impugn the same and claim their legal provisions, or shall by any means prevent this settlement from taking effect in whole or in part, then such child or children shall forfeit all right to any share or shares of that part of my estate and effects, heritable and moveable, that I may freely dispose of by law, and they shall have right only to their legal provisions, and the share or shares of such child or children shall in that event accresce and belong or be held for behoof of my other children equally who shall abide by this settlement and accept of the provisions herein contained, the surviving issue of predeceasing children taking equally the share to which their parent, if alive, would have been entitled as aforesaid: And providing and declaring that any share accrescing in virtue of this clause for behoof of my sons John, Alexander, and Duncan, shall be retained and held by my trustees for their respective behoofs, for their liferent use allenarly, and for behoof of their respective foresaids in fee, in the same manner and for the same ends as are applicable to the other shares hereinbefore provided for their behoof."

The residue of the truster's estate amounted to £11,361, 2s. 4d., of which each of his children under the settlement became entitled to one-sixth, or £1893, 10s. 4d. John claimed his legitim. The first parties thereupon, after paying him as out of the whole estate the sum of £943, 8s. 8d., less £248 admitted to have been received by him from the truster in respect of his legitim, divided the residue into six equal shares of £1777, 12s. 3d., one share being paid to each of Peter, Mary Ann, and James, while one share was invested for behoof of each of Alexander and Duncan, and the remaining one-sixth share was set aside for the representatives of John. In making that division the trustees gave effect to the directions of the truster in regard to the deductions before referred to, and the apportionment of the amounts thereof. The income on the last-mentioned one-sixth share set aside for the representatives of John was in turn periodically divided into six equal shares, one share being paid to each of Peter, James, and Mrs Mary Ann M'Caull or Robertson, one share being added to the capital of the shares set aside for behoof of each of Duncan and Alexander, of which only the income subsequently accruing thereon was being paid to them, and the remaining share being added to the capital of the share set aside for John's representatives.

Questions having arisen as to the validity of the division thus made by the trustees, a special case, in which the foregoing facts were stated, was presented by James M'Caull's trustees, first parties; Peter, James, and Mrs Mary Ann M'Caull or Robertson, second parties; Alexander and Duncan, third parties; and John, fourth party.

The opinion and judgment of the Court was asked on several questions, but in the view which the Court took, it is necessary to state only the following:—"1. Did John M'Caull, by declining to accept

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the provision made for him in his father's settlement and claiming his legitim, forfeit, not only for himself but also for his issue or other next of kin, all further interest under the fourth, fifth, and sixth heads of the settlement?"

Argued for the second and third parties;—There was here no separate and independent estates in John and his children or other next of kin. There was no estate in his children at all at the date of his repudiation, and could not have been, for there was no vesting until the parent's death. "Share" throughout the deed meant an aliquot sixth part of residue, the portion dedicated to and set apart for each *stirps*. There was no reason for giving it a restricted meaning in the forfeiting clause, even if the context had permitted it, which it did not; the language used in directing what was to be done with a forfeited share was referable only to the entire share of the *stirps*. It was absurd to read out of it an intention to provide in certain contingencies the liferent of a liferent. It was to be noted also that if the opposing view were upheld, the result of John's repudiation would be in the end to secure a greater benefit to himself, his family, or next of kin, than would enure to those of the testator's children who accepted their provisions. The case of *Campbell*[1] was on all-fours with the present, and in it the parent was held to have forfeited not only for himself but also for his children.

Argued for the first and fourth parties;—The rule of construction applicable to provisions like that in question had been ascertained and laid down in *Fisher* v. *Dixon*,[2] and had been followed in many subsequent cases.[3] The forfeiture fell to be limited to the share or interest of the person repudiating, unless there was an express declaration or provision extending its effect. There was no such provision here.

At advising,—

LORD PRESIDENT.—James M'Caull, the truster, died on 20th November 1884, leaving a trust-disposition and settlement dated 18th November 1884, by which he conveyed to the first parties to the case, along with another person, now deceased, as trustees for the purposes therein mentioned, his whole means and estate, heritable and moveable.

(After reciting the purposes of the trust before narrated)—The truster's estate amounted to £11,361, 2s. 4d., to one-sixth of which, or £1893, 10s. 4d., each of his children had right under his settlement. John, the fourth party, claimed his legitim, and the trustees paid to him his share of the legitim fund, and divided the residue into six equal shares, paying one share to each of Peter, Mary Ann, and James, investing one share for behoof of each of Alexander and Duncan, and setting aside the remaining one-sixth share for the representatives of John.

The first question put in the case is,—"Did John M'Caull, by declining to accept the provision made for him in his father's settlement and claiming his legitim, forfeit, not only for himself but also for his issue or other next

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[1] Campbell's Trustees v. Campbell, July 17, 1889, 16 R. 1007.

[2] Fisher v. Dixon, Nov. 24, 1831, 10 S. 55, July 1, 1833, 6 W. & S. 431, 5 Scot. Jur. 524.

[3] Jack v. Marshall, Jan. 21, 1879, 6 R. 543; Snody's Trustees v. Gibson's Trustees, Feb. 9, 1883, 10 R. 599.

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of kin, all further interest under the fourth, fifth, and sixth heads of the settlement?

The second and third parties maintain that the truster's intention was that if any child should decline to accept the provisions of the settlement and claim legitim, such child should forfeit, not only for himself or herself, but also for his or her representatives, all further interest in the estate, and that therefore, as John, the fourth party, claimed legitim, his representatives are not entitled to have any share of the estate set aside for them. The trustees, the first parties, and John, the fourth party, on the other hand, maintain that no such forfeiture is implied in the settlement.

I am of the opinion that the contention of the second and third parties is well founded, and that John by claiming legitim disentitled his representatives to any benefit which they might otherwise have taken under the settlement. In the fourth purpose the word "share" is used to designate one-sixth of the residue, six being the number of aliquot parts of the residue corresponding to the number of the truster's children, and the word appears to me to be used in the same sense in the fifth and the sixth purposes. Thus in the sixth purpose the shares which the trustees are directed to hold and apply for John and his foresaids are declared to include the portions of any share which might accrue through any child predeceasing the truster without leaving lawful issue (clearly a share of capital) and also the portion of any share accruing through any child repudiating the settlement and claiming his or her legal provisions. The latter, like the former, appears to me clearly to mean a share of capital, not merely the liferent given to the repudiating child. The most important question, however, is as to the meaning of the word "share" in the clause which declares the consequence of a child repudiating the settlement and claiming his legal rights, and I think that the word "share" is used there as in the rest of the settlement, as meaning the aliquot part of the residue directed to be held for the repudiating child and his issue or next of kin. The contention of the trustees and of John involves the view that the word "share" is used in two different senses in the settlement, first, as meaning an aliquot part of the residue, and secondly, in the clause of forfeiture, as designating merely the life interest in the aliquot part given to John, leaving the right of his issue or next of kin to the fee of that part unaffected. This does not seem to me to be a natural construction of the word "share." The share "of" John mentioned in the clause of forfeiture appears to me to mean the aliquot part given to him in liferent and to his issue or representatives in fee, and if the term was to be used for the first time in an essentially different sense as designating merely John's life interest in the share, some clear evidence of the change might have been expected. The provision in this, as in the sixth purpose, that the share of the repudiating child shall accresce to the other children, naturally means the share or portion primarily given to that child, not merely the liferent of that share. If the word "share" in the clause of forfeiture meant merely the liferent in the case of John, the interest in his share given upon his repudiation to Alexander and Duncan would be a liferent of a liferent.

The trust-disposition and settlement was made in November 1884, long

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after the decisions in *Fisher* v. *Dixon*,[1] and other cases of that class, and at a time when the prevalent practice of conveyancers had come to be to make repudiation by a child infer the forfeiture of any gift made by the settlement not only to him, but to his children. I consider this to be a very reasonable practice, seeing that if (to take the present case) John was allowed to take his legitim, and his children were permitted to claim the fee of an equal share of the residue upon his death, John and his children collectively would obtain a larger proportion of the estate than the other children, contrary to the intention of the truster. The decision in the case of *Campbell's Trustees* v. *Campbell*[2] appears to me to support the views now expressed.

Other questions are put in the case, but if the view now stated in regard to the effect of John having claimed his legitim is correct, they do not arise.

LORD ADAM.—The testator directed that if any child should claim his legal provisions, he should forfeit his right to any share or shares of the estate, and the share or shares of such child should in that event accresce to the other sisters and brothers of the forfeiting child and their heirs.

One of the sons, John, has claimed his legal provisions, and has thereby forfeited any right to a share of the estate. But John's position was this, he had a liferent only of a share of the estate, the fee of the share being held by the trustees for his children; and the question arises whether John has forfeited his own liferent only, or whether by claiming his legal provisions he has also forfeited any right of his children to the fee of the share. That is the question which arises in this case. Now, it appears to me that that question depends on what meaning is to be attached to the words "the share or shares of such child" which are to "accresce." What did the testator mean when he used these words? Is it as your Lordship said merely the interest of John in that share, or is it not only that interest but also the fee which was given to the children? Now, that takes us back to consider the settlement generally to see what meaning the testator himself attached to the words "share of such child"—whether he meant the share itself or merely the interest in the share. What the testator did with reference to the residue of his estate was this: He divided it into six equal shares. One of these he gave to his son Peter under certain deductions. A second share he gave in similar terms to Mary Ann, and the third he gave to James under similar deductions, so that the whole of these shares were given to these three children. With reference to the other three shares, his direction to the trustees was this:—"My trustees shall hold and apply one of said shares for behoof of my son John and his lawful children, or their lawful issue, whom failing," &c. The second of these three shares was given to his son Alexander, and the third to his son Duncan in exactly similar terms, deductions in each case being made from the share to be paid to each of them. We see from a subsequent part of the deed that these shares were to be held by the trustees—in John's case for John in liferent allenarly and his children in

[1] 10 S. 55, 6 W. and S. 431. [2] 16 R. 1007.

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fee. Then the testator, after directing that the sums deducted from the several shares of the children shall be made into a *cumulo* sum, and that *cumulo* sum divided and paid in the same way as the original shares, goes on to what appears to me to be a very important clause, and, therefore, I shall read it,—"It is hereby declared with reference to the whole of the shares hereinbefore provided that, if any of my said children shall predecease me, leaving lawful issue, such issue shall be entitled to the share or shares original and accruing which their parent would have taken by survivance," and then come these words—"the share of" "any child predeceasing me without leaving lawful issue shall be divided in the same manner as the original share." It will be observed that the testator in here speaking of shares makes no distinction whatever between the shares which were to be paid to the three first children in fee and the shares which were to be held for the three last-mentioned children in liferent. He refers to the whole of these shares, and speaks of them all without distinction, and it will, therefore, be observed that the words "share of any child predeceasing me" apply to the one set of shares just as much as to the other, and, accordingly, it appears to me to be clear in this part of the deed that he uses the word share of a child indifferently whether it refers to the share of a child that is to be paid in fee, or the share that is given in liferent to the child, and to the child's issue or next of kin in fee. Therefore, I think it is clear from this clause of the deed that when the testator speaks of "share" he means the share itself, whether it be one in fee, or whether it be one to be held by the trustees in liferent. Having done that, he goes on in the next clause to give directions as to the shares of the three latter children, John, Alexander, and Duncan, which come to this, that the share of each is to be held and applied by the trustees for the child in liferent allenarly, and his children in fee; and then there is this declaration, that there is to be no vesting until the expiry of the liferent. He deals with each son severally and separately, but the provisions in regard to each are identical. These being the provisions of the deed, we are brought back to the forfeiture clause to see—having ascertained in what sense the testator speaks of the share of a child—whether it applies to this clause. In dealing with this clause, the testator says "such child shall forfeit all right to any share or shares," and "the share or shares of such child" or children shall in that event accresce to the brothers and sisters and their issue. I think it is clear that when he speaks here he again imports no distinction between the two classes of shares, whether they are to be paid in fee or whether they are to be held by the trustees in liferent. He deals with them all in the same category, and obviously when he speaks of the shares of such child accrescing, he means the share of the child, whether it be a share of the first class to be paid at once or whether it be a share to be held by the trustees; and I think that the meaning of the testator is the whole share of the son who has the liferent only, and not merely the liferent interest in it. Therefore I agree with your Lordship, and I do not think it necessary to say more about it. But as your Lordship pointed out, if we were to take the meaning that it was only the liferent interest that was to accresce we should get into a very anomalous position—a position anything like which I do not

remember ever seeing in this Court—because the result would be that all that would accresce, for example, to the younger sons, Duncan and Alexander, would be John's liferent, and all that they would get would be the liferent of a liferent, which in one case, I observe, would mean that they would get the liferent of £17, 17s. 3d. That is a *reductio ad absurdum*, and it could not be the meaning of the testator; and therefore I agree with your Lordship in the result at which you have arrived.

LORD M'LAREN.—There can be no doubt at this day of the principle to be applied to the determination of such cases. If the election and the consequences of the election are determined by law, then the law is, that if the children take an interest independent of that of the parent, the election of the parent in no way affects the independent right of the child; but if the child's right is dependent on that of the parent, as, for instance if he takes by substitution, or if a sum is given to the parent for the maintenance of himself and his family, so that the two rights are inseparable, it may be in such a case that the forfeiture of the share given to the family would involve the children in the consequences of forfeiture. But in order to avoid the consequence which has been pointed out by your Lordship—that it leads to one branch getting a larger share than the other branches of the family—it has been not unusual for lawyers in framing wills to provide that anyone who claims contrary to the scope of the will shall forfeit his provisions, not only for himself, but also for his children or descendants.

Now, when a testator uses an unusual word, or it may be a common word in an unusual sense, and thereby puts a mark upon the word, defines it inferentially as having a signification peculiar to his will, it is in the absence of any explanatory context probably quite legitimate to carry that meaning into the other clauses of the will. But then the word "share" is a very common word. It may be said in wills to be *nomen generale*. I do not know any word that is more frequently used, or one which is used in a more general sense, and its ordinary meaning is just the benefit that is reaped by the individual whose interest is dealt with. Although for shortness the testator in the clause of residue speaks of the portion of his estate that is given to a family as the share of his son, I have difficulty in understanding that as impressing a peculiar meaning on the word "share," or obliging us to read it in the sense of share of a family wherever the word is used again. It is just the function of a will to describe in what way a testator's estate is to be "shared" by relatives or persons to whom he leaves it. I think it would be quite consistent with sound construction to hold that, as no reference is made to the issue of the person who incurs a forfeiture (in the clause of forfeiture), the clause means nothing more than what the law would imply—a declaration that whoever claims contrary to the will shall take no benefit under it, and that the benefit intended for him shall pass to the other branches of the family. But then while I should probably have accepted that interpretation if I had been considering this case alone, I do not feel so confident on the subject as to induce me to dissent from the judgment proposed, there being no question of principle involved. I hope it will always be kept in view in such cases that the ambiguities of one testator are not to form a canon of construction for the ambiguities of

No. 35. another testator; and under that condition I am prepared to concur in the judgment proposed, which I think involves nothing more than a question of construction of a special clause in a somewhat special will.

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LORD KINNEAR was absent at the hearing.

THE COURT answered the first question in the affirmative, and found it unnecessary to answer the other questions.

WILLIAM THOMSON, L.A.—WILLIAM FINLAY, S.S.C.—DAVIDSON & SYME, W.S.—R. BARCLAY ALISON, W.S.—Agents.

No. 36. JAMES DAIRON AND OTHERS, Pursuers (Respondents).—*Jameson, Q.C.* —*C. D. Murray.*

EDWARD DAIRON AND OTHERS, Defenders (Reclaimers).—*Clyde.*

Dec. 4, 1900. Dairon v. Dairon.

Expenses—Witness—Party as Witness.—An action of reduction of a trust-deed was directed against the trustees, and against an individual who was a party to the deed. The last-mentioned defender appeared and gave evidence at the proof in support of the deed. *Held* that he was entitled to expenses against the unsuccessful pursuer (*per* the Lord President) on the ground that he was a necessary witness for the trustees, who were the proper defenders of the trust; (*per* Lord Adam and Lord M'Laren) on the ground that as a necessary witness he was entitled to expenses whether he was a party to the case or not.

Opinion (*per* Lord M'Laren) that such expenses ought to include an allowance for subsistence as well as travelling expenses.

1ST DIVISION. Lord Low.

BY trust-assignation and settlement dated 8th June 1892, Andrew Miller Dairon, since deceased, James Dairon, Edward Dairon, David Alfred Dairon, and Catherine Dairon or Fleming, all children of the deceased James Dairon, plasterer in Glasgow, conveyed the heritable estate left to them by their father to Andrew Miller Dairon, Edward Dairon, and James Brownlie, writer in Glasgow, as trustees. The purpose of the trust was to regulate the distribution of the trust-estate among the different members of the family and their children.

In 1898 James Dairon and Mrs Fleming raised an action of reduction of this deed on grounds involving a charge of personal fraud against Edward and David Dairon. The defenders called in the action were (1) the surviving trustees, and (2) Edward and David Dairon as individuals. At the proof before the Lord Ordinary David Dairon, who was resident in Canada, appeared as a witness for the defenders.

On 11th August 1899, the Lord Ordinary repelled the reasons of reduction and assoilzied the defenders, and this judgment was affirmed by the First Division on 22d June 1900. The defenders being found entitled to expenses, the accounts were remitted to the Auditor for taxation, and on his report coming up for approval the pursuers objected to the report in respect, *inter alia*, that the Auditor had not disallowed the following items:—

Witnesses examined.—(2) David A. Dairon, plasterer, Vancouver, British Columbia, 36 days at £1, 1s.; travelling expenses between Vancouver and Montreal, £38, 12s.; and passage money between Montreal and Glasgow, £25, charged at £101, 8s.; taxed at £63. (3) Edward Dairon, plasterer, Glasgow, 2 days at £1, 1s., and travelling expenses, 15s., charged at £2, 17s.; taxed at £1, 8s. 6d.

On 20th July 1900, the Lord Ordinary sustained this objection to

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the extent of £61, 11s. 6d., reducing the sum of £63 allowed to David Dairon to £1, 8s. 6d., the same sum as that allowed to Edward Dairon.

The defenders reclaimed, and argued;—By the Act of Sederunt of 15th July 1876[1] non-resident witnesses were entitled to an allowance at the same rate as resident witnesses for the time "necessarily occupied by them in going to, remaining at, and returning from the place of trial or proof, besides reasonable travelling charges for going to and returning from the place of trial or proof," and as a party was now a competent witness,[2] there was no reason why a party appearing as a witness should be treated differently as regards the question of expenses from other witnesses.[3] It was not disputed that David Dairon was a necessary witness, while the nature of the case made against him and Edward rendered examination on commission inappropriate.

Argued for the pursuers;—A party was not entitled to recover expenses incurred in pleading his own cause, although it was his right to plead it if he chose,[4] and the same principle applied where a party appeared as a witness on his own behalf. Under the law as it stood prior to 1853 a party, even when a competent witness, was not treated on the same footing as other witnesses in the matter of expenses. Thus, a defender deponing on a reference to his oath by the pursuer was held not entitled to the usual charges for loss of time, but only to travelling expenses.[5] Further, this witness might have been examined on commission, and his coming to this country was an unnecessary expense.

Lord President.—I think the Lord Ordinary has erred in this matter, as I am unable to see any reason why David Dairon should not get his expenses. His position in this action is peculiar. He was a party to the family arrangement which was challenged, but he is not one of the trustees. Hence, in so far as the action was directed against the trustees as defenders of the trust, he was not a party, but he was asked by the trustees to appear as a witness, and no ground has been stated why in that capacity he should not be entitled to his outlays, which is all he claims. It is not disputed that he was a necessary witness.

But we have heard an argument which covers a much larger ground. It is maintained by the pursuers as a general rule that a party to a cause is not entitled to expenses—even outlays incurred by him as a witness—and although he may be a necessary witness, and whatever the nature of the case may be. In this case a very serious charge of fraud was made on record against this defender, and it would be an unfortunate state of the law if an innocent party was not, under such circumstances, entitled to come and deny such a charge except on condition of paying his own outlays. In this case both the Lord Ordinary and the Court have held the charge of fraud to be wholly unfounded, and it would require much stronger authority

[1] Part V. of Table of Fees, Art. III. (2).
[2] The Evidence (Scotland) Act, 1853 (16 and 17 Vict. c. 20), sec. 3.
[3] Willcox & Gibbs Sewing Machine Company v. Stirling & Son, Nov. 19, 1869, 7 S. L. R. 98.
[4] Forbes v. Whyte, March 17, 1891, 18 R. 688.
[5] Thorburn's Trustees v. Short, May 22, 1838, 16 S. 1016; M'Gill v. Ferrier, Dec. 2, 1836, 15 S. 178.

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than has been quoted to us to dispose me to hold that a witness is not, in such circumstances, to have his outlays, merely because he is a party to the case. But the first ground which I have stated is, in my judgment, sufficient to warrant us in holding that David Dairon is, as a witness, entitled to the very moderate sum in name of outlays which was allowed by the Auditor.

LORD ADAM.—I am of the same opinion. I always understood, and my impression has been confirmed, that by the old law if a party chose at his own convenience to attend the Court in his own case he was not entitled to be remunerated for doing so. And if he chose to go further, as in the case of *Whyte*,[1] and to plead his own cause, dispensing with the aid of agent and counsel, that would make no difference. But a material change in the law was made as to the position of parties by the Evidence Act, which enabled a party to become a witness in his own case; and if a party is entitled to give evidence, why should he not get his expenses? Now, in this case not only was the evidence necessary, but I think it was not such as could properly be taken on commission, because there was a personal attack on the defender's character—a charge of fraud—and he was one of the only two witnesses who could speak on that matter. The case turned upon the credibility of the witnesses, and the Lord Ordinary and we were of opinion that Edward and David Dairon had spoken the truth. No doubt if David had not come here he would have lost his case. There is, accordingly, no question as to the relative expense of his coming here and of his evidence being taken on commission. Being present he was examined as a witness, and why should not the rule applying to other witnesses apply to him? The necessity for his coming here was caused by the pursuers, and there was a decree for expenses given against them. Was the expense to him caused by them any the less because he was a party to the case?

LORD M'LAREN.—When a party to a case is examined as a witness, whether in his own favour or at the instance of his adversary, he gives his evidence under the same conditions as any other witness, and if his evidence is necessary he will be entitled to his travelling expenses and to money for his subsistence during the journey.

It is strange that this point is raised for the first time so many years after the date of the Evidence Act, by which it was made competent for parties to appear as witnesses, and the fact that no distinction has been taken during all this time (for I presume the Auditor has followed the practice of his office) leads me to suppose that a contrary view could not be maintained. If that be so, the only question is whether the evidence given by David Dairon was necessary for the determination of the case. It was said that a party is not to be allowed expenses for conducting his own cause. I agree in the decision quoted, in which I concurred, that no party can be allowed such expenses, because he is entitled to appear by counsel, and if he does not choose to avail himself of that privilege, and thinks he can conduct his case better in person, his election is not to be the means of subjecting the other

[1] 18 R. 688.

party to a new liability. But if a party gives evidence he must do so in person, and I cannot see how he differs from any other witness. No. 36. Dec. 4, 1900. Dairon v. Dairon.

As to the materiality of the evidence, I think that where a person is charged with fraud there is a direct challenge to him to appear and maintain the deed or the benefit which is said to have been obtained by fraud. I cannot figure a clearer case for allowing the application of the ordinary rule.

I would add that, while the Auditor has only allowed the reduced charge of £63, and the present reclaiming note is only directed to having that amount allowed, if the matter had been open I should have seen no reason for distinguishing between travelling expenses and subsistence money. If a witness is entitled to journey money as costs in the cause, he must live on the way, and he is entitled to an allowance for subsistence in so far as it is not covered (as in the case of a steamship voyage) by the passenger fare.

LORD KINNEAR was absent.

THE COURT recalled the Lord Ordinary's interlocutor of 20th July 1900, repelled the pursuers' objections to the Auditor's report on the defender's account of expenses, approved of the said report, and decerned for the taxed amount of expenses.

JAMES E. GORDON, W.S.—JAMES SKINNER, S.S.C.—Agents.

WILLIAM M. BUCHAN, Pursuer and Nominal Raiser.
HUGH LIVINGSTONE, Real Raiser and Claimant (Respondent).—*Kennedy—Guy.*
JAMES ALLAN AND JOHN ALLAN, Claimants (Reclaimers).—*M'Lennan—R. Scott Brown.*

No. 37. Dec. 5, 1900. Livingstone v. Allans.

Assignation—Real Security—Tantum et tale—Trust—Trust title for beneficiaries pro indiviso—Proof of purposes of trust—Joint Adventures.—A feudal title to lands was taken to A and B as trustees for themselves, each to the extent of one-half *pro indiviso*. By *ex facie* absolute disposition, B conveyed to an onerous assignee his one-half *pro indiviso* of the lands. This disposition was recorded.

In a competition between B's disponee and A, *held* (1) that the disponee's right was qualified by the trust disclosed in his disponer's title; (2) that the purposes of the trust, not being set forth in the title, might be proved by parole; and (3) that, accordingly, as it was established by such proof that the purpose was a joint adventure by A and B with reference to the lands in question, the disposition by B was only effectual to the extent of his interest in the joint adventure, viz., to the extent of one-half of the free balance on an accounting with A.

HUGH LIVINGSTONE, wholesale ironmonger in Glasgow, and William Brown Alexander, wright, Bridge of Weir, acquired in 1896 an area of ground on the west side of Milbrae Crescent, Glasgow, for the purpose of a joint building speculation, and as a site for tenements to be erected and afterwards sold for their behoof. In the feu-contract of this ground, dated 10th and 25th, and recorded 27th April 1896, the title was taken "to and in favour of the said Hugh Livingstone and William Brown Alexander, and the survivor of them, and the heir of the survivor, as trustees and in trust for behoof of the said Hugh Livingstone and William Brown Alexander, and their respective heirs 1ST DIVISION. Lord Pearson.

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and assignees whomsoever, each to the extent of one-half *pro indiviso*, heritably and irredeemably."

In pursuance of the joint adventure a tenement, No. 17 Millbrae Crescent, was built during 1896-97, the main part of the outlay on which was borne by Livingstone.

By disposition dated 23d, and recorded 25th April 1898, Alexander, having borrowed £250 from James and John Allan, wholesale provision merchants in Glasgow, conveyed to them his "one-half *pro indiviso*" of the subjects described in the feu-contract. This disposition was *ex facie* absolute, but was qualified by a back-letter, restricting it to a conveyance in security of the loan. The disposition was duly recorded.

Disputes having arisen among the parties, the tenement No. 17 Millbrae Crescent was, by common agreement, conveyed to Mr William M. Buchan, writer in Glasgow, in order that he might sell it and hold the proceeds for whoever should be found entitled thereto.

The tenement was accordingly sold, and one-half of the proceeds was, of consent, paid to Livingstone. In regard to the other half, amounting to £273, 7s. 10d., an action of multiplepoinding was brought by Livingstone as real raiser in name of Buchan as nominal raiser, and calling Alexander and the Allans as defenders. In this action claims were lodged by Livingstone and the Allans. Livingstone claimed the whole fund *in medio* in liquidation of the balance due to him by Alexander arising out of the joint adventure.

He pleaded;—(1) The said indebtedness of the defender Alexander to this claimant being a proper charge upon the share of the proceeds of the heritable property in question, and being in excess of the said share which forms the fund *in medio*, this claimant ought to be ranked and preferred in terms of one or other of his claims, with expenses.

The Allans also claimed the whole fund *in medio* as onerous assignees of Alexander holding a completed real security.

They pleaded;—(3) The said claimant's [*i.e.*, Livingstone's] averments of joint adventure are excluded by the terms of the title to the property; *et separatim*, they can only be proved by writ or oath.

On 7th March 1900 the Lord Ordinary (Pearson), before answer, allowed the parties a proof. The proof established, *inter alia*, the facts relating to the joint adventure, and the state of the accounts arising therefrom between Livingstone and Alexander.

On 17th August the Lord Ordinary pronounced the following interlocutor:—"Finds that the claimant Hugh Livingstone is entitled to be ranked and preferred *primo loco* on the fund *in medio* for the sum of £172, 17s. 6d. sterling, and that *quoad ultra* the claimants James Allan and John Allan are entitled to be ranked and preferred on the fund *in medio* for the whole balance thereof, reserving as to the expenses of raising and bringing the action into Court; and ranks and prefers the respective claimants accordingly, and decerns." *

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* "OPINION.—(In his note the Lord Ordinary, after reviewing the facts, with the result, *inter alia*, of holding that the Allans were onerous assignees, dealt with the question of law as follows):—This being so, the Allans contend that the terms of the title on which the subjects stood are conclusive in their favour, and that it is incompetent to look behind it. Their argument is, that while it is a trust title, it discloses a bare formal trust without purposes, each being beneficial owner of one-half *pro indiviso* of the

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The Allans reclaimed, and argued;—In a question with an assignee a title to heritage could not be qualified by a latent trust.[1] Here the feu-contract defined the interest of each beneficiary as "one-half *pro indiviso*," and the principle referred to applied just as if the title had been taken in the name of the parties as individuals and without a trust. The Allans were onerous assignees, and were not aware of the existence of the joint adventure. They were entitled to rely on the records, and as the title disclosed an interest in Livingstone and Alexander, each to the extent of one half, they were not bound by extraneous transactions altering this division. The proof led of the joint adventure was thus incompetent, or at any rate irrelevant. It was also incompetent on the ground that against a third party a joint adventure could only be proved by writ or oath.[2]

Argued for the respondent;—Alexander, who was merely one of two trustees in whom the feudal title was vested, could not effectually convey to an assignee any real right. He could only convey his *jus crediti* in the subjects. To determine what this was, parole proof that the purpose of the trust was a joint adventure on the part of

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subject, and being entitled at any time to get rid of the trust by an action of denuding. They say that they advanced the money in reliance on the records, and that they are in the position of a *bona fide* onerous disponee or assignee acquiring from a trustee who is vested in the subject by a title *ex facie* absolute. It is necessary in considering this question to examine the Allans' title, and it at once becomes apparent that the principle does not apply. They hold no title from the trustees, and it was the trustees who alone had the power to sell that subject or to borrow upon it. The Allans' title is derived from Alexander alone, and although it bears to dispone his one-half *pro indiviso* of the subjects, and was recorded in the Register of Sasines, it really amounts to no more than an assignation of Alexander's beneficial interest under the trust. No doubt the registration in the sasines would accresce to the Allans so soon as the trustees had conveyed to Alexander his *pro indiviso* half (as they might ultimately be bound to do), and he had completed his title thereto; but until that time the Allans were merely assignees of Alexander's interest, and were subject to all the qualifications affecting that interest.

"Now, one of these qualifications was, that Livingstone was not bound to concur in any deed affecting the subjects until he was reimbursed for his outlay on the subjects. This followed from the fact that the tenement was beyond all doubt erected 'on joint account'; and I presume that the original title was taken as it was, not merely for convenience, but in order to secure the rights of the two joint adventurers *inter se*.

"The Allans further object to this view of their rights, on the ground that even as between Livingstone and Alexander it is incompetent to qualify the terms in which the title was taken except by writ or oath, and that this rule holds good whether the case falls within the law of trust or the law of partnership, *Wilson* v. *Threshie*, 1826, 4 S. 366, being referred to. Alexander's right, they say, is by the title declared to be a full half *pro indiviso* of the subjects, and this is an attempt to cut it down. I do not think this is accurate. The right of each co-adventurer was and remains a right to one-half of the proceeds of the joint adventure. While the subjects remain heritable it is accurately expressed as a right to one-half *pro indiviso*, just

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[1] Bailey v. Scott, May 24, 1860, 22 D. 1105, 32 Scot. Jur. 504; Heritable Reversionary Co., Limited, v. Millar, Aug. 9, 1892, 19 R. (H. L.) 43, 47; Redfearn v. Somervail, 1813, 1 Dow, 50.

[2] Dunn v. Pratt, Jan. 25, 1898, 25 R. 461.

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Livingstone and Alexander was competent. The *jus crediti* of Alexander in the property of the joint adventure was the residue after all the charges on it had been met, and the accounts of the joint adventure adjusted.[1] It was only to this extent that the assignation to the Messrs Allan was effectual.

LORD PRESIDENT.—This action has been raised for the purpose of obtaining a decision as to the right to the sum of £273, 7s. 10d. held by Mr Buchan, the pursuer and nominal raiser. The competitors are Mr Livingstone, who was, along with Mr Alexander, engaged in a joint adventure in building, and Messrs Allan, who claim as the assignees of the share which belonged to Mr Alexander. It was not disputed that Mr Livingstone was entitled to one-half of the free proceeds of the joint adventure, and the fund *in medio* consists of the other half, which would have belonged to Mr Alexander if no charge had been created upon or against it. Part, however, is claimed by Mr Livingstone, who maintains that upon a just accounting between the parties to the joint adventure, there would be very little left for Mr Alexander, or anyone claiming in his right.

Messrs Allan, on the other hand, contend that they are not affected by the result of such an accounting, because they made to, or procured for, Mr Alexander a loan of £250 on the security of his whole right in the property, which they say is not affected by the accounting. The success or failure of that contention must, in my view, depend upon their being able to establish that they were entitled to rely on the records, or upon evidence submitted to them that the right assigned to them by Mr Alexander was not burdened with any debt or charge. I concur with the Lord Ordinary in thinking that the Messrs Allan were *bona fide* onerous assignees, and I shall deal with the case on that assumption.

The question at once arises, what information did the Messrs Allan get from the title shewn to them—did it or did it not shew an unequivocal and an unburdened right? The title is a feu-contract dated February 1896, by which certain subjects were disponed in feu to Mr Alexander and Mr Livingstone, and the survivor of them and the heirs of the survivor, as trustees for behoof of themselves and their respective heirs and assignees

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as, if the subjects had been held under the power of sale, it may be described as a right to one-half of the net proceeds. It does not really alter the copartners' equal rights, that there may have to be an accounting between them as partners in order to ascertain what it is that they are to share equally. If writ be necessary at all to shew the relation between Livingstone and Alexander touching this property, it is furnished by the minute of reference between them, which expressly bears that the tenement in question was built on joint account. It was not suggested that the original site could in this dispute be treated separately from the tenement built upon it. The sale was of the entire subject, and the fund *in medio* is one-half of the net proceeds of that sale.

"In my view, therefore, the Allans cannot compete upon the fund *in medio* with Livingstone's claim against Alexander on account of the tenement No. 17 Millbrae Crescent."

[1] Keith v. Penn, Feb. 21, 1840, 2 D. 633, 12 Scot. Jur. 363; Creditors of M'Caul v. Ramsay & Ritchie, 1740, M. 14,608; Murrays v. Murray, F. C., Feb. 5, 1805.

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whomsoever, each to the extent of one-half *pro indiviso*. The beneficiaries under the trust are the same persons as the trustees—that is to say, on an accounting between them each would be entitled to one-half of the free value or proceeds of the trust-estate, but their right rests upon the trust, not upon the feudal conveyance in the feu-contract. I agree with the Lord Ordinary in thinking that the principle applicable to a feudal title, *ex facie* absolute, in two persons, does not apply here, although it happens that the trustees and the beneficiaries are the same persons. Their real position was that they were engaged in a joint adventure in building, and were accordingly entitled to charge the trust property, which was in effect the capital of the adventure, with all the liabilities incident to it, so that all that Mr Alexander could effectually assign to Messrs Allan was half the free balance which might remain after the joint adventure had been wound up. Though not technically a partnership, as no separate legal *persona* was created in whom the common stock could be vested, the case of such a joint adventure is very similar to that of a partnership for the purposes of the present question. This follows from the decisions in the cases of *Keith* v. *Penn*, 2 D. 633, and *Creditors of M'Caul*, M. 14,608, which establish that the property embraced in a joint adventure cannot be effectually assigned until all the liabilities of the joint adventure have been satisfied.

It was maintained by the claimant Allan that it is only competent to prove a trust by writ or oath, and this is true as in a question between the truster and the alleged trustee. But here the fact that the property was held in trust is proved by the writ of both, viz., the feu-contract. It was argued that there is a similar restriction as to the mode of proving the terms of a trust, but this is not so, it having been repeatedly decided that when the fact that property is held in trust has once been admitted or proved by writ or oath, the terms and purposes of the trust may be proved otherwise.

For these reasons I am of opinion that the Lord Ordinary's decision upon the main question is right. If this be so, the only remaining question is one of amount, and as it is evident that this question has been carefully considered by the Lord Ordinary, we should be slow to disturb his decision upon it. After giving all due attention to the argument, I can see no reason for differing from him on that question.

LORD ADAM.—I concur.

LORD M'LAREN.—I am of the same opinion. I do not think the case is one of difficulty, but it is interesting because it raises in a new form the well-worn distinction between the rights of an assignee and a creditor either under his own diligence or through the trustee in a sequestration. Reference was made by both parties to the opinions expressed in the case of *The Heritable Reversionary Company* v. *Millar*.[1] The point decided in that case was that a creditor cannot acquire from a debtor who is in possession of estate anything more than the interest really belonging to him. He takes his debtor's interest *tantum et tale*, and, if the debtor has no real interest will acquire nothing. But it was clearly recognised in that case in my opinion and in the opinion delivered in the House of Lords, that an

[1] 19 R. (H. L) 43.

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assignee may take a higher right than a creditor. He takes in general all that his cedent has to convey or is empowered to convey. In this case we are not concerned with any question of power, because the debtor as a partner is only assigning what is his own, *i.e.*, a *jus crediti* in the partnership estate held. Now every assignee of a *jus crediti* under a trust is put on his inquiry to ascertain the terms of that trust, because the right assigned cannot be larger than the cedent's right against the trust. It is not enough merely to look at the terms of a trust-deed declaring that the trustees held for two persons *pro indiviso*. In such a case there may well be a supplementary deed embodying contract rights under which the trustees are bound to hold upon conditions not expressed in the deed of conveyance. That is the case here, and it is the key to the decision of the case, because while for convenience the title was taken in favour of the two partners as owners each of one half *pro indiviso* of the subject the real purpose of the trust was to hold it as estate of the joint adventure, and subject to the debts affecting such joint estate. I therefore agree with the Lord Ordinary that, assuming the Allans to be *bona fide* onerous assignees, they took nothing beyond such rights in the property as their author could have insisted on, having regard to his contract with his copartner.

I also agree with your Lordship that in applying that principle to the accounting the Lord Ordinary has dealt with the case correctly and satisfactorily, and that no sufficient cause has been shewn for reopening the accounting.

LORD KINNEAR was absent.

THE COURT adhered.

MARTIN & M'GLASHAN, S.S.C.—CUMMING & DUFF, S.S.C.—Agents.

No. 38.
Dec. 7, 1900.
Gillies' Trustees v. Hodge.

JOHN MORRISON AND ANOTHER (Gillies' Trustees), First Parties. MRS HELEN HAY OR HODGE AND OTHERS, Second Parties. JOHN HODGE (*Tertius*), Third Party.—*Wilson, Q.C.*—*Younger.* MRS MARGARET HODGE OR ROSS AND OTHERS, Fourth Parties.—*Vary Campbell*—*Craigie.*

Succession—Vesting—Fee or Liferent—Direction to Trustees to hold—Repugnancy—Power to advance capital.—By a testamentary settlement trustees were directed, on the death of two annuitants (who predeceased the testator), to hold a share of residue "for behoof of" J. H. and his family, as follows, viz., for payment of the interest of said share to said J. H. to the extent of one half thereof, and the interest of the other half thereof to his children, and if the said J. H. and his children "stand in need thereof" the trustees were directed "to expend the capital of said share for and in behalf of the said J. H. and his said children in such proportions as they may think proper." The settlement further declared that in the event of J. H. "dying before the division of the residue," the share which he would have been entitled to if alive was to go to his issue, but failing issue, then to the survivors of the beneficiaries equally. There was no further disposal of the share.

Held that the power to advance capital was a power to advance to the extent of one-half only to J. H., and to the extent of the other half to the children, and that there was a gift of the fee of the share to the extent of one-half to J. H., and as regards the other half, to the children, which vested *a morte testatoris.*

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2D DIVISION.

BY trust-disposition and settlement, dated 15th April 1879, Mrs Mary Mitchell or Gillies, widow of Thomas Gillies, Stirling, disponed her whole estate to John Morrison and others, as trustees, *inter alia*, for the following purposes:—(4) and (5) To pay annuities to two persons named; and (lastly) on the death of the survivor of the two annuitants, to divide the residue into seven shares, one of which they were directed to dispose of as follows:—"To hold another of said shares for behoof of the said John Hodge junior and his family, as follows, viz.:— . . . for payment of the interest of said share to the said John Hodge junior to the extent of one half thereof, and the interest of the other half thereof to the children procreated of the marriage between the said John Hodge junior and the deceased Elizabeth M'Laren, and if the said John Hodge junior and his children by the said Elizabeth M'Laren stand in need thereof, I direct my trustees to expend the capital of said share for and in behalf of the said John Hodge junior and his said children, in such proportions and in such way and manner as they may think proper . . ."

Then followed a declaration that in the event of any of the beneficiaries having right to the said shares, including John Hodge junior, "dying before the division of the said residue, leaving lawful issue, such issue shall be entitled to the share or respective provisions and share which their deceased parent or parents would have been entitled to if alive, but, failing issue, then to and among the survivors equally."

The testator was predeceased by the two annuitants and survived by John Hodge junior and his children. One of the other beneficiaries to whom a share had been destined, having predeceased the testator without issue, the share of residue to which John Hodge and his children became entitled as above, at the testator's death, amounted to one-sixth. John Hodge junior died in 1899, leaving a settlement by which he conveyed to trustees, *inter alia*, everything to which he was or might be entitled under the settlement of Mrs Gillies. Down to the time of his death Mrs Gillies' testamentary trustees had retained in their own hands the share destined to John Hodge junior, and his children for their behoof, and had advanced no part of the capital. After the death of John Hodge junior certain questions, hereinafter set forth in the contentions of the parties, arose as to the construction of the last purpose of Mrs Gillies' settlement, to determine which the present special case was brought.

The parties to the case were (1) Mrs Gillies' testamentary trustees; (2) The trustees of John Hodge junior; (3) John Hodge (*tertius*), a son of John Hodge junior; and (4) the other children of John Hodge junior.

The second parties maintained that Mrs Gillies' settlement conferred the fee of one-half of the one-sixth share on John Hodge junior *a morte testatoris*, and that they were entitled to payment thereof, and in this view the third party concurred. The fourth parties maintained that they and the third party were entitled in virtue of their having survived their father, John Hodge junior, to payment of the whole one-sixth share, or alternatively to payment of one-half thereof.

The questions of law for the determination of the Court were:—"(1) Are the second parties entitled to payment of the one-sixth share of the residue of Mrs Gillies' estate provided in her trust-disposition and settlement to John Hodge (*secundus*) and his family? or (2) Are

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the second parties entitled to payment of one-half of said one-sixth share? or (3) Are the children of John Hodge (*secundus*) and Elizabeth M'Laren entitled to payment of the whole of said one-sixth share equally among them? or (4) Are said children entitled to payment of one-half of said one-sixth share?"

Argued for the second and third parties;—The right to the fee of the one-sixth share vested *a morte*, one-half in John Hodge junior and the other half in his children.[1]

Argued for the fourth parties;—Nothing vested in John Hodge junior. The only fee he was to get depended on the trustees exercising their power of apportionment—a power which suspended vesting.[2] At his death the fee vested in the children. The only other possible view was that there was no fee in anybody but the trustees until apportionment. The fee was conveyed to them for the purposes of the trust, one of which was the disposal of the fee. They might dispose of the whole to these parties,[3] and counsel mentioned, though it was not stated in the case, that they desired to do so. Further, the meaning of the survivorship clause was that if Hodge junior died before the division of the residue, *i.e.*, before any capital had been advanced to him, his issue took the whole.

At advising,—

LORD TRAYNER.—The testator directed her trustees after the death of two annuitants to realise his whole estate and divide it among certain beneficiaries named. To some of the beneficiaries the share destined to them was to be paid, the shares of other beneficiaries were to be held by the trustees for their behoof. The share with which we are here concerned the trustees were directed to hold for behoof of "John Hodge junior and his family, as follows"—to pay the interest of one half thereof to John Hodge junior, and the interest of the other half to his children, "and if the said John Hodge junior and his children . . . stand in need thereof I direct my trustees to expend the capital of said share for and in behalf of the said John Hodge junior and his said children, in such proportions and in such way and manner as they may think proper." There is also a provision that if John Hodge junior should die before "the division of the said residue" his said children should be entitled to the provision and share of the residue which he would have taken had he survived that period. As the two annuitants (on whose death the residue was directed to be divided) predeceased the testator, the period of division was reached when the testator died. John Hodge junior having survived the testator, he accordingly survived the period of division, and therefore the provision made in favour of his children in the event of his predecease never became operative. It was said that we should read "division of the residue" as meaning actual payment of the residue—a reading which I reject as introducing a term which is inconsistent with the plain words of the trust-deed. We have therefore to decide what was the right conferred on John Hodge junior and his children respectively, and when did that right vest.

The testator directed the share in question to be held by the trustees for

[1] Greenlees' Trustees v. Greenlees, Dec. 4, 1894, 22 R. 136.
[2] Russell v. Bell's Trustees, March 5, 1897, 24 R. 666.
[3] Chambers' Trustees v. Smiths, April 15, 1878, 5 R. (H. L.) 151.

behoof of John and his children. I take that to be equivalent to a gift to John and his children, in accordance with opinions expressed in several recently decided cases, and the gift, in my opinion, was a gift of fee which vested *a morte*. There seems to me to be no reason for holding that vesting was postponed, and without such reason vesting must be held to have taken place *a morte* according to the well-settled presumption of law. I think further that it was a gift of fee, for this reason, that if it was not, then the fee was not disposed of at all, and would fall into intestacy, a result which is to be avoided if possible, and in itself rather inconsistent with the fact that the testator was by her deed disposing and intending to dispose of her whole estate.

But the question remains, In what proportion was the fee gifted to John and his children? The deed certainly does not make this clear, but I am of opinion that the deed sufficiently indicates that the fee was to be divided into equal parts, one of which went to John and the other to his children. The fact that the interest of one-half was to be paid to each is an indication of the extent of their respective rights in the capital. It was said that the direction to the trustees to expend the capital, if necessary, on behalf of John and his children was against this view. But I think otherwise. If the trustees were authorised to expend the whole capital for the benefit of the children (which was an argument used in support of the view that they alone were fiars), they were equally authorised to expend the whole capital for behoof of John, the result of which (on the argument I have referred to) would be to confer the whole fee on John. This was not, however, the testator's intention. She did not, I think, authorise the whole capital to be expended for behoof of the children, for that would have deprived John of the interest of the half, which was carefully guarded for him. In like manner, the trustees could not expend the whole capital for behoof of John, which would have deprived the children of the interest of one-half, as carefully guarded for them. But the trustees could expend the capital destined to John for his behoof, and equally expend the one-half of the capital destined to the children for their behoof. That I take to be the meaning and intention of the testator, and on no other interpretation of her deed does it appear to me that her whole directions can be carried out. I think, therefore, that the second and fourth questions should be answered in the affirmative.

LORD MONCREIFF.—I am also clearly of opinion that the one-half of a sixth share of the residue, which the trustees were directed to hold for behoof of John Hodge junior, vested in him *a morte testatoris*, and that the other half of the said sixth share vested at the same date in the children of the marriage between him and his first wife Elizabeth M'Laren. The scheme of that clause in the deed which deals with the one-sixth share in question makes it clear that the trustees were to hold one-half exclusively for the benefit of John Hodge junior. The interest of it was to be paid to him, and the trustees were empowered to expend so much of the capital of said half share for his behoof as they thought fit. I do not think that his children had any interest in that half, or that he had any interest in the half destined to them. Accordingly, it would not have been in the power

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of the trustees to apply any part of the capital of John Hodge junior's half for behoof of his children, or *vice versa*.

It is true that there is no direct gift of the capital to John Hodge junior; but this is one of the class of cases in which a gift of the interest coupled with a power to the trustees to make advances of capital is sufficient to indicate a gift of the capital to the beneficiary. John Hodge junior was a residuary legatee. There was no ulterior destination and no survivorship clause, because the survivorship clause, which was relied on strongly by Mr Vary Campbell, relates solely to the date of division of the residue, which is directed to take place on the death of the survivor of the two annuitants. At that date the truster directs her trustees to divide the residue into seven equal parts or shares, and pay the same to or hold them for the beneficiaries as therein directed. That is "the division of the said residue" which is referred to in the deed.

I am, therefore, clearly of opinion that the second alternative question and the fourth alternative question should be answered in the affirmative; and the first and third in the negative.

The LORD JUSTICE-CLERK and LORD YOUNG concurred.

THE COURT answered the second and fourth questions in the affirmative, and found it unnecessary to answer the others.

COUTTS & PALFREY, S.S.C.—BEVERIDGE, SUTHERLAND, & SMITH, S.S.C.—Agents.

No. 39.
Dec. 7, 1900.
Urquhart's Trustees v. Gordon.

WILLIAM GALL AND OTHERS (Urquhart's Trustees), First Parties.—*C. D. Murray.*

THE HON. JOHN EDWARD GORDON AND OTHERS, Second and Third Parties.—*W. E. Mackintosh.*

ALEXANDER REID URQUHART AND OTHERS, Fourth and Fifth Parties.—*Jameson, Q.C.—Younger.*

BAPTIST UNION OF SCOTLAND, Sixth Party.—*Kennedy—Cullen.*

Succession—Legacy—"Free from Legacy-duty"—Annuity—Substituted Annuitant.—A testator by his settlement directed his trustees to pay certain annuities, "each free of legacy-duty." By a supplementary will he nominated four persons, a nephew and nieces of the annuitants, as "heirs to the annuities" of their uncle and aunts, as these should become vacant by the deaths of the annuitants.

Held that the trustees were not bound to pay the succession-duties exigible on the "heirs" becoming entitled to the annuities.

2D DIVISION.

LEWIS CARMICHAEL URQUHART, sometime at West Villa, Elgin, died on 20th January 1889. He left a holograph will, dated 31st July 1878, with a codicil, dated 14th August 1884, and a supplementary will, dated 1st May 1888.

By his will he left his whole estate of every description to trustees for certain purposes, and, *inter alia*, directed them to pay "annuities of £50 sterling, in half-yearly instalments, each free of legacy-duty, to my dear brother Alexander Urquhart, . . . and to my dear sisters, Helen Urquhart and Isabella Urquhart or Stewart; . . . and also to pay therefrom, in a similar manner, annuities of £10 sterling, each free of legacy-duty, to my cousins Margaret Cormie, Helen Cormie or Archibald, and Penuel Anderson or Falconer, whom failing, to her daughter Penuel Falconer . . . and, free

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of legacy-duty, an annuity of £20 sterling to Ann Reid, spinster, in Elgin, presently in service with me."

By codicil of 14th August 1884 he provided,—"The annuity of £10 sterling, lapsed by the death of Helen Cormie or Archibald, I give, devise, and bequeath to the aforementioned Ann Reid, my housekeeper, in addition to the annuity of £20 sterling previously settled on her, and all free of legacy-duty."

By the supplementary will of 1st May 1888 the testator recalled a bequest under the will in favour of his nephew and nieces, Frank Urquhart, Agnes Urquhart, and Elspeth Jane Urquhart; and further provided,—"I hereby constitute and appoint them and their brother, Dr Alexander Reid Urquhart . . . heirs to the £50 annuities of their uncle Alexander Urquhart, of Agnes Villa, and their aunts Miss Helen Urquhart and Mrs Captain Stewart, . . . each annuity as it may become vacant by the death of the annuitant being divided equally amongst the said four children or the survivors of them during their lifetime. . . . With regard to the annuities of Miss Penuel Falconer, Margaret Cormie, and Alexander Macintosh, as they become vacant by death, I constitute and appoint Miss Ann Reid, my housekeeper, heir to each of them, in addition to that settled upon herself."

The testator was survived by the said Alexander Urquhart, Helen Urquhart, and Isabella Urquhart or Stewart, who all subsequently died. He was predeceased by Mrs Penuel Anderson or Falconer. Miss Penuel Falconer and the annuitants substituted by the supplementary will survived.

Upon the death of the original annuitants, and the succession to their annuities opening, a question arose between the trustees and the substituted annuitants as to whether the former or the latter were liable for the succession-duty which then became payable. To determine this, among other questions not here reported, the present special case was brought.

The parties to the case were—(1) the testamentary trustees; (2) the trustees and managers of Dr Gray's Hospital, Elgin, to which a legacy had been left; (3) the trustees and managers of the Northern Infirmary, Inverness, to which a legacy had been left; (4) the testator's nephews and nieces, Alexander Reid Urquhart, Frank Urquhart, and Mrs Agnes Urquhart or Tamson, Mrs Elspeth Jane Urquhart or Hobart, and their husbands for their interests, and Miss Penuel Falconer; (5) Ann Reid; and (6) the Baptist Union of Scotland, the residuary legatee.

The first, second, third, and sixth parties maintained that the substituted annuitants must pay the succession-duties due on their succeeding to the annuities; the fourth and fifth parties maintained that they must be paid by the testamentary trustees.

The following questions, *inter alia*, were submitted for the judgment of the Court:—"(3) Do the succession-duties upon the annuities of £50 bequeathed by the testator to his brother Alexander Urquhart and his sisters Helen and Isabella respectively, which became payable upon the succession thereto of the said Alexander Reid Urquhart, Frank Urquhart, Agnes Urquhart or Tamson, and Elspeth Jane Urquhart or Hobart, and which will hereafter become payable upon the succession of the survivors and survivor of them; and also upon the annuity of £10 bequeathed by the testator to Penuel Falconer, which may become payable upon the succession thereto of the said Ann Reid, fall to be paid by the first parties? or

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(4) Are these duties payable by the parties respectively succeeding to said annuities?"

Argued for the first, second, third, and sixth parties;—The testator neither directed nor intended that the substituted annuitants should escape paying legacy-duty, except in the case where he expressly said so, viz., in the bequest to Ann Reid in the codicil of 14th August 1884. This was not a case of changing a gift to the same legatee or of changing the legatees.[1] It was a case of a gift to a legatee in succession to a different legatee, and there was no case where the succeeding legatee was held entitled to take free of legacy-duty because the original legatee did.

Argued for the fourth and fifth parties;—These parties were made "heirs" to annuities free of legacy-duty. The testator intended to place them exactly in the position of the original annuitants. The bequest to Ann Reid in the codicil of 14th August 1884 was altogether different. That was a bequest of a lapsed annuity, and it was necessary there to repeat the condition. Here there was a gift of annuities as originally bequeathed, *i.e.*, free of legacy-duty.

The opinions of the Court, so far as applicable to the point reported, were:—

Lord Justice-Clerk.—Further in the same codicil, he recalled his bequests of several heritable subjects and in lieu of them he made those who would have been entitled to them "heirs" to certain annuities left by the previous deed. The question in regard to them is, whether the trustees must pay these annuities free of legacy-duty. The contention upon which the beneficiaries maintain that the annuities must be paid free of duty, is that the original legacies, to which they were made heirs were declared to be free of legacy-duty, and that it must be presumed that in conferring this benefit upon the new legatees it must have been the intention of the testator to confer it upon the same conditions. If there were nothing else in the testamentary writings except the bequest in general terms, and if this making of heirs to legacies had followed in the same deed on the original legacies, there would I think be great plausibility in the suggestion that the intention must be held to be the same as in the original bequest. But here the testator was by a separate deed making an entirely new arrangement, in view of an expected deficiency in his estate, giving a new gift in lieu of what he was cancelling, and it is according to the sound reading of such a bequest to look for conditions favourable to the legatee and against the estate to the words of the bequest itself, and not to inferences to be drawn from the favourable conditions under which by a previous deed the same gift had been given to another. But even if this latter were proper to be done, in such a case it could only be done fairly if all parts of the testamentary deeds which might bear upon the question of intention were considered also. And in this case we find that the question of legacy-duty was considered and specifically dealt with by the testator in the immediately preceding codicil, in which he is doing a similar act to that which he does in the last codicil. An annuity which he left to one legatee, who predeceased him, he bequeathed to another legatee, and in

[1] M'Alpine v. Studholme, March 20, 1883, 10 R. 837.

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that particular case he provided that the legacy—which was also in the form of an annuity—should be free of legacy-duty. He having not so expressed himself in regard to the legacies in question, I am unable to hold that the trustees are entitled to free the legatees of legacy-duty.

LORD YOUNG.—I concur.

LORD TRAYNER.—There is some difficulty perhaps connected with the question, whether the annuitants who succeed to annuities originally paid "free of legacy-duty," are entitled to receive the annuities they succeed to on the same terms. But I think the safer view is to hold that no annuity is to be paid "free of legacy-duty" except where this is distinctly and in terms provided. It supports this view to note that in one case where the testator provides for the annuitant succeeding to an annuity originally provided to another person he distinctly states that the annuitant so succeeding shall receive that succession free of duty. Having so provided in one case, the presumption is that he did not intend the same benefit to be conferred in other cases where he did not so provide.

LORD MONCREIFF.—The next question is whether the annuities given by the supplementary will to certain parties who are substituted to the original annuitants should be paid free of legacy-duty. I am of opinion that they should not, for the reasons that have already been stated.

THE finding of the Court with regard to the question here reported was "(2) That the legacy or succession duties upon the annuities of £50 bequeathed by the testator to his brother Alexander Urquhart and his sisters Helen and Isabella respectively, which became payable on the succession thereto of Alexander Reid Urquhart, Frank Urquhart, Agnes Urquhart or Tamson, and Elspeth Jane Urquhart or Hobart, and which will hereafter become payable on the succession of the survivors and survivor of them, and also upon the annuities of £10 bequeathed by the testator to Margaret Cormie and Alexander Macintosh respectively, which became payable on the succession thereto of Ann Reid, and on the annuity of £10 bequeathed by the testator to Penuel Falconer, which may become payable upon the succession thereto of Ann Reid, fall to be paid by the parties respectively succeeding to said annuities."

BOYD, JAMESON, & KELLY, W.S.—MORTON, SMART, & MACDONALD, W.S.—THOMAS WHITE & PARK, S.S.C.—Agents.

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JESSIE BUCHANAN, Pursuer (Appellant).—*W. C. Smith*—*W. Thomson.*
JOHN FINLAYSON, Defender (Respondent).—*Salvesen, Q.C.*—*Hunter.*

Parent and Child—Proof of Paternity—Admission of intercourse subsequent to date of conception.—In an action of filiation and aliment brought by the mother of a child born on 13th February 1900, the pursuer deponed that she had connection with the defender on various occasions from December 1898 to 11th August 1899. The defender admitted having had connection with the pursuer on 11th August 1899, but deponed that he never had had connection with her on any other occasion. Apart from the pursuer's

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evidence there was no evidence of any familiarities between the parties prior to 11th August 1899, although they frequently met together.

Held (*diss.* Lord Moncreiff) that the pursuer had failed to prove that the defender was the father of the child.

Lawson v. *Eddie*, May 18, 1861, 23 D. 876, and *Ross* v. *Fraser*, May 13, 1863, 1 Macph. 783, *commented on*.

2D DIVISION. Sheriff of Fifeshire.

JESSIE BUCHANAN raised an action of filiation and aliment in the Sheriff Court of Fifeshire against John Finlayson, butcher in Kincardine-on-Forth, on the ground that he was the father of her illegitimate child, which was born on 13th February 1900.

The pursuer averred a continuous course of connection during the period from December 1898 till August 1899, and in particular on the 22d May 1899.

The pursuer produced a letter from the defender, dated 16th February 1900, quoted below.*

The defender denied *simpliciter* that he was the father of the child, and averred that he had connection with the pursuer for the first and only time on the night of the Kincardine Fair on 11th August 1899. He also averred that in or about the month of May 1899 the pursuer had connection with several men, and specified two of them.

The defender produced a letter from pursuer to the defender, dated 8th January 1900, quoted below.†

The defender averred that on receipt of this letter, and on the

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* "16th February 1900.—I was very much surprised to hear that a child was born on Thursday, the 13th of this month. I am extremely sorry for you, for by the laws of nature the child, in order to be mine, should not have been born for three months yet. I admit that I was with you on the Fair night [11th August 1899], which was the first and only time that I had connection with you, as you also state in the letter which I received from you last month, which I have in my possession. You will see from the above it is useless for you to try and make me the father of it, as I now know of others whom you have been in company with, and I therefore deny all liability."

† "Dear John,—How I am to begin this letter I'm sure I do not know, but I thought it best for both of us. I've kept the truth from you till I could do it no longer, but, John, if I did deny it at the time it was for your sake, and believe me I did it for the best. I have always wanted a chance this last fortnight to explain everything to you, but you never looked near hand me. So I came away on Saturday and never said where I was going, so I don't know what they are thinking, but believe me, dear John, I never will tell them; but you must know, John, as well as I can tell you, I never took up with any other one, and I blame the Fair night for it, because it was just after that I was afraid what was going to be. I know you will be in a state, but how do you think I am? for I think I will lose my senses. I am staying with my cousin just now. . . . I will not go home for certain till everything is over; but if I had seen you yourself I could have explained things better, for I'm sure I hardly know what to write; but, John, if you would only write me a few lines and say you forgive me. It will always help to cheer me on a bit. I will stay here for a few days longer; and about them at home I'm sure I don't know what to do. . . . Oh, John, if this had never happened; but it can't be helped now, more's the pity. But, John, you might write me a few lines; you don't know what they would be to me; and I don't think I need write any more, for I'm sure I don't know what to write, but surely, John, you think more of me than cast me off when it has come to this, for I'm sure nobody will ever be what you are to me.—From your sincere friend, JESSIE BUCHANAN."

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understanding that the child of which the pursuer was pregnant was the result of what took place on 11th August 1899, he accepted responsibility, and made arrangements for the confinement of the pursuer on this footing.

Proof was led, in which the defender deponed that the one and only time of connection was the Fair night in August. Apart from pursuer's evidence, there was evidence of opportunity at the date of conception, but not of opportunity peculiar to the parties, or such as was not open to any other man residing in the same town, or of familiarity from which intercourse might have been inferred apart from the admission which the defender made. Of the two men with whom the defender alleged the pursuer had connection at the date of conception, both denied it, one of them, however, deponing that he had connection with the pursuer two years previously. The pursuer denied connection at any time with either. The nature of the evidence generally sufficiently appears from the opinions of the Court.

On 4th June the Sheriff-substitute (Gillespie) assoilzied the defender,* and the pursuer appealed to the interim Sheriff (Chisholm)

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* "NOTE.—The child was born on 13th February 1900. The pursuer avers a course of connection from December 1898 to August 1899, and among other occasions 'on or about the 22d May 1899.'

"The defender admits having had connection with the pursuer on the night of Kincardine Fair, 11th August 1899, but he explains that this was the first and only time.

"Now, it is settled in actions of filiation, that when the man admits connection, but at a time too near the birth to result in the birth of a full-grown child, the admission may be sufficient confirmation of the woman's statement that connection took place at a time corresponding with the ordinary period of gestation, if similar opportunities existed at that time. But the admission is not necessarily sufficient confirmation.

"In the present case there is nothing in the parole evidence to make it improbable that connection took place in May, though there is no direct evidence in support of it. The parties had the same opportunities which they admittedly took advantage of on 11th August.

"There was nothing in the manner of either party to lead me to give a decided preference to one over the other as regards credibility. Each gave evidence in a fairly consistent way, and neither is materially contradicted except by the other. . . .

"The decision of the case largely depends on the pursuer's letter to the defender (No. 5 of process), in which she says, 'You must know John, as well as I can tell you, I never took up with any other one, and I blame the Fair night for it, because it was just after that I was afraid what was going to be.' While it is a fair observation that the letter indicates terms of closer intimacy and affection than the defender admits, it contains nothing which to my mind suggests that there had been a course of illicit connection previous to the 'Fair day,' though, with the explanations which the pursuer has given, there is nothing necessarily inconsistent with there having been such a course of connection.

"On the whole, I cannot but regard the letter as raising some difficulty in the way of accepting the pursuer's statements as to previous connection without more corroboration than she has been able to bring.

"It is in the defender's favour so far, that on the understanding that the pursuer's pregnancy was due to connection on the 'Fair' night, he accepted the legal responsibility. But he has not improved his case by putting on record an averment that two other men named had connection with her in or about the month of May 1899, which has completely broken down."

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who, on 14th July, adhered to the interlocutor of the Sheriff-substitute.*

The pursuer appealed to the Court of Session, and argued;—There having been admitted connection during the period of pregnancy, that, coupled with evidence of opportunity at the date of conception, and the absence of evidence of connection with other men at that date, was sufficient corroboration of the pursuer's oath that there was connection at the date of conception.[1]

Argued for the defender;—The pursuer must prove her case, and evidence in filiation cases must be treated just as in any other kind of case depending on disputed fact.[2] There was no doubt here evidence of opportunity, but none of any familiarity from which *per se* impropriety might be inferred.

LORD JUSTICE-CLERK.—This case is in some respects a peculiar one. There is no evidence whatever, except the evidence of the defender himself, from which anything suggestive of corroboration of the pursuer's testimony can be drawn. The circumstances spoken to as regards the social intercourse between the pursuer and the defender are all of the most ordinary character, having regard to their rank in life, and nothing of the nature of intimacy, familiarity, or clandestinity is proved to have taken place at or near the time of conception.

But it is maintained that, as the defender admits, and all along has admitted, that he had connection with the pursuer on the Fair night in August, and by his conduct indicated his intention to meet his honourable obligations on the birth of the child on the assumption that it was then

* "NOTE.—The defender admits that he had connection with the pursuer on the 'Fair night,' *i.e.*, on 11th August 1899, but he states that the 11th August was the first and only occasion on which he had such connection. It may, I think, be said fairly to be made out by the proof that practically similar opportunities of connection existed at the time of conception (in May 1899), and pursuer states that connection with defender occurred in May. In the absence of anything, other than defender's evidence, impugning pursuer's statements, I should have been disposed to apply what Lord Justice-Clerk Inglis, in *Ross* v. *Fraser* (1 Macph. 783), called 'a general rule in judging of evidence in such cases, founded on ordinary experience and common sense,' and to hold that (1) defender's admission of connection within the period of gestation, (2) proof of similar opportunity at the time of conception, and (3) pursuer's deposition on oath that connection took place at that time, are together sufficient to make out that the defender is the father of the child. But it seems to me that the letter (No. 5 of process), written by pursuer to defender in the beginning of January 1900, contradicts the pursuer's evidence as to connection having occurred before the 'Fair night,' 11th August 1900. The question of construction is a narrow one. But, on the whole, I think that the most reasonable interpretation of the passage quoted in the Sheriff-substitute's note is that the pursuer there admits that connection between her and the defender took place for the first time on 11th August 1899."

[1] Fraser, Parent and Child, 135; Robertson v. Petrie, Dec. 22, 1825, 4 S. 333; Burns v. Cumming, June 27, 1846, 8 D. 916; Lawson v. Eddie, May 18, 1861, 23 D. 876, 33 Scot. Jur. 471; Ross v. Fraser, May 13, 1863, 1 Macph. 783, 35 Scot. Jur. 473; M'Donald v. Glass, Oct. 27, 1883, 11 R. 57.

[2] M'Kinven v. M'Millan, Jan. 13, 1892, 19 R. 369; M'Bayne v. Davidson, Feb. 10, 1860, 22 D. 738, 32 Scot. Jur. 296.

conceived, which was the pursuer's own statement in her letter to him, if the pursuer can prove that there was opportunity at the period corresponding to the birth, she has proved her case. This is maintained on the authority of two cases cited, in which some observations tending to support it are to be found. I confess that I find myself unable to hold that a confession of carnal intercourse at a period months after the actual time of conception constitutes in any sense a corroboration of a pursuer's statement of previous connection, requiring only that there be proof of previous opportunity about the time of conception to complete the chain of evidence, so that a defender cannot escape from it. I am far from saying that such a confession, if it fixes a date near the date of possible conception, may not be considered. If it is only a question whether the connection was in one month, when it probably was in the next month, then any inference deducible from a statement made by the defender may be strong. I also do not say that even where the date to which the confession relates may be many months from that of conception, the confession may not be an element for consideration along with other evidence, such as evidence of familiarity or clandestinity at the earlier period, but I cannot assent to the doctrine that it is sufficient of itself, coupled with mere proof of opportunity, to justify a decision that a pursuer's case has been proved.

I do not enter upon the question whether the pursuer's letter to the defender indicates a suggestion that there had been—according to the position she was then taking up—more acts of connection than one, for that letter cannot be looked upon as anything more than part of her own statement, which whatever it may have meant cannot be accepted as decisive if there is no corroboration. In my opinion, the case of an acknowledgment of connection by a defender before the time when conception could have taken place, and the case of connection at a period beyond the time when it must have taken place, are very different as regards their cogency. If a man has admittedly had connection with a woman, and is afterwards having meetings with her in circumstances in which connection could take place again, there is a considerable presumption from the fact of his continuing to meet with the same woman in such circumstances that the opportunity will be again taken advantage of. But I can see no sound reason for drawing back a presumption from one admitted act to there having been acts of a similar kind at an earlier period, unless there be evidence inferring improper familiarity of conduct. In the former case, it is quite reasonable to answer the question *quo animo* were the subsequent meetings, by saying there is strong presumption that intercourse would continue; in the latter the act confessed cannot be founded on to judge of the *animus* of what occurred months before. The distinction is, to my mind, very obvious, and it has a very important bearing in this case. I think the difference may be illustrated in the case of certain crimes, such as reset, where the law allows previous convictions to be founded on as corroborative proof. Where a person has been proved by his own confession, or by other evidence, to have been guilty of reset, that affords presumptive evidence in aid of proof that he has on a subsequent occasion committed the same offence. But it would be a totally different thing, and in no way just, to hold that evidence of a present act

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of reset afforded presumptive evidence in favour of an accusation of reset said to have occurred a long time before. It is principally because of the probability of one lapse from proper conduct leading to others when opportunity arises that any presumption is derived from previous lapses having been established.

There is further certain evidence in this case which tends to throw doubt on the pursuer's testimony—evidence that she had previously had connection with another man. She denies this, but it is difficult to throw it out of view that there is this sharp contradiction of her evidence in considering whether it is safe to proceed upon it to give decree, unless it is substantially corroborated. Also in her evidence there are some very vile suggestions made in regard to the defender's conduct otherwise, which were in no way followed up, and about which no questions were put to the defender.

In the whole circumstances, I hold that the pursuer has failed to bring any corroboration of her statement that there was connection with the defender at the time of conception, and that the Sheriffs were right in refusing to grant decree.

LORD TRAYNER.—After considering the argument addressed to us, and reading the proof more than once, I have come to the conclusion that the interlocutors appealed against are well founded, and ought to be affirmed.

If it were not for the defender's admission that he had connection with the pursuer in the month of August 1899, I think there could have been no hesitation in holding that the pursuer had failed to prove her case. The pursuer avers that she and the defender began to keep company in December 1898; that in that month the defender had carnal intercourse with her, that after this the intercourse was frequently repeated, and "was kept up during the months of May, June, July, and August 1899." It is somewhat remarkable that if the parties were "keeping company" all that time there should not be a single witness to speak to this fact except the pursuer herself. None of her relatives, acquaintances, or neighbours prove the "keeping company," of which they could scarcely have been ignorant had it been going on. It is also important to notice that while the pursuer speaks to an intercourse which for months had been frequent and continuous, yet there is no proof whatever of the slightest familiarity passing between the parties, nor of their ever having been seen in any place or in any position suggestive of the intimacy which is said to have existed. I repeat that but for the defender's admission the pursuer's case could not have been maintained.

Now, that admission is, that in the month of August 1899 the parties had intercourse. But the child in question, born in February 1900, could not be the result of that connection, and the only way in which the pursuer makes the defender's admission available as evidence of his paternity of the child in question is by adding to the admission given what she represents as a presumption, that from intercourse admittedly had in August, there may be inferred intercourse at an earlier date, if at that earlier date there was opportunity. For the position which the pursuer thus takes up, there is some show of authority in the opinions expressed in the cases of *Law-*

son[1] and *Ross*,[2] which were cited to us. But in the latter case the Lord Justice-Clerk (while stating his concurrence with what Lord Benholme had said in *Lawson's* case[1]) said that the presumption was not a rule of law but "merely a general rule in judging of evidence in such cases founded on ordinary experience and common sense." To this, as a general rule, I must say that I cannot assent. Ordinary experience has no doubt shewn that intercourse once commenced will most probably be repeated if opportunity for it is afforded, but ordinary experience does not shew that intercourse in one month has probably been had six months before. Everything must have a beginning, and there is nothing in the commission of an offence or impropriety admitted to have taken place at one date to suggest that such impropriety had been committed at any previous date. I take no exception to the judgment in either of the cases cited, because in each of them there were facts proved from which intercourse might have been inferred apart from the admission which the defender made. That admission of subsequent intercourse threw light upon and gave significance to facts established by evidence to have occurred at an earlier date. But in this case no anterior facts are proved which have any bearing upon the question at issue. Still, if we apply to this case what has been termed the "general rule," as I have given it from the case of *Ross*,[2] one of the conditions of its application is that at the earlier (that is, the inferred) date there should be opportunity for illicit intercourse. I take that to mean, such opportunity as was peculiar to the parties—not opportunity such as was common to every man and woman in the same town or village. There was no such opportunity here, so far as the proof shews. Every young man in the town had as much opportunity as the defender of meeting with the pursuer, and receiving her favours if she was disposed to bestow them.

But there is a point in the case which goes far, in my opinion, to corroborate the defender's story. When the pursuer in January 1900 communicated her condition to the defender, and said that she blamed "the Fair night for it" (that being the occasion of the admitted connection), he made arrangements for acknowledging the pursuer's expected child as his, and providing for it, and the pursuer's accouchement. If he had been disposed to deny all connection with the pursuer I see nothing to have hindered him doing so, but he admitted "the Fair night," and was prepared to meet any obligation or duty which the proceedings of that night might impose upon him. When, however, he learned that the child was born in February, and could not be the result of what took place on the Fair night, he quite naturally declined an obligation which he was sure was not his. That accounts for the tone of his letter of 16th February 1900. He was resenting what he considered as an injustice—blaming him for a child which was not his, and a child which could not be the result of what took place in August, which could not, in the pursuer's own language, be "blamed" on the Fair night. I think the defender's readiness to be responsible for anything that could be "blamed on the Fair night" goes a good way to support his statement that that was the only occasion on which anything took place which might account, so far as he was concerned, for the pursuer's pregnancy.

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[1] 23 D. 876. [2] 1 Macph. 783.

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There is just one other point to notice. The Sheriff-substitute says that the defender has not improved his case by putting on record a statement that two men, whom he named, had had connection with pursuer in or about May 1899, which had "completely broken down." I agree that the defender has not proved that either of the persons named had connection with the pursuer in May 1899. But the statement was not so reckless as many of the same kind which we have seen. M'Nee admits having had connection with pursuer two years before. The pursuer denies this, but M'Nee had no interest to say what was false, the pursuer had an interest to deny this statement. I believe M'Nee, for there is no reason suggested why he should not be believed. As to Campbell he admits having said that he might get blamed for the pursuer's child. The defender hearing this might very well suppose that Campbell had some reason for saying so—Campbell now says he spoke in joke, but I accept that explanation given in the witness-box with some hesitation. All, however, that I infer from the evidence of M'Nee and Campbell is that the defender had some foundation for what he said—that it was not a mere invention of his own. That he has failed to prove a statement made by him, does not prove any statements made by the pursuer.

LORD MONCREIFF.—I have come to a different conclusion. This case besides raising questions of some difficulty upon the proof, also raises a question of general importance, viz.: as to the kind and amount of evidence that is required to establish previous opportunity where the defender admits connection with the pursuer during the period of gestation at a date which will not account for the birth of the child. And as the judgment proposed seems to run counter to previous decisions I shall state my views in some detail.

Before considering the facts of the present case, I think it will be convenient to state what is my understanding of the law and practice as to this matter. Lord Fraser in his work on Parent and Child, 2d ed. p. 138, after giving the rules relative to the older law of *semiplena probatio* and oath in supplement says: "The Act allowing parties to a suit to be examined as witnesses has superseded though not abolished the rules." Both the pursuer and defender may be examined and cross-examined as witnesses in the cause, and each case must be determined on the evidence as a whole; but from the very nature of such cases the evidence available and the conclusions to be drawn from it remain very much the same.

Lord Benholme thus states the effect of the alteration in practice effected by the Evidence Act, 1853, in *Ross* v. *Fraser* [1]:—"It appears to me that the rule of law, or rather the view of the evidence, on which the decision of this case ought to rest, is one which we have adopted from our former practice. The rule is in substance the same, although it is exemplified under different circumstances, the difference being this, that formerly the pursuer's deposition was not competent at all, until after a *semiplena probatio*, which she was allowed to supplement. And then if her oath was given without inconsistencies or contradictions, that was held sufficient to make out the

[1] 1 Macph. 783, 786.

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case. We still adhere to the same rule substantially, viz., that where intercourse is admitted by the defender, though denied at the period of conception, an unsuspicious deposition of the pursuer will be sufficient to make out the case. I think that is the same rule in substance, although in practice we adopt it in somewhat different circumstances. There may be circumstances in which the pursuer's evidence is not worthy of credit, in which case her case will fail."

I may observe in this place that this statement of the law is not complete, because Lord Benholme does not make any mention of proof of opportunity at the date of conception; but this, I think, is through inadvertence, because in the earlier case of *Lawson* v. *Eddie*,[1] the same Judge said:—"Although it is true that in cases of filiation no one case can form a decisive precedent for another, yet I think our practice has proceeded on this general rule, that if the defender admits connection within the period of gestation, and if in addition to this it is proved that he had opportunity of connection at or about the time of conception, the pursuer's oath as to connection at that time will require little or no additional corroboration."

Reverting again to the case of *Ross* v. *Fraser*,[2] Lord Justice-Clerk Inglis says:—"I am not disposed to represent that presumption as a rule of law. . . . It is merely a general rule in judging of evidence in such cases founded on ordinary experience and common sense; and I think that view of the law could not be better stated than it is by Lord Benholme in the case of *Lawson*"[1]—that is in the passage which I have just quoted. The Lord Justice-Clerk proceeds thus:—"I go fully that length, and quite agree that if in such case the statement of the pursuer on oath be worthy of credit and not liable to be impugned on ground of contradictions on serious points, then the fact of connection having taken place between the parties within the period of gestation may be sufficient corroboration of such evidence." It is to be observed that here the Lord Justice-Clerk also does not make any mention of opportunity; but this omission, I think, is also inadvertent, because his Lordship approved of Lord Benholme's statement in *Lawson* v. *Eddie*,[1] which expressly mentions opportunity of connection at or about the time of conception.

The opinions thus expressed are indorsed in the opinions of other learned Judges in cases which have occurred since the Act of 1853. Therefore, as to the weight to be attached to an admission by a defender in such an action of connection at a time which will not account for the birth of the child, the decisions prior to 1853 may be referred to with advantage, and differ little in weight from subsequent decisions.

Of the cases prior to 1853, by far the most apposite are the three cases reported in Hume's Dec., pp. 32 and 33. In the first case, *Brown* v. *Smith*, decided 12th Dec. 1799, the facts were, that there was proof of great familiarity between the pursuer and defender in the end of harvest 1795. The child was not born sooner than 12th October 1796, and apparently there was no direct evidence of familiarity between the parties in the interval. But the pursuer was the defender's domestic servant, and remained in his service till Whitsunday 1796; and the Court, holding

[1] 23 D. 880. [2] 1 Macph. 785.

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that there was opportunity, admitted the woman to her oath in supplement.

In the next case, *Leckie* v. *Lindsay*, decided February 1810, the defender admitted intercourse with his father's servant down to but not later than a year before her delivery. But they both continued to live in the same house till within nine months of the birth of the child, and without any other evidence, the pursuer was allowed her oath in supplement.

The third case, *Wightman* v. *Tomlinson*, 17th November 1807, is still more closely in point. The defender admitted connection nearly twelve months before the birth of the child. The only evidence of subsequent opportunity was that the parties lived in the same village. The case was fully debated; the Commissary admitted the woman to the benefit of her oath in supplement. The Lord Ordinary altered, but the Court confirmed, the Commissary's interlocutor.

I may also refer to the case of *Robertson* v. *Petrie*.[1]

As to the cases after the Act of 1853, I may refer to *Lawson* v. *Eddie*,[2] There the defender admitted connection six months before the birth of the child, but denied prior connection; but the Court held that there being evidence of previous opportunity, the pursuer's case was proved by her oath as a witness.

Then came the case of *Ross* v. *Fraser*.[3] The evidence of familiarities at the time of conception was stronger, no doubt, than here; but the law laid down did not turn on that.

In *M'Donald* v. *Glass*,[4] the child was born on 28th November 1882. The defender, who was a son of the pursuer's master, swore that he never had connection with the pursuer before April 1882, but admitted connection on several occasions from that time onward. There was no proof of previous opportunity except the fact that they lived in the same house; but it was held that the pursuer's case was made out.

The decisions prior to 1853 and those since that date establish this—that if connection is admitted within the period of gestation, and the woman swears to acts which would account for the birth of the child, proof of opportunity about the date of conception will in general be sufficient to complete the pursuer's proof. The proof of opportunity need not, although it often does, include proof of familiarities; otherwise the defender's admission would be unnecessary. It is enough if it is shewn that at the time of conception the parties had the same opportunities of meeting as that which was admittedly taken advantage of.

Such evidence is at least as strong as that which is constantly accepted as sufficient in cases in which the defender denies connection altogether, and the only evidence against him, except that of the pursuer, is circumstantial; usually evidence, and sometimes very slight evidence, of familiarities or suspicious circumstances. In such cases there is no *certainty* that the defender ever had connection with the pursuer; while the same cannot be said when he admits connection, although he antedates or postdates it to suit his defence.

To come now to the facts of the present case. The Sheriffs have decided

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[1] 4 S. 333.
[2] 23 D. 876.
[3] 1 Macph. 783.
[4] 11 R. 57.

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against the pursuer solely on account of a passage in a letter which she wrote to the defender in January 1900, which they construe as an admission by her that she only had connection with the defender on one occasion, viz., the "Fair night" of 11th August 1899. I think they are mistaken in this, and right in what was evidently their view of the evidence apart from the letter.

The letter (to which the defender returned no answer, because the letter No. 10 of process was no answer) strikes me as creditable to the pursuer; it is genuine and sincere, and indicates a much greater degree of intimacy than the defender is willing to admit. The pursuer when she wrote it must have honestly believed that her condition was due to the occurrence on 11th August, otherwise she would not have given herself away by fixing an impossible date.

The passage in dispute is this:—"But you must know, John, as well as I can tell you, I never took up with any other one, and I blame the 'Fair night' for it, because it was just after that I was afraid what was going to be."

Now, if there had been only one act of connection with the defender, and (as the pursuer states in the letter) none with any other man, there was no need to give or hint at reasons for selecting the 'Fair night' as the date of conception. The pursuer might have referred to the 'Fair night'; but it would only have been to remind the defender of what he had done to her then. The pursuer states more particularly in her evidence what those reasons were. I need not read them. They could not safely be put into a letter; but the passage, however elliptical, must have been quite intelligible to the person to whom it was addressed if the pursuer is right. In the least favourable view for the pursuer the letter will bear her construction equally well.

Therefore I regard the letter not as telling against the pursuer, but in her favour.

It is said as against the pursuer's credibility that she denied being in the family way in November 1899. Strangely enough the defender denies that he ever asked the pursuer as to her condition or that she denied it. The denial which the pursuer admits tells so far against her. At the same time I do not attach much importance to it, because it is a curious feature in these cases that the first intimation the man often gets of the woman's condition, especially when it is a first child, is after or shortly before the birth.

To turn now to the defender's own evidence. It has been stated as to his credit that when he thought the child was begotten on 11th August he was willing to admit paternity. At first I was disposed to attach a good deal of importance to the fact. But I find in the defender's evidence a statement as to the occurrences of that night which indicates pretty clearly that it would have been useless for him to deny the occurrence; because his companion and the witness Bessy Sneddon could have proved that he left the Fair in company with the pursuer at a late hour.

It is not to the credit of the defender that he has attempted, unsuccessfully, to blacken the pursuer's character by alleging that at or about the time of conception she had connection with two other men, Robert M'Nee and John Campbell. He endeavoured to get these men to swear that they

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had connection with the pursuer about that time. The pursuer's procurator boldly put them both in the box, with the result that Campbell denied ever having had connection with the pursuer; and M'Nee, while he alleged that he had connection with her, said it occurred two years before. This is emphatically denied by the pursuer. Thus the defender's attempt failed, and this necessarily affects the weight to be given to his evidence.

Thus, so far, if I am right, we have the pursuer's evidence not shaken in any material respect, and the defender's admission of connection in August 1899; and it only remains to consider whether there is sufficient proof of opportunity at the time when the child must have been conceived. I have already indicated my views, formed upon the authorities, as to the kind of evidence that is required. If it is necessary that there should be evidence of familiarities the pursuer must fail, because no such familiarities are proved prior to August. But I am of opinion that such evidence is not necessary. The Sheriff-substitute thus states his view of the evidence on this point. "In the present case there is nothing in the parole evidence to make it improbable that connection took place in May, though there is no direct evidence in support of it. The parties had the same opportunities which they admittedly took advantage of on 11th August." These words concisely express my view of the evidence. It is proved that the defender knew the pursuer intimately; indeed, he says himself that he has known her all his life. In the end of 1898 and beginning of 1899 he was in the habit of meeting her at dances and walking home with her from them; he frequently called at her father's house, to which he went with his van on business, or ostensibly to call upon her brother. Moreover, it is plain that the pursuer, unfortunately for herself, was allowed to go about unattended, and to be out later at night than was perhaps safe for her. Now, all this taken by itself was quite consistent with innocence. But the question is not whether it is proved that anything improper occurred on these occasions, but whether the pursuer and the defender had opportunities of connection if they chose to avail themselves of them. Although the case is narrow, I think that it is proved that they had. Considerable reflected light is thrown by the evidence of what took place on the 'Fair night.' There is no trace whatever in the evidence either of the pursuer or the defender of that being the first occasion. There would be nothing in this if the pursuer were proved to be the abandoned woman that the defender has unsuccessfully tried to prove her to be. But holding that not to be her character, it is a reasonable conclusion that that was not the first time that connection took place between the pursuer and the defender.

The defender would have us believe that this girl, with whom he says that he was not on intimate or affectionate terms, yielded herself to him without any previous courtship or course of seduction. I do not believe him. I believe that what took place on 11th August 1899 was merely a continuation of an improper intimacy of some duration.

I am therefore of opinion that judgment should be for the pursuer.

Lord Young was absent.

The Court adhered.

Geo. Byres Ross, S.S.C.—Macdonald & Stewart, S.S.C.—Agents.

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GEORGE COWIE AND SON, Pursuers (Respondents).—*Campbell, Q.C.* —*W. Brown.*

THE COMMISSIONERS OF THE BURGH OF DUFFTOWN, Defenders (Appellants).—*Johnston, Q.C.*—*Chree.*

Cowie & Son v. Commissioners of Dufftown.

Burgh—Police—Drainage—Distillery—Proof—Onus—Rivers Pollution Prevention Act, 1876 (39 *and* 40 *Vict. c.* 75), *sec.* 7.—The Rivers Pollution Prevention Act, 1876, sec. 7, enacts,—"Every sanitary or other local authority having sewers under their control shall give facilities for enabling manufacturers within their district to carry the liquids proceeding from their factories . . . into such sewers; provided that this section shall not extend to compel any sanitary or other local authority to admit into their sewers any liquid which would prejudicially affect . . . the disposal by sale, application to land, or otherwise, of the sewage matter conveyed along such sewers. . . ."

A distiller, who was liable in drainage assessment, presented a petition under the above quoted section against the local authority of the district for a decree ordaining them to allow him to carry the liquid refuse from his distillery into the defenders' sewers. The defenders pleaded that the liquid would prejudicially affect the disposal of the sewage matter conveyed by their drains.

After a proof the Court *held* that the liquid refuse was in fact of such a character that, if received into the defenders' sewers without treatment, it would prejudicially affect the disposal of the sewage, and that there was no obligation on the defenders themselves so to treat the liquid as to render it innocuous, or to shew that it was impossible to do so, and *refused* the petition.

Guthrie, Craig, Peter, & Co. v. *Magistrates of Brechin*, 15 R. 385, *distinguished.*

1ST DIVISION. Sheriff of Aberdeen, Kincardine, and Banff.

GEORGE COWIE AND SON were the owners and occupiers of the Mortlach Distillery in the county of Banff. The distillery was situated within the district of which the Commissioners of the burgh of Dufftown were the local authority, and Cowie & Son paid assessments to them for sewers and drainage.

On 13th April 1898 Cowie & Son wrote to the Commissioners of Dufftown requesting that, in terms of section 7 of the Rivers Pollution Prevention Act, 1876 (39 and 40 Vict. c. 75),* the Local Authority would afford Cowie & Son facilities for causing the liquid refuse from the Mortlach Distillery to be carried into the commissioners' sewers. The commissioners having declined to grant the facilities asked, on the ground,

* The Rivers Pollution Prevention Act, 1876, sec. 7, enacts,—"Every sanitary or other local authority having sewers under their control shall give facilities for enabling manufacturers within their district to carry the liquids proceeding from their factories or manufacturing processes into such sewers; provided that this section shall not extend to compel any sanitary or other local authority to admit into their sewers any liquid which would prejudicially affect such sewers, or the disposal by sale, application to land, or otherwise, of the sewage matter conveyed along such sewers, or which would, from its temperature or otherwise, be injurious in a sanitary point of view: Provided also that no sanitary authority shall be required to give such facilities as aforesaid where the sewers of such authority are only sufficient for the requirements of their district, nor where such facilities would interfere with any order of any Court of competent jurisdiction respecting the sewage of such authority."

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inter alia, that the introduction of the liquid refuse from the distillery would prejudicially affect the disposal of the sewage matter, Cowie & Son raised an action against the Commissioners of Dufftown in the Sheriff Court of Aberdeen, Kincardine, and Banff, at Banff, praying the Court "to grant a decree against the above-named defenders decerning and ordaining them to give facilities to the pursuers for enabling the pursuers to carry the liquids proceeding from their said Mortlach Distillery into the sewers under the control of the defenders, . . . or otherwise, to give to the pursuers such facilities for the purpose aforesaid in terms of section 7 of the said Rivers Pollution Prevention Act, 1876, and on such terms and conditions as to the Court may seem proper. . . ."

The defenders stated that their sewer was quite unable to carry off the discharge from the pursuers' distillery, and that the discharge would be injurious to their pipes and to the public health.

The defenders further stated that they had been in use to discharge the ordinary sewage of the town direct into the River Fiddich, but that they had been recently called upon by the County Council of Banffshire to make immediate provision for disposing of said sewage; that they had been advised by an engineer that the only practical way in which they could dispose of the sewage was by irrigation; that they proposed at once to proceed with the scheme thus recommended by the engineer; but that the introduction of the pursuers' sewage into their sewer would render this scheme quite impracticable.

"The pursuers' sewage would further, if introduced into the defenders' sewer, prejudicially affect the disposal by sale, application to land, or otherwise, of the sewage matter, in respect that the ingredients contained in the refuse from said distillery are of such a virulent caustic nature that the refuse would burn up and destroy all vegetable life in land to which it was applied, even though admixed with other sewage."

The defenders also referred to section 233 of the Burgh Police (Scotland) Act, 1892 (55 and 56 Vict. c. 55),* and section 116 of the Public Health (Scotland) Act, 1897 (60 and 61 Vict. c. 38).†

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* The Burgh Police Act, 1892, section 233, enacts,—"Any owner or occupier of distilleries, manufactories, or other works who causes or permits any refuse, refuse water, steam, or other substance fitted to interrupt the free passage of a sewer, or to be otherwise injurious thereto, or to be injurious to the health of persons living in the vicinity, to enter a public sewer, . . . shall be guilty of an offence. . . . Such owners and occupiers shall construct pools or reservoirs, as near their works as possible, for receiving and depositing such refuse and other substances. If it shall be impracticable, in the judgment of the commissioners, to render such refuse or other substances inoffensive or innocuous, or to prevent the same from interrupting the free passage of the sewer or otherwise injuring the same, it shall be lawful for the commissioners to prohibit and interdict such owner or occupier from permitting the same to run into such sewer from his works aforesaid."

† The Public Health Act, 1897, section 116, enacts,—"The owners or occupiers of distilleries, manufactories, and other works shall be compelled, where possible, to dig, make, and construct pools or reservoirs within their own ground, or as near their works as possible, for receiving and depositing the refuse of such works so far as offensive or injurious or dangerous to the health of those living in the vicinity thereof, or to use the best practicable

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The pursuers pleaded;—(1) The defenders having wrongfully refused to give to the pursuers the facilities to which they are entitled under section 7 of the Rivers Pollution Prevention Act, 1876, the pursuers are entitled to decree allowing them to carry the liquids from their said distillery into the defenders' sewers, and to make the necessary communication for that purpose. (2) Alternatively, and in any event, the pursuers are entitled to facilities for discharging the said liquids into the defenders' sewers, upon their adopting such steps as the Court may think necessary in order to comply with the provisions of the said statute.

The defenders pleaded;—(2) The discharge from the pursuers' distillery being of an offensive character, and calculated to interfere with the free flow of sewage in the sewer, and being otherwise injurious to the sewer and dangerous to the health of those living in the vicinity, the defenders are entitled to absolvitor. (3) The pursuers' sewage being of such a character as would, if introduced into the defenders' sewer, prejudicially affect the disposal of the sewage matter, the defenders are entitled to absolvitor.

Proof was led in the Sheriff Court. The evidence sufficiently appears from the opinions and interlocutors of the Sheriff-substitute and of the Court.

On 28th July 1899 the Sheriff-substitute (Grant) pronounced the following interlocutor:—"Finds in fact—subject to regulations to be approved of by the Court (*a*) to secure the settling and cooling of that part of the liquid effluent of the pursuers' distillery known as burnt ale; (*b*) to secure a proper mixture at a suitable temperature of all the different parts of the said liquid effluent before discharge into the defenders' sewer; (*c*) to secure a right to the defenders to exclude for a period not exceeding one hour at a time the whole of the pursuers' liquid effluent in times of excessive rain, or other cause of an excessive discharge of surface water by the defenders' said sewer—that the said liquid effluents proceeding from the pursuers' Mortlach Distillery will not prejudicially affect the defenders' sewers, or the disposal by sale, application to land, or otherwise, of the sewage matter conveyed along said sewers, and will not from its temperature or otherwise be injurious in a sanitary point of view: Further finds in fact that the said sewer is sufficient for the requirements of the district, including the discharge of the liquid effluents from the pursuers' Mortlach Distillery; and in law that the defenders, as local authority of the burgh of Dufftown, are bound to give facilities to the pursuers to carry the liquid proceeding from their said Mortlach Distillery into the sewers under the control of the defenders: Therefore, before further procedure, appoints the defenders to lodge in process draft regulations in terms aforesaid within two months from this date, and continues the cause, and grants leave to appeal." *

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means for rendering the same inoffensive or innocuous before discharging it into any river, stream, ditch, sewer, or other channel."

* "OPINION.—. . . The defenders did not maintain that occasional and intermittent application of burnt ale might not be sometimes beneficial, but they say that from its physical properties it is sure to choke the surface of the soil if continuously applied, causing inevitably thereby [by the growth and decay of the characteristic fungus] a state of matters prejudicial to health on a small ordinary irrigation farm; and that to ask them to acquire an extent of land sufficient to allow of disposal by occasional and

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Thereafter the Sheriff-substitute approved of certain regulations, and ordained the defenders to give facilities to the pursuers to carry the waste liquids from their Mortlach Distillery (but subject always to the regulations and relative plans) into the sewers under the control of the defenders.

The defenders appealed, and argued;—The discharge from the distillery was in fact of such a noxious character that if the defenders were compelled to receive it, the sewage farm in contemplation would be impossible, and the disposal of the ordinary burgh sewage would be very materially prejudiced. The Sheriff-substitute had confused or rather subverted the issue. He was entirely wrong in putting on the defenders the *onus* either of themselves so treating the refuse as to render it innocuous, or at least shewing that it was impossible so to render it. There was no warrant either in the Act or at common law for laying such a burden on the local authority. It was clear that the refuse from the distillery when it was presented to the sewers—and that was the time when it fell to be examined—was of the most pernicious character. Again, the question was not a merely quantitative one, and it was no answer to say that by adding a few acres to the sewage farm the evil complained of would be overcome. That was not established by the proof to be an effective remedy. The evidence was the other way. It was clear from the proof that the methods hitherto attempted for the purification of distillery refuse had been failures. Even if there had been an effectual mode of purification, it was for the pursuers, not the defenders, to give

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intermittent application would be an outrageously unreasonable demand. They say that it amounts on the part of the pursuers to an attempt to put upon them the burden of solving a hitherto insoluble problem, videlicet, the safe and economical disposal of distillery refuse, and they point to the state of matters disclosed in the evidence taken in the recent case of *Seafield and Others* v. *Kemp*, reported in 1 Fraser, 402. To that last argument I fear the true answer is, that the whole point in this case is to ascertain on whose shoulders that burden is to fall: and that it is equally natural for the pursuers to seek to relieve themselves of it, as it is for the defenders to try and keep it off themselves. I certainly think the defenders have succeeded in shewing that hitherto no local authority in Scotland (excluding those who have facilities for putting distillery refuse into the sea) has succeeded in disposing of it by purification. But where they fail is in not satisfying me that it is scientifically impossible to purify it, seeing that from its inherent nature it is not destructive, but may be positively beneficial to land; or that the difficulties they find in the solution of the problem are greater than those that have been successfully surmounted in England, when dealing with far more virulent trade effluents, for which I refer to the evidence of Mr Thudichum. The defenders do not yet appear to have made any real attempt to ascertain how they might surmount that difficulty; in giving instructions to their engineer, Mr Gordon, to prepare a sewage scheme they allowed him to proceed without providing for the distillery effluent at all. I do not say that there is positively no limit to the extra expense, or to the extra land they must be prepared to take, to meet the pursuers' requirements, but it is obviously no discharge of their obligation to exclude the question of taking any. On the whole, therefore, they have failed to satisfy me that the problem is insoluble. Reading the striking evidence of Mr Thudichum, the pursuers' expert, I go further, and say that I think, by facing their obligation and availing themselves of the latest practical application of sewage purification schemes, that they will find it soluble after all. . . ."

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effect to it. In no event were the defenders either entitled or bound to experiment. The case of *Guthrie*[1] did not apply. The decision in it proceeded on the assumption that the traders' effluent was in an innocuous condition when put into the drains.

Argued for the respondents;—The defenders were bound both at common law and under the Act to provide a sufficient drainage system for the burgh, and the pursuers were within the burgh. Section 7 of the Rivers Pollution Prevention Act regulated the way in which the local authority were to exercise their powers and perform their duties. The *onus* was on them to shew that they were entitled to refuse the facilities requested, and they had not discharged that *onus*. To enable them to do so, they would have to shew that the admixture of the refuse from the distillery would render the disposal of the ordinary sewage practically impossible. That followed from the *Brechin* case.[2] The evidence was entirely the other way. An acre or two additional of land would solve the difficulty. The question here was just as in the *Brechin* case[2] a quantitative one. There was nothing in the Rivers Pollution Prevention Act to suggest that any obligation was laid on traders of purifying the discharges from their works as a condition of their getting the benefit of the public sewers. That was in marked contrast to section 233 of the Burgh Police (Scotland) Act, 1892. Even by that Act injury to the pipes and to the public health were the only results which had to be provided against, and it was not now pretended by the defenders that either the pipes or the public health would suffer by the pursuers getting the facilities craved. The scientific evidence established that distillery refuse could be so treated as to render it innocuous, and that so treated it could be disposed of just like the ordinary sewage. The matter was susceptible of equitable regulation, and there was no reason for upsetting the scheme which had been sanctioned by the Sheriff-substitute.

At advising,—

LORD PRESIDENT.—Dufftown is a police burgh with a population of about 1800, and the defenders are the Commissioners of it. The defenders in 1881 established a sewerage system in the burgh, consisting of glazed fireclay spigot and faucet pipes, by which the sewage was discharged into the River Fiddich. In consequence of the County Council having complained of the discharge of the sewage into the Fiddich, the defenders consulted Mr George Gordon, C.E., and he advised that the sewage should be disposed of by filtration and irrigation. The defenders state that they intend to act upon his advice.

The pursuers are distillers carrying on business at Mortlach Distillery, which is situated in the burgh of Dufftown. On 13th April 1898 the pursuers wrote to the defenders' clerk intimating that they intended to cause the liquid refuse proceeding from their distillery to be carried into the sewers belonging to the defenders, and requesting that, in terms of section 7 of the Rivers Pollution Prevention Act, 1876, the defenders would afford them facilities for doing so. The pursuers stated in their letter that they were prepared to comply with any regulations of the defenders in regard to

[1] Guthrie, Craig, Peter, & Co. v. Magistrates of Brechin, Feb. 8, 1888, 15 R. 385; Pasmore v. Oswaldtwistle, L. R. [1898], A. C. 387.

[2] Guthrie, Craig, Peter, & Co. v. Magistrates of Brechin, 15 R. 385.

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the mode in which the communication between their drains and those of the defenders should be made. On 28th April 1898 the defenders resolved, as the burgh sewer was sufficient only for the requirements of the district, and as the introduction of the liquid refuse proceeding from the pursuers' distillery would prejudicially affect the disposal by sale, application to land, or otherwise, of the sewage matter, as well as for other reasons, to decline to grant to the pursuers permission to introduce the liquid refuse proceeding from their distillery into the burgh sewer, and this resolution was duly intimated to the pursuers.

(His Lordship here read section 7 of the Rivers Pollution Prevention Act, 1876, and section 116 of the Public Health Act, 1897)—The present action is directed to enforce the claim of the pursuers to have the liquid refuse proceeding from their distillery received into the defenders' sewers, and the defenders maintain that they are not bound so to receive that refuse, upon the grounds (1) that their sewers are not of adequate capacity to receive it; (2) that it would injure their sewers by causing them to leak, in consequence of the acid which it contains acting upon the lime in the cement at the joints of their sewer pipes; (3) that it would be injurious to the public health; and (4) that the admission of the refuse into the sewers would prejudicially affect the disposal by sale, application to land, or otherwise, of the sewage matter conveyed along them.

It appears to me that the defenders have failed to establish the first three of these objections, but I consider that a serious question, and a question of much general importance, is raised by their fourth objection. Section 7 of the Rivers Pollution Prevention Act, 1876, does not declare that, in order to warrant the refusal of a local authority to admit a liquid into its sewers, it must be established that the admission of that liquid would render the disposal of the sewage matter conveyed along the sewers by sale, application to land, or otherwise, impossible. It is enough to warrant the refusal that the disposal of the sewage would be prejudicially affected by the admission of the liquid,—that is to say, that its disposal by sale, application to land, or otherwise, would be rendered more difficult, or less advantageous, than if the liquid had not been admitted. The word "materially" may be introduced as qualifying this statement, but if it is proved that the effect of the admission of the liquid would be "materially" to prejudice the disposal of the sewage by sale, application to land, or otherwise, I think that this would afford a sufficient answer to the demand that the liquid should be admitted into the sewers. So construed, the provision in section 7 appears to me to be entirely reasonable, and in accordance with the equities of the case. As the owners and occupiers of distilleries pay sewer rates, it is only just that they should get the benefit of the sewers, but they should only get a benefit similar to that received by other ratepayers, and if they were allowed to discharge into the sewers a liquid which would injure the sewers, or the sewage conveyed along them, in any of the particulars mentioned in section 7, they would get a greater and a different benefit, and would throw an unfair burden upon the other ratepayers. The equity referred to is also recognised by section 233 of the Burgh Police (Scotland) Act, 1892.

The effluent from the pursuers' distillery to which the defenders chiefly object is the burnt ale, and they maintain that they have proved that even

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after the solid ingredients contained in it have been allowed so far to settle in the pursuers' settling ponds, the burnt ale, if applied to a sewage farm, as it must be throughout the year while the distillery is working, would be most injurious in its effects. It is not, as I understand, disputed that burnt ale may be applied to land, or to vegetation, in certain quantities, at certain seasons, and at certain stages of growth, not only without injury, but with distinctly advantageous results. The defenders, however, say that if they were compelled to admit the pursuers' burnt ale into their sewers throughout the year, it would be highly prejudicial to any system of filtration, or of irrigation, or to any other system which they could adopt with a view to disposing of their sewage. It is essential to the efficiency and success of intermittent downward filtration, or indeed of any system of filtration, that the place upon which it is practised shall be kept porous; and they allege that burnt ale, even after its more solid ingredients have settled in the distillery, leaves upon the ground a glutinous or a "clotty" deposit which destroys its porosity and prevents the filtration from being accomplished. The defenders also say that owing to its strong acidity, the burnt ale in the sewage would have a burning or rotting effect on the vegetation, in the quantities in which, and in the circumstances under which, they would require to apply it to their land. It appears to me, upon a careful consideration of the evidence, that the defenders have established such a case on this head as to amount to a prejudicial affecting of the disposal of their sewage by application to land, within the meaning of section 7 of the Act of 1876.

Even if I had thought that this point had not been proved as adequately as I consider that it has been, it appears to me that it would have been a sufficient answer to the pursuers' demand for the defenders to plead that the question how to dispose of sewage containing burnt ale by application to land in such quantities or proportions as would require to be dealt with in this case, has not as yet got beyond the experimental stage, and that they are not bound to conduct costly experiments for the benefit of the pursuers in regard to a matter with respect to which the pursuers are as yet unable to satisfy the conditions expressed in section 7 of the Act of 1876. The Sheriff-substitute says in his note, "I certainly think the defenders have succeeded in shewing that hitherto no local authority in Scotland (excluding those who have facilities for putting distillery refuse into the sea) has succeeded in disposing of it by purification. But where they fail is in not satisfying me that it is scientifically impossible to purify it, seeing that from its inherent nature it is not destructive, but may be positively beneficial to land; or that the difficulties they find in the solution of the problem are greater than those that have been successfully surmounted in England, when dealing with far more virulent trade effluents, for which I refer to the evidence of Mr Thudichum." I am, however, of opinion, that the defenders are not bound to prove the negative proposition that it is "scientifically impossible" to treat sewage containing burnt ale so as to render it innocuous to land. The question is a practical one, and for the reasons already given, I think it is proved that no method has as yet been devised by which such a continuous application of sewage containing large quantities of burnt ale to land as would be necessary in the present case could be prevented from

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being prejudicial in the sense of section 7 of the Act of 1876. It does not appear to me that the defenders are bound to embark upon a course of scientific experiment or invention, but that it is enough for them to shew that, in the present state of knowledge, burnt ale in such quantities as the pursuers claim right to discharge into their sewers, cannot be continuously applied to land without material injury and prejudice to the land.

The Sheriff-substitute refers to Mr Thudichum's very interesting evidence as to the possibility of treating distillery effluents, or sewage containing them, by bacterial or biological methods, but that highly skilled witness did not mention any case in which these methods had been so applied—indeed the idea of such an application seems to have first occurred to him when preparing to give evidence in this case. I understand that the bacterial or biological method has been applied to ordinary sewage with more or less success, and that by it the injurious and putrescent substances in the sewage are not merely separated or disposed of but destroyed, this being accomplished not by adding anything, but by the organisms normally present in the sewage, or in the land as the filtering agent, upon which the sewage is treated. Evidence was, however, given on behalf of the defenders, to the effect that the bacterial or biological method could not be successfully applied to distillery refuse, and especially to burnt ale, because the burnt ale would choke the filters, and prevent the aeration, which is an essential part of the system. I do not think that the defenders are, in the present state of knowledge, bound to establish experimental bacterial beds and embark upon an attempt at discovery, with all the risks of failure incident to a process new in this application. If the pursuers have confidence in Mr Thudichum's suggestions, it is, of course, open to them to act upon these suggestions before presenting their effluents for admission into the defenders' sewers.

The pursuers relied upon the case of *Guthrie, Craig, Peter, & Co.* v. *The Magistrates of Brechin*,[1] but the decision in that case does not appear to me to be at all at variance with the views now expressed. The petition was at the instance of a firm of papermakers, and it was proved that three liquids which issued from their works were severally objectionable, but that they became harmless when they were mixed together, and exposed to the action of the air in settling-ponds. The experts reported that in their opinion the resultant fluid or effluent issuing from the pursuers' tanks into the public sewers of Brechin was not of such a character, so long as it was maintained in its then condition of practical neutrality, as to produce any injurious effect on the sewer pipes or on the crops or soil of the sewage farm, but that the larger volume of liquid to be dealt with necessitated a different mode of working the sewage farm to effect proper purification of the combined discharges from the sewer before they reached the river South Esk. It could only be alleged that the effluent was prejudicial "in its application to land" because the then existing sewage farm was too small for the reasonable treatment of the quantity which would be discharged. The present case, however, is very different, inasmuch as a question not merely of quantity but of quality is involved, and it appears

[1] 15 R. 385.

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to me to be established that the introduction of the pursuers' burnt ale into the defenders' sewers would prejudicially affect the application of the sewage to land in the sense of section 7 of the Act of 1876.

For these reasons I am of opinion that the interlocutors of the Sheriff-substitute of 28th July 1899 and 21st February 1900 should be recalled, and that the prayer of the pursuers' petition should be refused, with expenses.

LORD ADAM.—The pursuers do not, as I understand, maintain that the liquid proceeding from their manufacturing premises, and which they desire to have admitted to the defenders' sewers, is, in the condition in which it leaves their works, so innocuous in its character or quality that in an undiluted state they are entitled to have it admitted to the sewers. What they do maintain is that, after being mixed with the other contents of the sewers, its condition is such that it would not prejudicially affect either the sewers, or the disposal of the sewage matter by sale, or its application to land, or otherwise, and therefore that the defenders are bound under the 7th section of the Rivers Pollution Act to give them facilities for carrying the liquid in question into their sewers.

That contention necessarily leads to the consideration of the state of matters at the outfall of the sewers, and raises the question of fact whether the sewage matter as it issues from the sewers complies with the conditions specified in the Act, compliance with which entitles the pursuers to demand that the defenders shall give them facilities to enable them to carry the liquid coming from their works to the defenders' sewers. The defenders say that the sewage matter in question will, in consequence of the addition of the liquid proceeding from the pursuers' manufacturing processes, prejudicially affect the land to which it is applied, and will, therefore, prejudicially affect its disposal in that way, and that, I think, is the question at issue in this case.

Of the various liquids produced in the pursuers' works which go to the composition of the liquid in question, the one to the presence of which the defenders particularly object is burnt ale, which they say is prejudicial to the land to which it is applied.

The pursuers, on the other hand, maintain that burnt ale is not in its nature or quality prejudicial to land—that, on the contrary, it has been, and is, applied to land with beneficial results. That would appear to be true, but it is only true when it is applied to land in small quantities and at intermittent periods of longer or shorter duration. That, however, is not the question. The question is whether it would prejudicially affect the land if applied in the quantity, and continuously, as the defenders would be bound to receive it, as it issues from the sewers. I agree with your Lordship that the evidence clearly shews that it would. Burnt ale seems to contain a glutinous substance, which, when so applied, would destroy the property of the soil, and render it unfit for filtration and agricultural purposes. Burnt ale may be beneficial to land when applied in small quantities, but I certainly think that it would poison any land when applied in the quantity in which in this case it would necessarily have to be applied. If that be so, I think it is sufficient for the decision of the case.

But the pursuers further maintain that the liquid coming from their

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works can by treatment, by means of settling ponds or otherwise, be rendered perfectly innocuous in its application to land,—and, if that be so, that the defenders are bound to receive into their sewers and themselves apply the treatment requisite to produce that result.

Your Lordship has pointed out that no one has as yet succeeded in rendering the liquid innocuous in practice; and that success, if at all, has so far only been obtained in the laboratory. But, however that may be, I fail to see that the defenders are under any obligation of the kind. No doubt, if there was an absolute obligation on the defenders to receive into their sewers all liquids whether innocuous or otherwise, then, of course, they would have to dispose of the sewage thence resulting by treatment or otherwise as might seem to them best. But they are under no such obligation. Their obligation is to receive only innocuous liquids—such as fulfil the conditions specified in section 7 of the Act. If the resulting sewage matter, as it issues from the sewers, does not fulfil these conditions, as in this case, then the defenders are not bound to give facilities for the admission of the offending liquid, the admixture with which produces that result.

In the *Brechin* case,[1] when the local authority were finally ordained to admit the liquid proceeding from the manufacturing processes into the sewers, it had been ascertained, not merely by laboratory experiment, but by actual experience, that the liquid had been rendered innocuous, and fulfilled all the conditions specified in the 7th section of the Act. But it had been rendered innocuous by treatment in the manufacturers' own works. If the pursuers follow a similar course in this case, and offer an innocuous liquid for admission to the sewers, then, no doubt, the defenders will give them the necessary facilities.

Lord M'Laren.—I was not a member of the Court at the time when the case of *Brechin*[1] was decided, and do not feel called upon to examine the principle of construction of the statute which I find in the report of that case. I shall only say that, from the report itself, and from the explanations made to us at the bar, the case appears to have been presented under conditions depending upon the state of the record and the previous evidence, which somewhat limited the field of inquiry, and I do not gather that the Court was so free in that case to consider the pure question of liability under the statute as we are in the present case. But I am perfectly clear in my own mind that in this case it would not be in accordance with the statute to compel the burgh authority of Dufftown to receive the distillery effluent in the condition in which it is offered for their disposal. I do not enter into the facts of the case, or the scientific evidence, because I accept your Lordship's reasoning and conclusions in all particulars.

Lord Kinnear.—I am of the same opinion with your Lordships. I think the Sheriff-substitute was probably right in declining to be convinced that it is impossible to purify the distillery effluent, but there is no *onus* on the defenders to shew that no effective method of purifying such refuse can

[1] 15 R. 385.

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be discovered by proper experimentation. They are bound to take the pursuers' liquid as it is, if they are bound to take it at all, and the question that they have to consider is whether, if it were admitted, it would prejudicially affect the disposal of the sewage in its application to land, and therefore they must consider what is the character and condition of the liquid when it is presented to them for admission to their sewers; and again they must consider what will probably be the character of the discharge which issues from the sewers after the pursuers' liquid has been carried through them along with the ordinary sewage matter which they are designed to carry. If it appears that the matter issuing from their sewers at the outfall will be injurious provided they are required to receive the liquids in question continuously and in the quantities which the pursuers call upon them to receive, then that shews that the admission of this liquid will prejudicially affect the disposal of the sewage matter by application to land, and there is nothing in the statute which requires them to go further and shew that it is not within the resources of science to discover any effective method of treatment which will render the liquid innocuous. If that be practicable, there is nothing to prevent the pursuers discovering, in the first place, and then applying such method of treatment and so presenting a harmless liquid for admission to the defenders' sewers. The true question comes to be, whether distillers are entitled to impose upon the local authority, or, in other words, upon the ratepayers, the cost and pains first of discovering, and then of effectively applying a method of treatment of distillery refuse which will render it innocuous, or whether they must not undertake that task themselves if they desire that it shall be admitted into the sewers of the local authority. It appears to me to be quite obvious that they cannot impose any such burden upon the community unless the Legislature has so enacted, and I find nothing in the statute which confers upon them any such right. I quite agree with what your Lordship has said with reference to the details of the *Brechin*[1] case. I think it is distinguishable from the present case. In the first place, it was found in that case that certain factory refuse was not open to the charge that it would either injure sewers or prejudicially affect the disposal of sewage matter in its application to land, and so far the decision is only a decision upon a question of fact which can afford no aid or guidance to us in determining a different question of fact with reference to a totally different subject. The only other point, as I read the case, which was decided was that the local authority, not having been able to shew that the liquid offered to them transgressed any of the conditions laid down in the 7th section of the statute, and not being able to find any other statutory condition which entitled them to exclude the refuse in question, the section compelled them to admit it. It was simply a decision that there were no conditions of the statute which would entitle the local authority to refuse liquid which had been offered to them, and that having been offered it, they were bound by the main enactment of the section, because they could not shelter themselves under any of its provisos. It appears to me, therefore, that that is no real authority for the decision of the present case.

[1] 15 R. 385.

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THE COURT pronounced this interlocutor:—"Sustain the appeal: Recall the interlocutors of the Sheriff-substitute dated 28th July 1899 and 21st February 1900: Find in fact (1) that Dufftown is a police burgh, and that the defenders are the Commissioners and the Local Authority of it; (2) that in or about 1881 the defenders established a sewerage system in the burgh, consisting of glazed fireclay spigot and faucet pipes by which the sewage was discharged into the River Fiddich; (3) that in consequence of the County Council having complained of the sewage being discharged into the Fiddich, the defenders intend to dispose of it in future by filtration and irrigation; (4) that the pursuers are the owners and occupiers of Mortlach Distillery, which is situated in the burgh; (5) that the pursuers demand that the defenders shall admit the liquid refuse from their distillery into the defenders' sewers, and that the defenders shall allow them to make all necessary communications between their (the pursuers') drains and the Dufftown sewers for the purpose of admitting the said liquid refuse, and that the defenders decline to do so; (6) that it is not proved (1) that the defenders' sewers are not of adequate capacity to receive and convey the said liquid refuse; or (2) that the said liquid refuse would injure the defenders' sewers in consequence of the acid which it contains acting upon the lime in the cement at the joints of their sewer pipes; or (3) that the said liquid refuse would be injurious to the public health; but that it is proved that the admission of the said liquid refuse into the said sewers would prejudicially affect the disposal by application to land of the sewage matter conveyed along the said sewers: Therefore find in law that the defenders are not bound to admit the said liquid refuse into the said sewers: Refuse the prayer of the petition: Find the pursuers liable to the defenders in expenses, both in this Court and in the Sheriff Court, those in the Sheriff Court being on the higher scale, and remit," &c.

ALEX. MORISON & CO., W.S.—WALLACE & GUTHRIE, W.S.—Agents.

No. 42.
Dec. 11, 1900.
Horsburgh v Sheach.

ANDREW HORSBURGH, Pursuer (Appellant).—*Watt, Q.C.—Gunn.*
ROBERT SHEACH, Defender (Respondent).—*Salvesen, Q.C.—Glegg.*

Reparation—Negligence—Precautions for safety of public—Safety of Children—Street—Deposit of building materials against wall separating street from pond.—In an action for damages on account of the death of a child seven years of age, the pursuer averred that the defender was engaged in building operations adjoining a public street; that the street on one side was separated from a mill pond ten feet deep by a stone wall eight feet high; that the defender deposited a large heap of building materials close to this wall and reaching to within thirty inches from its top; that the child, while playing with other children on the top of this heap, fell over the wall into the pond and was drowned; that the defender in heaping up the material close to the wall made the pond a practically unprotected source of danger to the public; that he knew that children were in the habit of playing on the top of the heap; and that in depositing the heap and failing to take precautions for the safety of children playing on it, the defender was guilty of gross negligence, in consequence of which the child lost its life.

The Court *dismissed* the action as irrelevant.

No. 42.

Dec. 11, 1900. Horsburgh v. Sheach.

2D DIVISION. Sheriff of Forfarshire.

IN May 1900 Andrew Horsburgh, carter, Dundee, brought an action in the Sheriff Court at Dundee for £200, as damages on account of the death of his son William, a child aged seven years, against Robert Sheach junior, builder and contractor, Dundee.

The pursuer averred;—That (Cond. 2) in March last 1900 the defender was engaged in making extensions to certain works in Cunningham Street, Dundee, and in so doing had to make use of considerable quantities of sand, coping stone, &c.; that (Cond. 3) Cunningham Street was bounded on one side by a mill-pond between which and the street there was a stone wall of eight feet in height; that (Cond. 4) while engaged in the extensions the defender or his servants deposited a large quantity of coping, sand, gravel, &c., close to this wall; that at the date of the accident after mentioned the heap of coping, &c. had been accumulated to such an extent that its top was within thirty inches or so from the top of the wall. (Cond. 5) "On or about the 15th day of March last the pursuer's eldest son, William (aged seven years), was playing along with other children on top of the said heap of coping, &c. when he fell over the wall on to a ledge surrounding the pond, and from there fell into the pond itself, which is ten feet deep, and was drowned." (Cond. 6) "The wall situated between the pond and Cunningham Street already mentioned is so situated for the purpose of protecting persons using said street against the dangers of an unfenced pond, and in heaping up said sand, coping, &c. almost to the top of the wall, the defender or his servants, for whom he is responsible, practically did away with the effect of the wall, and rendered the pond an open and unprotected source of danger to the public." (Cond. 7) "The children living in the vicinity of Cunningham Street were in the habit of playing upon the top of the said heap of coping, &c., yet, although the defender or his servants were aware of this, they took no steps to prevent the children from falling over into the pond, and this it was their duty to have done, either by removing the heap altogether, by erecting some fence or other protection between it and the pond, or by having someone stationed to keep children away from the pond." (Cond. 8) "In erecting the said heap of coping, &c., and in failing to remove it or to take precautions for the safety of the children playing about it, the defender or his servants acted with gross and culpable negligence, and with a careless disregard for the safety of their fellow-beings, through which the pursuer's son lost his life, and for which the defender is responsible."

The defender pleaded, *inter alia*,—(1) The action is irrelevant.

On 4th July 1900 the Sheriff-substitute (Campbell Smith) repelled the first plea in law for the defender and allowed a proof.

The pursuer appealed for jury trial.

On the pursuer's motion to approve of an issue the defender was heard in support of his first plea in law.[1]

In reply the pursuer distinguished the case of *Thomson*[1] referred to by the defender from the present on the ground that there the boy was ten years old, while here he was only seven. In support of this distinction the pursuer referred to the opinion of the Lord Justice-Clerk in *Forbes* v. *Aberdeen Harbour Commissioners*.[2] [On the

[1] *Authorities cited by Defender.*—Ross v. Keith, Nov. 9, 1888, 16 R. 86; Thomson v. Lanarkshire and Dumbartonshire Railway Co., July 3, 1897, 24 R. 1025.

[2] Forbes v. Aberdeen Harbour Commissioners, Jan. 24, 1888, 15 R. 323, per Lord Justice-Clerk Moncreiff at p. 325. *Also cited by the*

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question of age Lord Moncreiff referred to *Fraser* v. *Edinburgh Street Tramways*.[1]]

LORD JUSTICE-CLERK.—I do not think that the present case presents any practical difficulty. The defender is said to have piled up on the public road close to one of the walls bounding the road a quantity of sand and gravel. It is not averred that this was done without the consent of the road authorities, and it must be assumed that where a building is being erected, and for the purposes of its construction the builder puts down a pile of material upon the public road, he has got the permission of the public authority to do so. On the pursuer's own statement this pile of material reached, not to the top of the wall but only to thirty inches from the top. That appears to me a perfectly safe distance to prevent any person falling over the wall, unless indeed such person climbs, not only on to the top of the pile, but also on to the wall. That is, I think, not a thing which anyone is bound to contemplate. If the deceased had been a grown-up person or a child of ten years, I do not think that there would have been a shadow of doubt that the defender was not responsible. The deceased was a child of seven, but even in such a case I do not think that the defender was bound to contemplate that a child of seven would climb on to the wall from a pile of gravel the top of which was thirty inches below the level of the wall.

I am therefore of opinion that this action falls to be dismissed as irrelevant.

LORD YOUNG.—I am clearly of opinion that there are no facts averred here indicating fault, or a shadow of fault, on the part of the defender.

LORD TRAYNER.—I cannot distinguish this case from the case of *Thomson*.[2] I therefore think that it falls to be dismissed.

LORD MONCREIFF.—I am of the same opinion.

THE COURT sustained the first plea in law for the defender and dismissed the action.

MACKAY & YOUNG, W.S.—MACPHERSON & MACKAY, S.S.C.—Agents.

No. 43.

Dec. 12, 1900.
Chivas' Trustees v. Douglas.

REVEREND ARTHUR GASCOIGNE DOUGLAS AND OTHERS (Chivas' Trustees), First Parties.—*Reid.*

REVEREND ARTHUR GASCOIGNE DOUGLAS, Second Party.—*J. G. Spens.*

REVEREND JAMES MYERS DANSON AND OTHERS, Third Parties.—*Cook.*

REVEREND ROBERT CALEDON ROSS AND OTHERS, Fourth Parties.—*Blackburn.*

REVEREND JAMES CROW SMITH AND OTHERS, Fifth, Sixth, and Seventh Parties.—*Reid.*

REVEREND JAMES BROWN CRAVEN AND OTHERS, Eighth and Ninth Parties.—*Pitman.*

Succession—Testament—Construction—Church—Episcopal Church in Scotland—"Diocese of Aberdeen"—United Diocese—"Clergy of Diocese"

Pursuer.—Findlay v. Angus, Jan. 14, 1887, 14 R. 312; Cormack v. School Board of Wick and Pultneytown, June 21, 1889, 16 R. 812; Gibson v. Glasgow Police Commissioners, March 3, 1893, 20 R. 466.

[1] Dec. 2, 1882, 10 R. 264.

[2] 24 R. 1025.

—*Stipend.*—A lady belonging to the Scottish Episcopal Church in Aberdeen who died in 1878, by a codicil to her settlement dated in 1872, directed her trustee to invest a sum of money, and on the termination of two liferents "to hold the said fund, and divide the annual income derived therefrom among the clergy of the Diocese of Aberdeen in supplement of their stipends."

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In 1864 the Diocese of Orkney in the Scottish Episcopal Church was united with the Diocese of Aberdeen, and the two sees were thereafter known as the United Diocese of Aberdeen and Orkney. The United Diocese was ruled by one bishop, and its affairs were managed by one set of officials. All the congregations within the United Diocese were assessed for diocesan expenses on the same basis.

Held that the bequest included the clergy of the original Diocese of Orkney as well as those of the original Diocese of Aberdeen.

Held further (1) that the bishop, clergymen instituted to regularly constituted incumbencies, clergymen holding the licence of the bishop and appointed to independent mission charges, curates or assistants to regularly instituted clergymen, and the "supernumerary clergyman," *i.e.*, a clergyman who performed clerical duties when required on behalf of other clergymen of the Diocese, were "clergy" of the Diocese within the meaning of the bequest, and entitled to participate in the income thereof; but (2) that clergymen formerly officiating within the Diocese who had retired, and were on the Aged and Infirm Clergy Fund, but who still held the licence of the bishop, were not entitled to participate, in respect that they had no stipends, and were under no obligation to perform any clerical duties.

2D DIVISION.

MRS CHRISTIAN CHIVAS, widow of Alexander Chivas, advocate in Aberdeen, died there on 14th November 1878. She left a trust-disposition and settlement, dated 28th June 1872, and a number of codicils thereto of various dates.

By the trust-disposition and settlement the testatrix disponed her whole means and estates, heritable and moveable, real and personal, to George Collie, advocate in Aberdeen, in trust for the purposes mentioned. Among the purposes was the following:—"And I further direct the said George Collie to lay out and invest on good security in his own name, as trustee foresaid, the following sums of money, and that at the first term of Whitsunday or Martinmas happening six months after my death, for the purposes following," *inter alia*,—"(Fifth) The sum of £2000 sterling, the interest or revenue whereof shall be divided and paid half-yearly and termly equally between the Right Reverend Bishop Thomas Suther, of St Andrew's Church, Aberdeen, and the Reverend Macleod, of the Episcopal Church at Ellon, during all the days of their lives, and on the death of the predeceaser the whole interest or revenue shall be paid wholly to the survivor during all the days of his life, and on the death of the last survivor the said principal sum of £2000 shall be paid to the Episcopal Fund in connection with the St Andrew's Church, Aberdeen, the said last-mentioned bequest being made by me in name of and as a memorial of my husband, who was much attached to his church."

By one of the codicils, dated 6th November 1872, the testatrix recalled the legacy above quoted, "and in lieu thereof I do hereby direct my executor to invest the sum of £4000 on good security, and pay the annual income therefrom equally between Bishop Suther and the said Mr M'Leod during all the days of their life, and wholly to the survivor, and after the death of the survivor of them to hold the said fund and divide the annual income derived therefrom among the clergy of the Diocese of Aberdeen in supplement of their stipends."

Bishop Suther and Mr Macleod survived the testatrix, and received

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the income of the above-mentioned fund in terms of the bequest. Mr Macleod survived Bishop Suther and died on 3d October 1898.

The whole purposes of the trust having been by that date fulfilled, with the exception of the bequest of the income to the clergy of the Diocese of Aberdeen under the provision above quoted, Mr Collie, as trustee, on 27th March 1899, assumed as trustees the Right Reverend Dr Arthur Gascoigne Douglas, bishop of the United Diocese of Aberdeen and Orkney in the Episcopal Church in Scotland, and certain other officials of that Diocese. Mr Collie then, on 11th May 1899, resigned office as trustee.

In July 1900 a special case was presented for the determination of questions (*a*) as to the classes of clergy entitled to share in the above bequest, and (*b*) as to the meaning of the term "the Diocese of Aberdeen" as used therein.

The case stated that in 1864 the Diocese of Orkney in the Episcopal Church in Scotland was united with the Diocese of Aberdeen in that Church, "and the two sees have ever since been known and referred to as the United Diocese of Aberdeen and Orkney. Before the union the said Diocese of Aberdeen included the whole county of Aberdeen and a portion of the county of Banff. The said United Diocese is ruled by one bishop, and the affairs of the United Diocese are regulated and managed by one set of officials. The diocesan expenses of the United Diocese are annually ascertained by the Diocesan Council, and the whole congregations, including missions, within the United Diocese are assessed in respect thereof upon the same basis."*

The first parties to the case were the trustees.

The second party was Dr Douglas, the bishop.

The third parties were the Reverend Dr James M. Danson and thirty-seven other clergymen, all being "clergymen instituted to constitutionally governed charges called incumbencies," situated within the portion of the United Diocese of Aberdeen and Orkney at one time known as the Diocese of Aberdeen. The case further stated that such clergymen "are appointed to their incumbencies by the members of the congregation, unless the appointment happens to be within the patronage of one or more private individuals."

The fourth parties were the Reverend Robert C. Ross and two other clergymen, being "clergymen holding the licence of the bishop of the said United Diocese, and appointed to the charge of independent missions, *i.e.*, congregations not yet constituted into incumbencies," within the same portion of the United Diocese. The mode of appointment of the fourth parties was similar to that of the third parties.

The fifth parties were the Reverend James C. Smith and another, being "clergymen holding licences of the said bishop, and acting as curates or assistants to instituted clergymen within" the same portion of the United Diocese. Such clergymen "are generally appointed by

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* The following letter by the testatrix to her trustee, Mr Collie, was produced with the special case:—"My dear Mr Collie,—I wish the sum of £500 to be set apart for a memorial window to Mr Chivas in our Church of St Andrews as it now is, or in a church that may be built hereafter. I may not look to see this, but the sum on demand must be paid to Dr Suther, the Rt. Revd. Bishop of Aberdeen and Orkney. Should he also have pass'd away ere the work is completed, you will please pay the said sum for the above-ment'd purpose to the Rt. Revd. the Bishop of Aberdeen in the Scottish Episcopal Church for the time being.—I remain, ever yours truly," &c.

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the instituted clergymen, whom they assist, and are paid by them or by their congregations as may be arranged."

The sixth parties were the Reverend John Comper and two others, being clergymen "formerly officiating regularly within the said United Diocese, now retired, and on the Aged and Infirm Clergy Fund of the Representative Church Council in connection with the Episcopal Church in Scotland, but still holding the bishop's licence, and entitled under said licence to officiate within the Diocese."

The seventh party was the bishop, "as representing a clergyman performing clerical duties when required on behalf of other clergymen of the said [United] Diocese happening to be temporarily unable to fulfil the same, and known as the supernumerary clergyman of said diocese. At the present date the office of supernumerary clergyman happens to be temporarily vacant, and the parties agree that for the purposes of this case he shall be held as represented by the said bishop."

The eighth parties (the Reverend James B. Craven and another) and the ninth parties (the Reverend Alfred Bromley and another) occupied positions identical with that of the third and the fourth parties respectively, except that the incumbencies of the eighth parties and the charges of the ninth parties were situated within the portion of the United Diocese formerly known as the Diocese of Orkney.

The bishop, as second party, maintained that he was entitled to share in the income of the bequest with such of the clergy as might be found entitled to participate.

The third parties maintained that only the bishop and clergy instituted to incumbencies were entitled to share in the bequest.

The fourth parties maintained that the income fell to be divided among the bishop and such of the clergy as were licensed to the charge of independent congregations.

The third and fourth parties further maintained that only clergy of the original diocese of Aberdeen were entitled to share.

The fifth, sixth, and seventh parties maintained that they were entitled to participate, in respect that they "hold the licence of the bishop of the diocese and have the full status of clergy therein."

The eighth and ninth parties maintained that the clergy of the district which formed the original diocese of Orkney were entitled to share along with the clergy of the district which formed the original diocese of Aberdeen. *Quoad ultra* the eighth and ninth parties adopted the position of the third and fourth parties respectively.

The question of law was:—"Are the second, third, fourth, fifth, sixth, seventh, eighth, and ninth parties, or any and which of them, entitled under said bequest to participate in the annual income to be derived from the said trust fund?"

LORD JUSTICE-CLERK.—What the testatrix in the present case desired was that the proceeds of this fund should be divided among the clergy of the diocese in supplement of their stipends. I am of opinion that this term is wide enough to include the bishop, clergy having incumbencies, those appointed to independent missions, curates or assistants to instituted clergy, and the person holding the office of supernumerary clergyman. But the sixth parties are in a different position. They formerly officiated within the diocese, but they have now retired on pensions, and although they still

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hold licences they have no stipends. They have no rights or obligations as acting clergymen, and I therefore think that the sixth parties are not entitled to share in the proceeds of the legacy.

The only question remaining is, whether the clergymen within that portion of the United Diocese of Aberdeen and Orkney, at one time known as the Diocese of Orkney are entitled to share in the bequest. It appears that in 1864 it was thought advisable to amalgamate the Diocese of Orkney and the Diocese of Aberdeen, and ever since they have been known as the United Diocese of Aberdeen and Orkney. They are under one bishop, whose official title is the Bishop of the United Diocese of Aberdeen and Orkney. But it seems quite plain that the United Diocese is popularly described as the Diocese of Aberdeen, and the bishop as the Bishop of Aberdeen. Aberdeen is the seat of the bishop. I am of opinion that the testator used the words Diocese of Aberdeen in that sense, and intended all the clergy of the United Diocese to have a share in the bequest. I am confirmed in this view by her letter of 12th September 1874, in which the testatrix uses the terms "Bishop of Aberdeen and Orkney" and "Bishop of Aberdeen" as synonymous.

LORD YOUNG, LORD TRAYNER, and LORD MONCREIFF concurred.

THE COURT answered the question of law by declaring that the second, third, fourth, fifth, seventh, eighth, and ninth parties were those entitled under the bequest to participate in the annual income to be derived from the fund.

BRUCE, KERR, & BURNS, W.S.—HENRY & SCOTT, W.S.—ROBERTON & WOOD, W.S.—J. & F. ANDERSON, W.S.—Agents.

No. 44.
Dec. 14, 1900.
Young's Trustees v. Young's Trustee.

JAMES BARKER DUNCAN AND ANOTHER (Archibald Young's Trustees), Pursuers (Reclaimers).—*Salvesen, Q.C.—J. Duncan Millar.*
JOHN BLAIR (Miss Agnes Wilson Young's Trustee), Defender (Respondent).—*Wilson, Q.C.—R. Scott Brown.*

Succession—Trust—Uncertainty—"*Such charitable or public purposes as my trustee thinks proper.*"—A lady by a holograph codicil to her trust-disposition and settlement directed that (in the events which happened) one half of the residue of her estate "shall be applied for such charitable or public purposes as my trustee thinks proper."

Held (*rev.* the judgment of Lord Pearson) that the direction was void from uncertainty.

2D DIVISION.
Lord Pearson.

MISS AGNES WILSON YOUNG, Edinburgh, died on 29th January 1900, leaving a last will and settlement dated 5th December 1898, and a codicil thereto of the same date.

By the last will and settlement the testatrix appointed John Blair, Writer to the Signet, to be her sole executor and trustee, and conveyed to him her whole means and estate, heritable and moveable, real and personal, for the purposes specified. The third purpose was in these terms:—"Thirdly, I leave the Residue of my Estate to my brothers, Archibald Young, Advocate, and the Reverend James Gerard Young, Doctor of Divinity, equally between them, and if either predecease me, and one survives, then I leave the whole to such survivor."

The codicil was in the following terms:—"Referring to the Will

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which I have signed to-day, I direct that in the event of either of my brothers predeceasing me, the half of the Residue, and in the event of both predeceasing me, the whole of the Residue, shall be applied for such charitable or public purposes as my trustee thinks proper."

James Gerard Young predeceased the testatrix, and Archibald Young survived her. Archibald Young was her heir-at-law and sole next of kin.

Mr Blair accepted office as trustee.

On 20th March 1900 Archibald Young brought an action against the trustee, concluding, first, for declarator that the direction in the codicil was void, invalid, and ineffectual, and that the whole residue of the means and estate of Miss Young belonged to the pursuer; secondly, for declarator that the pursuer, as heir-at-law and sole next of kin of Miss Young, or otherwise as residuary legatee under her last will and settlement, was entitled and had right to the whole of the residue. Then followed conclusions for count, reckoning, and payment. The amount of the residue was stated to be about £18,000.

The pursuer pleaded, *inter alia*;—(1) The direction as to the application of the residue of her estate contained in the holograph codicil of the said Miss Agnes Wilson Young being invalid on the ground of vagueness and uncertainty, the one-half of the residue falls to be dealt with as intestate succession, and to be paid over to the pursuer as heir-at-law and sole next of kin. (2) Or otherwise, the direction as to the application of the residue of the said estate contained in the said codicil being invalid on the ground of vagueness and uncertainty, the pursuer is entitled to the whole residue as sole residuary legatee under the trust-disposition and settlement. (3) The pursuer being the sole residuary legatee and heir-at-law and sole next of kin of the said Miss Agnes Wilson Young, is entitled to decree of declarator and decree for production of accounts and payment, in terms of the conclusions of the summons.

The defender admitted that the pursuer as one of the residuary legatees was entitled to one half of the residue, but with respect to the other half the defender pleaded, *inter alia*;—(2) The bequest of one-half of the residue for such charitable or public purposes as the late Miss Agnes Wilson Young's trustee shall think proper is valid, and the said one-half of the residue falls to be administered by the defender in terms of the said trust direction.

The pursuer having died on 8th May 1900, his trustees were, on 29th May, sisted as pursuers in his place.

On 19th July the Lord Ordinary (Pearson) pronounced this interlocutor:—"Finds that the legacy in favour of the defender is not void from uncertainty; therefore assoilzies the defender from the conclusions of the summons, and decerns: Finds the pursuers entitled to expenses out of the said legacy," &c.*

* "OPINION.—This question arises on the construction of one of the testamentary writings of the late Miss Agnes Young. She had two brothers, one of whom predeceased her. In that event she had provided by a codicil that one-half of her residue should be applied 'for such charitable or public purposes as my trustee thinks proper.' The half residue is said to amount to about £9000.

"The trustee named in the will accepted office, and is the defender in this action.

"The representatives of the surviving brother now claim that the bequest

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The pursuers reclaimed.

The nature of the arguments sufficiently appears from the opinions of the Lord Ordinary and the Court.[1]

At advising,—

LORD JUSTICE-CLERK.—I find myself quite unable to read this bequest so as to bring it under the class of charitable bequests. The codicil directs that in the event of either of the brothers of the testatrix predeceasing her,

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is void through uncertainty and vagueness, and that they are entitled to the fund.

"It is not disputed that but for the words 'or public' the bequest would be good, as being a bequest for charitable purposes to be selected by a person named. On the other hand it seems to be settled, that if the class of objects named alternatively is too vague and uncertain to receive effect, the otherwise good bequest to charitable purposes will also fail.

"I set on one side those cases of which *Low's Trustees* (11 Macph. 744) is an example where a legacy is left to a class of objects so wide that it requires a power of selection to make it definite, and where either no power of selection is given, or the trustees to whom it is given fail.

"Nor do I think much if any light is to be obtained from English authorities on this matter. The view taken by the English Courts is entirely different from ours, as is well explained by Lord Stormonth-Darling in his opinion in the case of *Cobb* (21 R. 638).

"In our law it is settled that a bequest for charitable purposes to be selected by trustees is valid, even where the purposes are not defined by a reference to locality, or to specific objects, or otherwise than by the word 'charitable.'

"If this be so, I profess myself unable to see any reason why the substitution of the term 'public purposes' for 'charitable purposes' should make all the difference in the validity of the bequest, and why the one bequest should be bad and the other good. Both terms are in a sense vague, not only as including a very large class, but as presenting difficulty in fixing the precise boundary of the class. It would be almost impossible to frame an exhaustive list either of charitable purposes or of public purposes; and possibly there would be a large difference of opinion, in the case of each list, as to whether certain objects fell within the description or not. But that observation seems to me quite as applicable to charitable as to public purposes.

"As to the absence of any geographical limit within which the bequest is to be applied, I do not find that this has been accepted as a ground for refusing effect to a bequest for 'charitable purposes' generally. It is not necessary to limit the scope of the bequest by any reference to a locality. Provided someone is appointed to make the selection of individual objects, the charitable purposes may be world-wide; and it has not, so far as I am aware, been suggested that the bequest must fail because the selection may be of foreign charities. It is true a distinction may here be suggested. For while charitable purposes, being founded on the needs of humanity, are much the same in scope and object wherever they are promoted, the promotion of public purposes is a very different matter when it is not confined to the testator's own people and nation. But if 'public purposes within Scotland' would do, as I think it clearly would, I see no sufficient reason for holding that this bequest by a Scotswoman is to fail because she has not confined the selection to her own country. That is a matter she left to her trustee; and in my opinion she was entitled to do so."

[1] *Authorities cited.*—Murray v. Fleeming, 1729, M. 4075; Crichton v. Grierson, July 25, 1828, 3 W. and S. 329; Miller v. Black's Trustees,

the half of the residue, and in the event of both predeceasing her, the whole of the residue "shall be applied for such charitable or public purposes as my trustee thinks proper." Whatever might be the result of an attempt, where two or more expressive adjectives are joined by the copulative word "and," to read the one as exegetical of the other, it would be a quite improper stretch of language, in such a sentence as we are now construing, to read "charitable" as being interpreted by the word "public." There is nothing in the bequest to lead us to any interpretation, and we are obliged to take the words as we find them. I think the plain reading of these words is that the trustee may apply the fund to "charitable" purposes, or, if he thinks proper, may apply it to "public" purposes not included in that word. And that being the view I take of the reading of the words, I differ from the judgment which the Lord Ordinary has given.

LORD YOUNG.—Had the codicil in question directed the residue of the testator's property to be applied "for such charitable purposes as my trustee thinks proper," I should have thought it valid, and indeed this, I understand, is not disputed. The question in the case is whether the direction that the residue shall be applied "for such charitable *or* public purposes as my trustee thinks proper," is valid; and agreeing with your Lordship, but differing from the Lord Ordinary, I am of opinion that it is not. "Public purposes" is a very wide and indefinite expression, quite as wide and indefinite as the expression "private purposes"—both and either so much so that I could not on authority or principle sustain either or both as a valid direction to a testamentary trustee. Nor can I hold that a direction to apply money to "charitable purposes" chosen by the trustee can be sustained if followed by words which extend his powers so that he may decline "charitable purposes" altogether, and choose any other he thinks proper, whether "public" or "private"—or either exclusive of the other. To hold otherwise would be to hold that a testamentary trustee may be validly empowered to apply the testamentary funds to any purpose he thinks proper, charitable or not, provided only that it is public or private, and of course lawful.

LORD TRAYNER.—I am of the same opinion. The language of this deed is not ambiguous. It is simply this, that the trustee or executor should apply the half of the residue for such charitable or public purposes as the trustee or the executor should think proper. Now, there is no doubt that if the direction had been to divide among "charitable purposes," or anything which could have been brought within the category of "charitable," it would have been a good bequest according to the decisions both in

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July 14, 1837, 2 S. and M. 866; M'Lean v. Henderson's Trustees, Feb. 24, 1880, 7 R. 601; Cobb v. Cobb's Trustees, March 9, 1894, 21 R. 638; M'Gregor's Trustees v. Bosomworth, Jan. 8, 1896, 33 S. L. R. 364; Brown's Trustees v. Young, June 3, 1898, 6 S. L. T. No. 43; Playfair's Trustees v. Playfair, March 1, 1900, 2 F. 686; James v. Williams, Ambler, 651; Dolan v. Macdermot, 1867, L. R., 5 Eq. 60; Goodman v. Mayor of Saltash, 1882, L. R., 7 App. Cas. 633, *per* Lord Cairns at p. 650; Commissioners for Special Purposes of Income-Tax v. Pemsel, L. R. [1891], A. C. 531; M'Laren on Wills and Succession, 3d edit., sec. 1691.

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England and Scotland. But I think it is also settled by authority that any disposition of an estate to a trustee to be disposed of, according to his discretion, for "public purposes," is too vague, and must be held to be ineffectual through uncertainty.

LORD MONCREIFF.—I am of the same opinion, and I have nothing to add on the merits; but I think that the pursuers take under the will, the codicil being bad. Mr Archibald Young, the surviving brother and original pursuer, became, as the sole residuary legatee under the will, entitled to the whole of the residue; and accordingly the pursuers, as his trustees and executors, are entitled to decree on that footing in terms of their second plea in law.

THE COURT recalled the interlocutor reclaimed against, sustained the second plea in law for the pursuers, decerned, and remitted the cause to the Lord Ordinary to proceed.

DUNCAN & BLACK, W.S.—DAVIDSON & SYME, W.S.—Agents.

No. 45. Dec. 14, 1900. Robey & Co., Limited, v. Stein & Co.

ROBEY & COMPANY, LIMITED, Pursuers (Respondents).—*Campbell, Q.C.—Hunter.*

JOHN G. STEIN & COMPANY, Defenders (Reclaimers).—*Ure, Q.C.—Clyde.*

Sale—Warranty—Collateral Representation—Sale of Goods Act, 1893 (56 *and* 57 *Vict. cap.* 71), *secs.* 53 *and* 62.—The Sale of Goods Act, 1893, section 62, enacts that "as regards Scotland, a breach of warranty shall be deemed to be a failure to perform a material part of the contract."

A brickmaker who wished to replace the engine at his works with one of greater power, to be connected, with the existing boiler received a letter dated 1st October 1898 from a firm of engineers enclosing a specification and estimate of an engine which they described as the most economical engine in the market. The letter stated,—"Assuming the steam pressure to be 110/120 lbs., the consumption will be as follows:—

1½ lbs. of coal	develop	15 lbs. of steam.
15 lbs. of steam	,,	1 i.h.p. per hour.
∴ 1½ lbs. of coal	,,	1 i.h.p. per hour.
∴ 247½ lbs. of coal	,,	165 i.h.p. per hour.
∴ 2475 lbs. of coal	,,	165 i.h.p. for 10 hours.
T. C. Q. LBS.		
=1 2 0 4 of coal	,,	165 i.h.p. for 10 hours,

One machine makes 10,000 bricks in ten hours. Three machines make 30,000 bricks in ten hours—one machine requiring 55 i.h.p., three machines require 165 i.h.p. Coal costing 4s. per ton—cost of coal per 10,000 bricks, 1s. 5⅜d.; cost of coal per 30,000 bricks, 4s. 4d. Present rate of working 10,000 bricks for 1 ton 16 cwts.—7s., which shews by adopting the above engine the saving will be 5s. 6d. per 10,000 bricks, or 30,000 bricks for about two-third cost at present for 10,000." The brickmaker by letter gave the order "as per your specification . . . subject to your guarantee of fuel consumption being fulfilled." The engine when delivered was found to be capable of developing, as estimated, 1 horse-power from 15 lbs. of steam, but the amount of coal at 4s. per ton required to raise this quantity of steam by the brickmaker's boiler was more than double that stated. The discrepancy was due to the engineer's representative having taken from a text-book the formula 1½ lbs. of coal develop 15 lbs. of steam, without adverting to the fact that the coal referred to was best Welsh coal (costing over £1 per ton) while the coal used by the defenders was Scots

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dross, costing 4s. per ton. In an action for the price, the purchaser contended that the letter of 1st October contained a guarantee that with the engine he would be able to produce 30,000 bricks at a cost of 4s. 4d., and that the damage sustained by him through the pursuers' breach of contract exceeded the price. *Held* (*aff.* judgment of Lord Low) that in view of the subject-matter of the contract—the sale of an engine—the letter could not be construed as containing a warranty as to the cost of producing the steam to be supplied to the engine, or as to the total cost of producing bricks, in which the cost of steam production was an element.

Opinion (*per* Lord M'Laren) that the statement "15 lbs. of steam develop one horse power per hour," was a material term of the contract, and a warranty in the sense of section 62 of the Sale of Goods Act, 1893.

1ST DIVISION. Lord Low.

ON 19th July 1899 Robey & Company, engineers, Lincoln, raised an action against John G. Stein & Co., Fireclay Works, Bonnyridge, concluding for payment of £955, 7s. 7d. The pursuers averred that they had conform to contract supplied an engine to the defenders, the price of which, less a small amount paid to account, was the sum sued for.

The defenders, who were brickmakers, admitted receiving an engine from the pursuers, but denied that it was conform to contract.

They stated that in May 1898 they contemplated replacing the engine at their Denny Works with one of greater power, and had entered into negotiations with the pursuers in the course of which they had received from Mr Dunkerton, the pursuers' Glasgow representative, a letter dated 7th June 1898 (quoted *infra*, note * p. 280), "in which he stated that the defenders appeared to have been working their plant at great expense and also loss of power, and he informed the defenders that in the event of their ordering an engine from the pursuers he guaranteed to prove this in a practical manner, viz., by a reduction in their coal bill and more work done."

(Stat. 3) "Proceeding on the guarantee mentioned in the preceding article, and with a view to placing an order with pursuers, the defenders asked pursuers to ascertain for themselves what power defenders were using. Mr Dunkerton accordingly called at defenders' work, examined the existing plant, and obtained data and information which enabled him to write to the defenders instructing them as to the power they were using, and setting forth the economy in fuel consumption they would obtain by purchasing an engine from the pursuers. Accompanying the letter were specifications and estimates of two engines, either of which the pursuers recommended."

(Stat. 4) "The pursuers' letter [dated 1st October 1898], mentioned in the preceding statement, is in the following terms:—'Dear Sirs,—We now have pleasure in enclosing herewith specification and estimate of our coupled compound condensing engine, Class E, having cylinders 13½ in. and 21½ in. by 30 in. stroke, and, as an alternative, one of the same type, but having cylinders 15 in. and 23½ in. by 33 in. stroke. The former running at 100 revolutions per min., the latter running at 90 revolutions per min. This type of engine has now stood the test of many years, and is, we have not the least hesitation in saying, the most economical and most efficient engine in the market at the present time. The smaller engine of the two will give 165 i.h.p. at its most economical working point, but is capable of developing 230 i.h.p. The larger one will give about 230 i.h.p. most economically, but is capable of working to 300 i.h.p. Assuming the steam pressure to be 110/120 lbs., the consumption will be as follows:—

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$1\frac{1}{2}$ lbs. of coal develop 15 lbs. of steam.
15 lbs. of steam „ 1 i.h.p. per hour.
∴ $1\frac{1}{2}$ lbs. of coal „ 1 i.h.p. per hour.
∴ $247\frac{1}{2}$ lbs. of coal „ 165 i.h.p. per hour.
∴ 2475 lbs. of coal „ 165 i.h.p. for 10 hours.

T. C. Q. LBS.
= 1 2 0 4 of coal „ 165 i.h.p. for 10 hours.

One machine makes 10,000 bricks in ten hours. Three machines make 30,000 bricks in ten hours—one machine requiring 55 i.h.p., three machines require 165 i.h.p. Coal costing 4s. per ton—cost of coal per 10,000 bricks, 1s. $5\frac{3}{8}$d.; cost of coal per 30,000 bricks 4s. 4d. Present rate of working 10,000 bricks for 1 ton 16 cwts.—7s., which shews by adopting the above engine the saving will be 5s. 6d. per 10,000 bricks, or 30,000 bricks for about two-third cost at present for 10,000.

"'The foregoing calculations are based on the most economical working load of the smaller engine driving three sets of machines. If you intend to put down three new machines—making four in all—we should recommend the larger engine, which would prove proportionately economical.'"

(Stat. 5) " . . . Relying entirely on pursuers' representations and guarantees as to the great saving which one of their engines would effect, defenders, by letter of 12th October 1898, gave pursuers an order for a coupled compound horizontal condensing engine . . . This order expressly bore that it was given subject to pursuers' guarantee of fuel consumption being fulfilled. The said letter is produced and referred to. By letter of 14th October 1898 pursuers accepted this order." (Stat. 7) "The engine was not ready to start work until the middle of April 1899, and when at length it did start, it was found to be quite incapable of accomplishing the saving in fuel which the pursuers had guaranteed it would effect. After being fairly and fully tried, the coal consumed for 10,000 bricks manufactured was found to be 1 ton (= 2240 lbs.), whereas the pursuers' guarantee was that the coal consumed would be for 30,000 bricks, 1 ton 2 cwt. 0 qrs. 4 lbs.; or for 10,000 bricks, 7 cwt. 1 qr. 13 lbs. (= 825 lbs.). The actual coal consumpt is thus about $2\frac{3}{4}$ times that of the pursuers' guarantee, on the faith of which the defenders gave the order for the engine. The defenders have suffered very serious loss in consequence of the pursuers' failure to fulfil their guarantee above mentioned, relative to the fuel consumpt of the said engine. The said loss amounts to a sum not less than the sum sued for."

The defenders pleaded;—(2) The pursuers having committed a breach of contract as condescended on, the defenders, having suffered loss and damage thereby, are entitled to set off that loss and damage against the pursuers' claim. (3) The pursuers having committed a breach of warranty as condescended on, the defenders are entitled to set up the same in extinction of the price of the engine sued for.

The Lord Ordinary allowed a proof.

From the evidence, it appeared that Mr Dunkerton had had several meetings with the defenders, and that the letters quoted below, *inter alia*, had passed between the parties.*

* Robey & Co. (Dunkerton) to Stein & Co., 7th June 1898.—" . . . According to the above-named data, you appear to have been working your plant at great expense, and also loss of power, which, in the event of

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It also appeared that the figures (in the letter of 1st October 1898) "1½ lbs. of coal develop 15 lbs. steam," were got by Mr Dunkerton from a text-book on steam, and that the formula was based on the assumption that the best Welsh coal was being used. The defenders, in fact, used Scots dross, the price of which at 1st October 1898 was 4s. a ton. The price of Welsh coal at that date was 25s. a ton.

On 8th March 1900 the Lord Ordinary (Low) decerned against the defenders in terms of the conclusions of the summons.*

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having the pleasure of booking your order, we guarantee to shew you in a practical manner, viz., reduction in coal bill, and more work done."

Robey & Co. (Dunkerton) to Stein & Co., 1st October 1898 (quoted *ante*, Stat. 4).

Stein & Co. to Robey & Co., 4th October 1898.—"Yours of 1st. The price you quote is certainly a stiff one. We presume it includes the erection and starting of the engine, and is also dependent on the fuel consumption turning out as you calculate. We note your calculations are based on one mill, elevators, screen, and machine requiring only 55 i.h.p., notwithstanding that your diagram of our present engine indicated about 100 i.h.p., and we understand that you are satisfied that this is so, and accept the responsibility of same. We understand that you guaranteed the same steam consumption to Messrs Dobbie, Forbes, & Co., although their engine is non-condensing. Is this so, and if so, what further advantage is the condenser?"

Stein & Co. to Robey & Co., 12th October 1898.—"We confirm order for coupled compound horizontal condensing engine cylinder, 15 in. and 23½ in. by 33 in. stroke, . . . as per your specification, for the sum of £960 sterling. Cash in three months, or £935 cash in one month, subject to your guarantees of fuel consumption being fulfilled."

Robey and Co. to Stein & Co., 14th October 1898.—"We have received per our Mr Dunkerton your esteemed favour of the 12th inst. confirming the order for coupled compound class E horizontal condensing engine. . . .

"With regard to the steam consumption, we have to state that one of our engines, slightly larger than the above, was lately tested by the authorities of Durham University, and came to somewhat less than the figure you gave, viz., about 17 lbs.; but to carry out tests to prove this at your works means running to a considerable expense, which, however, we shall be glad to do on your agreeing to pay for the skilled men. . . ."

Stein & Co. to Robey & Co., 15th October 1898.—"Yours of yesterday. It is not necessary to send skilled men from Lincoln at considerable expense, as on 1st inst. you gave us the fuel per 10,000 bricks, and it will be easily ascertained without expense."

Robey & Co. to Stein & Co., 17th October 1898.—"We are in receipt of your favour of the 15th inst. and note contents.

"We are not quite clear what is meant by the fuel for 10,000 bricks, but this probably refers to some conversation between you and our Mr Dunkerton.

"We have referred this matter to him, and assuring you of our best attention."

Stein & Co. to Robey & Co., 18th October 1898.—"Yours of yesterday. We note you have referred the matter to Mr Dunkerton, whose letter of 1st inst. goes fully into the fuel consumption, and on which our decision was based."

* "OPINION.—In this action the pursuers sue for the price of a steam-engine which they supplied to the defenders for their brick manufactory at Bonnybridge.

"In defence the defenders aver that the pursuers guaranteed that the

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The defenders reclaimed, and argued;—The guarantee was that 1½ lbs. of coal would produce 15 lbs. of steam, and that for an expenditure of 22 cwt. 4 lbs. of coal the engine would turn out 30,000 bricks. It might be that that had proved to be a guarantee impossible of fulfilment. Parties did not think so at the time of the contract, and in any case it was no answer to the defenders' plea of breach of warranty.[1] The object of getting a new engine was to economise fuel consumption, and accordingly the defenders insisted on getting a guarantee of fuel consumption. The pursuers said that the guarantee—if any—was of steam consumption, but the terms of the letters were entirely against that view. The correspondence, it was to be noted, closed by the pursuers saying that they would refer the matter of fuel to Dunkerton. They afterwards, without again communicating on the matter with the defenders, delivered the engine, and it must be taken, therefore, that they had referred to Dunkerton, and were satisfied that the defenders were right in what they said about a guarantee having been given, or that they had waived their right to refer to Dunkerton, and had accepted the defenders' statement. If the guarantee was given it was very clear that it had not

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fuel required to drive the engine would not exceed a certain amount, and that in fact a much larger amount is required. The defenders accordingly claim damages to an amount which entirely extinguishes the price.

"The defenders found upon the 53d section of the Sale of Goods Act, which provides that 'where there is a breach of warranty by the seller, the buyer may set up against the seller the breach of warranty in diminution or extinction of the price.'

"By the 62d section of the Act, it is provided that 'as regards Scotland, a breach of warranty shall be deemed to be a failure to perform a material part of the contract.'

"Now, if it was part of the contract that the amount of fuel required to drive the engine should not exceed a specified quantity, I think that there is no doubt that that would be a material part of the contract. The first question therefore is whether a condition as to the amount of fuel required was part of the contract.

"The negotiations with the defenders were conducted by Mr Dunkerton, the pursuers' agent in Glasgow. After a considerable amount of correspondence, to which I need not refer, Dunkerton, on 1st October 1898, wrote a letter to the defenders enclosing a specification and estimate which had been prepared by the pursuers for two engines of the same type, the one somewhat larger than the other. That letter is quoted at length in Article 3 of the defenders' statement, and upon it their case chiefly depends.

"The defenders, however, also found upon a letter which Dunkerton wrote to them on 7th June 1898, in which he said: 'You appear to have been working your plant at great expense and also loss of power, which in event of having the pleasure of booking your order we guarantee to shew you in a practical manner, by reduction of coal bill and more work done.'

"The defenders' reason for founding upon that letter is, I suppose, that the letter of 1st October does not in terms bear to be a guarantee, and accordingly they argued that the letter of 1st October contained the guarantee which was promised in the letter of 7th June. I do not think that there was any connection whatever between the two letters, and I do not regard the letter of 7th June as containing a guarantee in the proper sense of the term, or as a promise to give a guarantee. It was merely a representation that the pursuers' engine would consume less fuel and do more work than the engine which the defenders were then using, and, as matter of

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[1] Gillespie & Co. v. Howden & Co., March 7, 1885, 12 R. 800.

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been implemented. Rejection by the defenders was out of the question, for their whole premises had been rearranged at great expense to suit the new engine; and their only remedy, therefore, was to claim damages in extinction of the price.[1] The Sale of Goods Act, 1893, contemplated that damages for breach of warranty might exceed the price of the article purchased, and here the difference between the coal actually consumed and the coal consumpt which was guaranteed would, if capitalised over the life of the engine, exceed in value the price of the engine.

Argued for the respondents;—The construction put upon the letters by the Lord Ordinary was right. The guarantee claimed by the defenders was of a most extraordinary character. There was no precise statement of it on record. The inherent improbability of its having been given was an important factor in the construction of the letters which were alleged to instruct it. What the pursuers had warranted, if, indeed, they had warranted anything, was that the engine—given a certain number of lbs. of steam—would produce a certain amount of horse power. That was a warranty of steam con-

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fact, the engine which the pursuers supplied has justified that representation.

"If, therefore, the pursuers gave a guarantee in regard to the consumption of fuel, it is contained in the letter of 1st October.

"It is said that the calculations in regard to the consumption of fuel in the latter letter were not intended to be a guarantee, that Dunkerton had no authority to give a guarantee, and that owing to the calculations being based upon erroneous assumptions, the result brought out is an impossible one.

"Upon that view of the case I would only remark (1) that whether there was a guarantee or not depends upon the construction of the letters which passed between the parties; (2) that although Dunkerton had not authority to give a guarantee, or indeed to conclude a contract, he was introduced to the defenders as being the pursuers' representative, and in particular the defenders were referred to him in regard to the question of consumption of fuel; and (3) if it was a term of the contract that not more than a specified amount of fuel should be required to work the engine, the fact that it was impossible for the pursuers to fulfil that part of the contract will not save them from a claim of damages for breach of contract.

"I shall therefore turn to the letter of 1st October and consider whether it contains a guarantee, or, in other words, whether the pursuers therein contracted to supply an engine which would consume a certain amount of fuel and no more.

"The guarantee which the letter of 1st October is said to contain is that the engine would produce 30,000 bricks, with an expenditure of 1 ton 2 cwt. 4 lbs. of coal of a kind which at the date of the letter could be purchased for 4s. per ton. I think that that is a fair enough summary of the result of the statements in the letter, but it is to be observed that the calculations refer to the smaller engine, and are based upon the assumption of its being worked with the most economical load. Now, the defenders took the larger engine, and the actual consumption of coal upon which they base their claim was not taken when the engine was working with the most economical load. There was therefore in no view a definite guarantee applicable to the engine which the defenders elected to take, nor to the conditions under which the engine has been worked. It was, however, said in the letter that the larger engine would 'prove proportionately economical.' Now, although no

[1] Electric Construction Co., Limited, v. Hurry & Young, Jan. 14, 1897, 24 R. 312.

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sumption, not fuel consumption. The latter would have been a warranty having reference to no part or quality of the thing purchased and delivered, but to something entirely outside of and apart from it, viz., the calorific power of Scots dross. Fuel consumption, where that expression occurred in the correspondence, meant steam consumption. An engine consumed steam, not coal. If the subject of the sale had been a boiler, then it would have meant coal consumption. The letter of 1st October merely set out a series of calculations. The figures given by Dunkerton in reference to coal consumption were text-book figures. He had never examined the coal used by the defenders, or their boilers, and he had not, in fact, the materials wherewith to give the warranty claimed. In point of fact, a very large economy was effected by the engine supplied by the pursuers.

LORD M'LAREN.—This is a case which is important in its legal relations, and if I had been considering it in the first instance, I should have wished to take more time to study the case; but we have the advantage of a very

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one was able to say with precision what the consumption of coal of the engine supplied to the defenders, when worked as they work it, should be, if calculated upon the same basis as the calculations in the letter, it is not disputed that the amount would be considerably less than that actually consumed.

"If, therefore, the letter of 1st October is to be read as a guarantee, I think that it is plain enough that the engine supplied has not fulfilled the guarantee. In my judgment, however, the letter does not amount to a guarantee. The occasion of the letter being written was that the pursuers had made out a detailed specification and estimate for an engine of the kind in regard to which there had been previous negotiations with the defenders. The contract which the pursuers offered to make with the defenders was a contract to supply an engine in terms of the specification and at the estimated price. All that was said in the letter about the consumption of coal appears to me to have been merely representations as to the capacity of the engine. These representations were no doubt made for the purpose of inducing the defenders to enter into a contract for the purchase of an engine, and I accept Mr Stein's word that they did induce him to enter into the contract; but that does not make the representations part of the contract. It would have been a different matter if the defenders had been seeking to set aside the contract on the ground that they had been induced to enter into it by representations which, however honestly made, were in fact false, but that is not the position taken up by the defenders at all. They are holding by their contract, and they maintain that a material term of the contract has not been fulfilled, and that accordingly they are entitled to keep the engine (which, I may say, is admittedly a first-class engine, and consumes less fuel and does more work than the engine which the defenders formerly used) without paying any part of the price, which, they say, has been more than extinguished by the loss which they have sustained through the contract not having been fulfilled.

"On receiving the letter of 1st October the defenders did not at once give the pursuers an order for an engine, but on 4th October wrote a letter which, although addressed to the pursuers, was intended for Dunkerton, and was sent to him.

"In that letter the defenders say,—'The price is certainly a stiff one. We presume it includes the erection and starting of the engine? and is also dependent upon the fuel consumption turning out as you calculate.' The defenders then draw attention to the estimate of the power required to drive a brick-making machine, upon which Dunkerton's calculations in the

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instructive and very full opinion by the Lord Ordinary, in which I concur, in common, I believe, with your Lordships, and what I shall say will be supplementary to his Lordship's opinion rather than an independent and complete examination of the whole case.

The question is whether, in the sale of a steam-engine, a guarantee of a very peculiar nature was given—a guarantee which I shall consider more fully, but which, in the meantime, I may say shortly is to the effect that the engine, when applied to driving brick-making machinery, is guaranteed to turn out so many bricks per working day—I think 30,000 bricks per day of ten hours. Whatever view may be taken of the merits of the case, this guarantee or warranty, if given, is undoubtedly an undertaking in writing, because the contract was begun and completed by correspondence. The most important letter is a letter dated 1st October 1898, written by the travelling agent of the makers to the defender, Mr Stein, who was looking out for a new and more powerful engine for the purpose of driving his brick-making machinery. That is the first and important letter.

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letter of 1st October had been based. The estimate evidently struck the defenders as being too low, and it was in fact too low. They then proceed, —'We understand you guaranteed the same steam consumption to Messrs Dobbie, Forbes, & Company. . . . We are strongly disposed towards the larger engine.'

"Dobbie, Forbes, & Company were a firm to whom the pursuers had supplied an engine which Mr Stein had seen. It appears that the pursuers had given a guarantee in regard to that engine that it would develop one indicated horse-power for a certain number of pounds of steam per hour. That is a kind of guarantee which the pursuers are willing to give, and are in the habit of giving; but they never give a guarantee in regard to the amount of fuel which will be required, because that is a matter which does not depend only upon the engine, but upon other things over which they have no control, such as the character of the boiler and of the work to be performed.

"Whether the defenders were or were not aware of that I do not know, but it is to be noticed that in their letter of 4th October they used the word 'guarantee' in reference to steam, and only refer to what was said in the letter of 1st October about the consumption of fuel as calculations. Further, the natural inference, from the way in which the steam guarantee to Dobbie & Company is referred to, is that the guarantee which the defenders wanted, and understood that Dunkerton was giving to them, was of the same character. Mr Stein said that the word 'steam' must have been written by mistake instead of 'fuel,' because he did not know anything about a guarantee of steam. I cannot accept that explanation, but I think that at that time Mr Stein was under the impression that if the amount of steam was guaranteed, that necessarily involved a guarantee of the amount of fuel required. What Mr Stein did not then know, or did not take into consideration, was that that depended upon whether the coal actually used was the same as that upon which the calculation of steam had proceeded, because of course a given quantity of dross will not produce so much steam as the same quantity of best Welsh coal. That misapprehension on Mr Stein's part seems to me to explain a good deal of the misunderstanding which has arisen between him and the pursuers.

"Dunkerton answered the defenders' letter of the 4th October upon the 7th. That letter is very long, and is directed chiefly to setting out the merits of the pursuers' engines, and there are only one or two passages which have any bearing on the present case.

"In regard to the power which he had assumed in his letter of the

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And then on 12th October there comes a letter from Mr Stein in which he says that he is prepared to order an engine of one of the two classes specified "subject to the guarantees of coal consumption being fulfilled." Now, there was some little correspondence following the letter of 12th October, but the end of it was that Messrs Robey, the pursuers, said they would inquire at Mr Dunkerton, their representative, who had initiated the bargain, and we know from the evidence that no inquiry was made—the matter was overlooked—and so the obligation of the pursuers must be found in the writings which I have referred to.

Now, a noticeable feature in the case is that while the case has been argued to us by the defenders as a claim founded on the Sale of Goods Act, which says that a warranty, or, as it is interpreted, a material condition of the contract of sale may be set up in diminution or extinction of the price, there is in this record no reference to the Sale of Goods Act that I can discover either in the condescendence or in the pleas, and no statement there of any warranty such as would satisfy the descriptive words of

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1st October as being required to drive a brick-making machine, Dunkerton said that he had taken the figure given by the makers of the machine, which he thought more reliable than diagrams which he had taken himself. He then wrote: 'We wish further to say that our calculations were based upon a 40 h.p. nominal engine' (that is the smaller engine), 'but noticing that you are thinking of adopting the 50 h.p. engine, it is only fair on our part to point out that with the increase of power the consumpt will also increase slightly, and instead of 15 lbs. of steam per i.h.p., it will be 17 lbs. Again, working at half-load will of course not be quite so economical, and the steam consumpt will then be approximately 22 lbs. So, assuming you work at first with about three-quarter-load, the consumpt will be about 19 lbs.'

"It is plain that Dunkerton is there speaking of the amount of steam required and not of the consumption of coal, but I do not think that the pursuers can take much benefit from that fact, because it is not at all inconsistent with the letter of 1st October. In the latter letter, Dunkerton's calculation is that 1½ lbs. of coal will develop 15 lbs. of steam, and that 15 lbs. of steam will develop 1 i.h.p. per hour, and that accordingly 1½ lbs. of coal will develop 1 i.h.p. per hour. Now, all that he says in the letter of the 7th October is that with the larger engine, 17 to 22 lbs. instead of 15 lbs. of steam will be required to develop one indicated horse power, and therefore Mr Stein was entitled to assume that the only alteration which required to be made upon the calculations of the letter of the 1st, in order to make them applicable to the larger engine, was to increase the 1½ lbs. of coal in proportion to the difference between 15 and 17, or 22.

"The next letter was written by the defenders on 12th October, and was sent to the pursuers at Lincoln. Whether it was sent there directly by the defenders or through Dunkerton, I do not know, but the defenders were aware that it was being sent to Lincoln to be dealt with at the head office of the company. In that letter the defenders confirmed the order for an engine of the larger type, in terms of the specification and estimate, and then they added, 'subject to your guarantees of fuel consumption being fulfilled.'

"The pursuers at that time did not know that Dunkerton had written the letter of 1st October, or that he had made any representations as to the consumption of fuel. Dunkerton, however, had communicated with them in regard to the steam required, and they had told him that 17 lbs. of steam would be required for one horse power, and had apparently intimated their

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the statute, or which would at common law amount to an independent undertaking. Perhaps on a strict construction of this record it might be held that there was no relevant defence to the action for the price, but as the case has been argued and advised in the Outer-House on the basis of an averment of such a warranty—which certainly was made clear in the argument—I propose to follow the Lord Ordinary in considering the question whether such a guarantee or warranty was given.

It is to be observed that the defenders' letter of 12th October speaks of an existing guarantee contained in the letter of 1st October from Robey & Company, which I may describe generally as a specification of the engine which they proposed to furnish. It is not said in the defenders' letter, "I agree to take an engine on the basis of your letter, provided you guarantee all the representations which are made in that letter." Nothing approaching to that is suggested. What is said is, "We give the order subject to something which we call your guarantee of coal consumption." And therefore it seems to me that the question to be considered is whether there is in

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willingness to give a guarantee to that effect. Mr Richardson (the managing director of the pursuers' company), accordingly assumed that the reference in the defenders' letter to a guarantee of fuel consumption really referred to steam consumption. He therefore wrote a letter to the defenders on 14th October, in which, after accepting the order, he said: 'With regard to the steam consumption, we have to state that one of our engines, slightly larger than the above, was lately tested by the authorities of Durham University, and came to somewhat less than the figure you give, viz., about 17 lbs., but to carry out the tests to prove this at your works means running to a considerable expense, which, however, we shall be glad to do on your agreeing to pay for the skilled men and apparatus we should have to send up to Bonnybridge for that purpose. It would be approximately £50.'

"In that letter Mr Richardson was in error in saying that 17 lbs. of steam had been given by the defenders. He understood, however, from communications which he had received from Dunkerton that the figure which the defenders wanted was 17 lbs.

"On the 15th October the defenders wrote to the pursuers: 'It is not necessary to send skilled men from Lincoln at considerable expense, as on the 1st inst. you gave us the fuel per 10,000 bricks, and it will be easily ascertained without expense.'

"On the 17th the pursuers replied:—'We are not quite clear what is meant by the fuel for 10,000 bricks, but this probably refers to some conversation between you and our Mr Dunkerton. We have referred the matter to him.'

"That letter shewed the defenders quite clearly that the pursuers did not know of the letter of 1st October, and were not aware of any guarantee of fuel consumption having been given. I think, however, that the reference to Dunkerton justified the defenders in assuming that the latter had full authority to deal with the matter.

"There is only one more letter to which it is necessary to refer. On the 18th October the defenders replied to the pursuers' letter of the 17th: 'Yours of yesterday. We note you have referred the matter to Mr Dunkerton, whose letter of 1st inst. goes fully into the fuel consumption, and on which our decision was based.'

"That letter concluded the correspondence as regarded the question of fuel consumption, which was not again brought up until the engine had been fitted up and was working in the defenders' works.

"The defenders did not after their letter of 18th October again specially

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the pursuers' letter of 1st October any guarantee which can be represented in a reasonable sense as a guarantee of coal consumption.

Now, the part of the letter of 1st October which is founded on may be described as an argumentative statement of the merits of the pursuers' engine based on calculations, and with an invitation to the intending purchaser to apply the same method of calculation to determine the efficiency of an inferior engine—I presume such an engine as he had at that time in use, but an engine of greater horse-power. And then it is said, "You will see that by taking our engine you will effect such a saving of coal as will speedily compensate you for the larger price." The exact words are—"You will find that the difference of cost between this and an inferior type of engine will be made up in a very short time." Among the data of calculation we have this line—"Fifteen pounds of steam develop one horse-power per hour." Now that, I take it, was a representation as to the efficiency or performance of the engine to be supplied, because it is common ground that the test of efficiency of a steam-engine is the quantity of power

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communicate with Dunkerton upon the subject, but apparently rested satisfied with the letter of 1st October.

"It seems to me that both parties were somewhat negligent in allowing the question of the consumption of coal to remain in such a vague position. When they were informed by the defenders that they were relying upon a letter from Dunkerton, the natural thing for the pursuers to have done would have been to get a copy of Dunkerton's letter. Why they did not do so appears to have been that Mr Richardson having told Dunkerton that the pursuers would guarantee 17 lbs. of steam, it never occurred to him that Dunkerton could have given any other guarantee. Further, a guarantee of steam is in a certain sense a guarantee of coal consumption, because the person working the engine can ascertain what amount of the coal which he uses is required to produce a given amount of steam, and that is what the pursuers understood the defenders to refer to in their letter of 15th October when they said that it was not necessary to send a skilled man to their works, 'as it will be easily ascertained without expense.' The chief mistake which Dunkerton had made in his calculations was that he assumed that dross at 4s. a ton would produce as much steam as the best Welsh coal. Naturally it never occurred to the pursuers that Dunkerton could have made such an obvious mistake, and if he had not done so his calculations would not have been far from the truth.

"On the other hand, the defenders saw from the pursuers' letters that they had never heard of a guarantee of coal consumption being given, and that what they were willing to give was a guarantee of steam, of the amount (17 lbs.) mentioned in Dunkerton's letter of the 7th October. The defenders must also have gathered that up to the date of the pursuers' letter of 17th October the latter had not seen Dunkerton's letter of 1st October. In these circumstances it would have been prudent and reasonable for the defenders either to send to the pursuers a copy of Dunkerton's letter, or to state specifically what was the guarantee which they considered that they had received, and which they now say they regarded as essential. That such a course would have been a proper one is, I think, the more apparent when it is considered that the letter of 1st October contained no specification as to the amount of coal required for the engine which the defenders had actually ordered.

"While therefore both parties seem to me to have been to blame for the misunderstanding which arose, I think that the result of the letters of 17th and 18th October was just to leave the matter upon the letter of 1st October for what it was worth, because the pursuers referred the defenders

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which it will develop upon being supplied with a given quantity of steam. I may observe that it is undisputed that the pursuers had nothing to do with the steam production. It was not intended that a new boiler should be furnished; the steam production was such as the defenders' existing boiler enabled them to produce. But I think it must be taken that when the pursuers' representative says—"Fifteen pounds of steam develop one horse-power per hour," that is a representation as to the efficiency of the engine which they were to furnish, and like all the parts of the specification—the double cylinder, the valves, and all the rest of it—is a thing that they intended to be bound by. It is no doubt a material term of the contract, and therefore this particular statement appears to me to satisfy the description of a warranty in the Sale of Goods Act, and to be binding on the pursuers.

I think it was not disputed by their counsel that they were bound in terms of that representation; but then they say—and I do not think this is open to doubt—that the expectation held out by these words has been completely fulfilled, and that the engine supplied does develop one horse-power per fifteen pounds of steam supplied to it. That, of course, does not satisfy the defender's case, and while I should desire, perhaps, greater definiteness in the statement of the guarantee which, they say, was granted, and especially that it should have been put definitely on the record, I understand them to say that the result of this letter is that Messrs Robey guaranteed that, with the defenders' boiler and the pursuers' engine and the defenders' brick-making machinery all working in an efficient manner, there would be an output of 30,000 bricks per day at a cost of 4s. 4d. in coal. Now, if such a guarantee was given or was intended, it was certainly not given in direct words, but it is said to be given as the result of certain statements, certain data, and calculations founded on these data. Now, as the guarantee is an inference from an argumentative statement, it follows, in my opinion, that in order to arrive at such a guarantee we must hold that the pursuers guaranteed all the facts on which their calculation was based, and from which it is said that this result was undertaken by the pursuers. Of course the pursuers were dependent on the defenders for information as to the efficiency of their boiler. They were also dependent on them, not only as to the capacity of the brick-making machines for turning out 30,000 bricks a day, but also as to the estimated horse-power which would be necessary to drive the brick-making machinery. This, I see, is stated in the letter of 1st October at 135 horse-power, and therefore as this is a guarantee which is to be constructed by the Court out of the materials in this letter, we must hold that the pursuers' representative not only guaranteed the accuracy of the assumptions which they made as to the amount of

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to Dunkerton, and the defenders were content to rest upon the letter which they had already received from him. Now, I have already expressed my opinion upon the construction of that letter, namely, that the calculations as to the amount of coal required did not amount to a guarantee, but were merely representations as to the capacity of the engines, made for the purpose of inducing the defenders to give the pursuers an order.

"I am therefore of opinion that there was no warranty, and that accordingly there has been no breach of warranty, and that the defender is liable in payment of the price of the engine. . . ."

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steam which would be produced from one pound of coal, depending partly on unknown data and partly on the efficiency of the boiler, but that they also guaranteed the performance of the brick-making machines which were at work in the defenders' establishment, and the number of units of horse-power that were necessary to drive them. But as to the letter, I think it was conceded by Mr Ure, and necessarily conceded, that it was quite impossible to read the letter of 1st October as containing any such guarantee. It was conceded that these were data supplied by the defenders themselves; that Mr Dunkerton, the pursuers' representative, was dependent on that information for the statement which forms one of the elements of the calculation; and therefore that that was not one of the things which entered into the guarantee. But then, if by such reasoning we are to arrive at the conclusion that the brick-making machines were not guaranteed, just as little can I suppose that the steam production was guaranteed, because that was not a thing entering into the contract of sale, nor a thing over which the pursuers had any control. They were dependent either on the information which they got from the defenders, or upon data in books of reference. It appears that the item, "1½ lbs. of coal develop 15 lbs. of steam," was taken from a text-book. It was certainly untrue in fact as applied to engine coal. But if the purpose of the letter was only to furnish a comparison between the work that might be got out of one of Messrs Robey's engines and the work that could be got out of an inferior engine—and certainly that is what the words of the letter seem to indicate—then the element of the amount of coal necessary to produce fifteen pounds of steam became very unimportant, because, as observed by your Lordship in the chair in the course of the argument, it was just the same as if an unknown quantity, x, were introduced into both branches of the calculation, and then, when one result is divided by the other, to see what the amount of saving will be, this quantity disappears from the calculation. In any view this warranty, which would not be a warranty under the Sale of Goods Act, but a warranty of a collateral matter altogether, must be considered in conformity with a rule very well established—though there are perhaps more illustrations of it in the English Reports than in ours—that a question whether a collateral representation amounts to a warranty or not is a question of intention to be deduced from the language used, and the facts of the case with reference to which the representation was made. Now, when that test is applied, we find, in the first place, that the purpose of the representation was a comparison of the efficiency of two engines. Then the representation, though it is not said from where it came, was in its nature one which Mr Dunkerton could not be held as stating from his own knowledge. Lastly—and I think this is really the determining consideration—there are no words of undertaking used; and therefore I come to the conclusion that we have here an entire absence of all the elements which would go to make up a warranty, or collateral representation having the effect of a warranty, regarding the production of steam from coal. But if that datum, which is the basis of the whole calculation, is not guaranteed, it follows, in my opinion, that the result is not guaranteed, because it is admitted also that the other elements—the efficiency of the brick-making machines and the power necessary to drive them—were no part of the alleged undertaking.

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In what I have said I do not mean to express any doubt that if proper words of undertaking had been used in the concluding part of the letter—if it had been said: "We guarantee that with the engine described you will be able to produce with your existing machinery and appliances thirty thousand bricks a day of ten hours"—that would have been binding on the pursuers, however absurd, however foolish the conduct of their representative might be in giving it. But it is a very different case when the question is not whether a guarantee in certain words is to be enforced, but whether you are to spell such a very improbable and unusual undertaking out of a letter which purports to be something quite different. Then, I say, the rule must be applied that it is a question of intention whether the words used amounted to a warranty or not; and on such question I have no difficulty in arriving at the conclusion that no such warranty was in fact given.

It is right to notice that while I think the purpose of the letter was comparison, it must be conceded to the defenders that a statement beginning "1½ lbs. coal develop 15 lbs. of steam" amounts to a representation which was part of a set of representations intended to induce a contract. It is admitted, or at any rate it is quite clear, that it was an innocent misrepresentation founded on a misunderstanding of the data contained in a text-book. The misunderstanding was in applying to engine coal a statement of the productiveness of standard coal. Now, if this had been discovered in time, I do not doubt that relief in another form might have been obtained by the defenders. In other words, they might have rescinded the contract on the ground of error induced by the act of the pursuers' agent. But the defenders are no longer in a position to rescind the contract, and they are not claiming to rescind the contract; and in the absence of fraud, I cannot hold that such a misrepresentation will furnish any legal foundation for a claim of damages.

These are the leading points in the case, and I have only to add, as I said at the beginning, that I also concur in the opinion of the Lord Ordinary.

The LORD PRESIDENT, LORD ADAM, and LORD KINNEAR concurred.

THE COURT adhered.

RONALD & RITCHIE, S.S.C.—WEBSTER, WILL, & Co., S.S.C.—Agents.

No. 46.

Dec. 20, 1900.
Whyte v. Glass.

JOHN WHYTE, Appellant.—*Shaw, Q.C.—M. P. Fraser.*
PETER GLASS, Respondent.—*Campbell, Q.C.—F. T. Cooper.*

Road—Building near Road—New building on old site—Turnpike Roads (Scotland) Act, 1831 (1 *and* 2 *Will. IV. c.* 43), *sec.* 91—*Police.*—The Turnpike Roads Act, 1831, by section 91, enacts that "no houses, walls, or other buildings above 7 feet high shall be erected without the consent of the trustees previously obtained in writing, and no new enclosures or plantations shall be made within the distance of 25 feet from the centre of any turnpike road."

Held that this enactment applied to the erection of new buildings on the site of existing buildings which had been erected prior to the passing of the Act, and which it was proposed to remove.

Macdonald v. *Commissioners of Fort-William*, 19th March 1895, 22 R. 551, *commented on.*

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1ST DIVISION. Dean of Guild Court, Glasgow.

ON 31st March 1900 Peter Glass, builder, Glasgow, presented a petition to the Glasgow Dean of Guild Court for a warrant to erect certain buildings on ground fronting Rutherglen Road, Glasgow. The petitioner stated that he intended to take down the existing buildings occupying the ground in question, and to erect in their place the new buildings for which a lining was craved. The new buildings were to be two tenements of shops and dwelling-houses, three storeys in height, as shewn on the plans produced.

The petition was opposed by John Whyte, Master of Works for the City of Glasgow, who stated that the buildings proposed would be only 16 feet from the centre of Rutherglen Road, which was a turnpike road, "whereas said buildings should be erected 25 feet from the centre of said road in terms of the Turnpike Roads Act, 1831, section 91, and the Glasgow Police Act, 1866, section 366."*

The petitioner in his answer to these objections admitted that the Rutherglen Road was a turnpike road, and that the new buildings would be 16 feet from the centre of the road. He averred:—"(1) That there are presently existing on the petitioner's ground old buildings which were erected long before the Turnpike Roads Act, 1831; (2) that the petitioner proposes to take down these buildings and erect in their place the buildings for which a lining is asked; and (3) that the proposed new buildings will not be nearer the centre of Rutherglen Road than the existing buildings, but will be on the same building line. Section 91 of the Turnpike Roads Act, 1831, and section 366 of the Glasgow Police Act, 1866, founded on by the objector, only apply to sites which have never been built upon, and have no application in the present case."

The Dean of Guild on 7th August 1900 pronounced an interlocutor, finding "that section 91 of the Turnpike Act of 1831, founded on by the objector, does not apply to the erection of new buildings on the site of buildings presently existing and erected before the passing of the said Act," and granting warrant to erect the proposed tenements.†

The Master of Works appealed to the First Division.

Argued for the appellant;—This was a case of the erection of a new building, not the alteration of an old one. It was thus distinguished from *Bruce* v. *Whyte*.[1] The admission of counsel in the

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* Section 91 of the Turnpike Roads Act, 1831, is quoted in the rubric.

The Glasgow Police Act, 1866 (29 and 30 Vict. cap. cclxxiii.), enacts, sec. 366,—"The Dean of Guild shall not grant a warrant to erect any building except a stone wall not exceeding six feet in height . . . within thirty feet of the centre of any portion of a turnpike road within the city, which is relinquished by the trustees thereof, and is assumed by [the Magistrates and Council] as a public street under the powers of this Act, unless the said building could have been erected within a less distance of the centre of the road without contravention of the Acts relating to the said road."

† "NOTE.—The petitioner proposes to take down his existing buildings and to erect new tenements in their place. He avers that the existing buildings were erected before the passing of the Turnpike Roads Act, 1831. The Master of Works has not denied this, but maintains that section 91 of the said Act applies to the erection of new buildings, even though in place of existing buildings, and on the same site. The decision in *Macdonald* v. *Commissioners of Fort-William*, 22 R. 551, seems conclusive in favour of the petitioner's construction of the section."

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Fort-William case[1] deprived it of any value as a precedent on the point now raised. There was no reason why the prohibition should be confined to buildings on new or previously unbuilt on sites; the policy of the Act was as seriously invaded when a one storey tenement was replaced by one of three storeys as when the latter had been erected on a new site; its effect in both cases was to prevent the free access of air and light to the road.

Argued for the respondent;—The statute was not intended to apply when there were buildings lawfully on the ground before it came into operation, otherwise the words "building, wall, &c." would cover alterations and additions. The contention now advanced if sound, and if taken along with the case of *Bruce* v. *Whyte*,[2] would involve the drawing of a distinction between building on the line of a front wall after its total demolition and building on the wall after partial demolition, *e.g.*, after it had been reduced to a height of one foot or one inch from the ground. The appellant's view was thus logically inconsistent with the case of *Bruce* v. *Whyte*.[2] The true view was that an owner was not restricted while operating within old building lines, lawfully adopted before the Act was in existence. Within these lines he might not only alter but reconstruct. The judgment in the *Fort-William* case[1] could not fairly be inferred to have proceeded entirely on the admission made by counsel. It was a direct authority in the respondent's favour. Acts like the present presumably made regulations for building on new sites only.[3]

At advising,—

LORD PRESIDENT.—(After stating the facts)—The provision of section 91 of the Turnpike Roads Act, 1831, is that "no houses, walls, or other buildings above 7 feet high shall be erected without the consent of the trustees previously obtained in writing, and no new enclosures or plantations shall be made within the distance of 25 feet from the centre of any turnpike road," and the important general question now raised is whether that section only prohibits the erection of buildings within the specified distance from the centre of a turnpike road where no buildings existed on the ground at the time when the Act of 1831 was passed, and does not apply to any case in which buildings existed on the ground at that date, but have been subsequently removed.

The prohibition in section 91 is expressed as a universal negative, no such restriction of its scope as is contended for by the respondent is to be found in it, and I am unable to see any sufficient reason for holding such a restriction to be implied. The section does not require that buildings already existing within the specified distance of the centre of the road shall be removed, but its prohibitory words appear to me to apply universally where there is no building on the ground at the time when the question arises and it is proposed to build, whether there has or has not previously been a building there. All the reasons which have been suggested for the prohibition appear to me to apply as strongly to ground on which there

[1] Macdonald v. Commissioners of Fort-William, March 19, 1895, 22 R. 551, *per* Lord Justice-Clerk, p. 552.

[2] March 20, 1900, 2 F. 823.

[3] Pitman v. Burnett's Trustees, Jan. 26, 1882, 9 R. 444; Chapman v. Robinson, 1858, 28 L. J. Mag. Cases, 30.

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were buildings in 1831 as to ground which was then unbuilt upon, whether it was subsequently built upon or not.

In this connection it is to be observed that while the words "enclosures and plantations" in section 91 are qualified by the adjective "new," no such qualification is attached to the words "no houses, walls, or other buildings above 7 feet high," a difference which seems to me to emphasise the universality of the words last quoted.

The Dean of Guild's judgment appears to have been founded mainly, if not solely, upon the decision in the case of *Macdonald* v. *Commissioners of Fort-William*,[1] which, he says, seems conclusive in favour of the respondent's construction of the section. Upon referring to that case, however, it will be seen that the question upon which I have just expressed an opinion was not raised in it. The Lord Justice-Clerk said in his judgment,—"Mr Thomson has argued the case upon the footing that the section would not apply supposing that buildings were taken down and rebuilt immediately for the purpose of improvement and renewal. He maintained, however, that according to the 'rules of good sense,' as he phrased it, the section would apply to cases where there had been an interval between the demolition and reconstruction of buildings,—what interval he did not specify." The decision was that section 91 did not apply to the site of a house which had been demolished thirty years before. As the point upon which the determination of the question in this case should, in my judgment, turn, was not raised, or, if raised, was given up, in that case, the decision pronounced in it cannot be an authority upon that point. The respondent also relied upon the case of *Pitman* v. *Burnett's Trustees*.[2] The question in that case, however, turned upon a different statutory enactment, viz., section 127 of the Edinburgh Municipal and Police Act, 1879, upon the terms of which the Court considered it to be clear that it was intended to apply only to the case of streets and courts referred to in the three preceding sections,—that is to say, new streets and courts. The decision has not, in my judgment, any bearing on the present case. The respondent also founded upon the recent decision in *Bruce* v. *Whyte*[3] as supporting his contention, but that decision is not in point, inasmuch as it related not to the "erection" of new buildings (*i.e.* to building from the ground) but to the "alteration" within the meaning of the Glasgow Police Act, 1866, of existing buildings.

Another example of the kind of policy which appears to have dictated section 91 of the Turnpike Roads Act of 1831, in its application to such a case as the present, is to be found in section 162 of the General Police and Improvement Act of 1862, and section 158 of the General Police Act of 1892, which requires that when a house projecting beyond the line of a street is pulled down with a view to its being rebuilt, the proprietor shall set the new buildings back as specified in these sections.

If the views now expressed in regard to the construction and effect of section 91 of the Turnpike Roads Act of 1831 are correct, it follows that section 366 of the Glasgow Police Act, 1866, prohibited the Dean of Guild from granting warrant to erect any building except a stone wall not exceed-

[1] 22 R. 551. [2] 9 R. 444. [3] 2 F. 823.

ing 6 feet in height within 25 feet from the centre of Rutherglen Road, and that his interlocutor of 7th August 1900 should be recalled, and the cause remitted to him to give effect to the restrictive provision contained in section 91 of the Turnpike Roads Act of 1831. The distance mentioned in section 366, as applicable to the case of turnpike roads, is 30 feet, but it concludes with the words "unless the said building could have been erected within a less distance of the centre of such turnpike road without contravention of the Acts relating to the said road," and a building could have been erected 25 feet from the centre of the road in question without contravening section 91 of the Turnpike Roads Act, 1831, which applied to it.

LORD M'LAREN.—I concur, and have very little to add.

According to the plain and literal meaning of the General Road Act, referred to in the Glasgow local statute, there is an unqualified prohibition against the erection of buildings within a certain distance of the centre of a turnpike road, unless where the consent of the road authority has previously been obtained. In this proceeding it is sought to put a qualification on the enactment, to the effect that it is not to apply to buildings erected on sites which have previously been built over. It is a safe rule in the interpretation of statutes that an artificial construction or limitation is never to be introduced except to avoid inconsistency or ambiguity in relation to other provisions of the same statute. If that rule is applied to this case, the plain meaning of this provision must receive effect.

There is one other observation which I desire to make, although I do not rest my opinion on it. If the motive of the enactment be the convenience of giving access of light and air to the road by prohibiting the erection of structures which would exclude them, then this motive must apply equally to old sites as to new. It would be a strange method of carrying out the object of the statute to allow a building of one storey to be pulled down and replaced by one of three or five storeys, while the erection of high buildings on new ground is prohibited.

LORD KINNEAR.—I have had the advantage of reading your Lordship's opinion, and I entirely concur.

The LORD PRESIDENT.—Lord Adam, who is engaged in another Court, asks me to say that he has also read my opinion, and entirely concurs in it.

THE COURT pronounced the following interlocutor:—"Sustain the appeal: Recall the interlocutor of the Dean of Guild, dated 7th August 1900: Find (1) . . . (2) that Rutherglen Road is a turnpike road, and that the buildings which the respondent proposes to erect would be only 16 feet or thereby from the centre of that road; (3) that the buildings at present on the respondent's said ground were erected prior to the passing of the Turnpike Roads Act, 1831, and that the proposed new buildings would not be nearer to the centre of Rutherglen Road than the existing buildings; (4) that section 91 of the Turnpike Roads Act, 1831, and section 366 of the Glasgow Police Act, 1866, apply to the case, and that in respect of the provisions contained in the said sections the respondent is not entitled to erect any buildings above 7 feet

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high within a distance of 25 feet from the centre of Rutherglen Road without the consent of the Magistrates and Council of the city of Glasgow as coming in place of the trustees of the said road previously obtained; (5) that no such consent has been obtained: Remit to the Dean of Guild to refuse the prayer of the petition in so far as it craves authority to erect buildings on the respondent's said ground within 25 feet of the centre of Rutherglen Road, and to decern; and thereafter, to proceed as accords: Find the appellant entitled to expenses."

CAMPBELL & SMITH, S.S.C.—HENRY & SCOTT, W.S.—Agents.

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Crawford v. Adams.

ANDREW RENNIE CRAWFORD, Pursuer.—*Ure, Q.C.—Hunter.*
JOHN K. ADAMS, Defender.—*Salvesen, Q.C.—Guy.*

Crawford v. Dunlop.

ANDREW RENNIE CRAWFORD, Pursuer.—*Ure, Q.C.—Hunter.*
R. MURRAY DUNLOP, Defender.—*Salvesen, Q.C.—Guy.*

Expenses—Several Defenders—Joint trial of two actions for reparation against different Defenders—Verdict for Pursuer in one action and for Defender in the other—Defenders represented by same counsel and agent.—Crawford, founding upon statements in letters written by Dunlop, a law-agent, on the instructions of Adams, Dunlop's client, sued Adams and Dunlop in separate actions of damages for slander. The actions were sent to trial together. The verdict was for the pursuer in the action against Adams, and for Dunlop in the action in which he was the defender. Adams and Dunlop were represented at the trial by the same counsel and agent, and their expenses were, *quoad* the trial, in all respects joint. The successful party in each action was found entitled to expenses.

Held, approving of the Auditor's reports, (1) that the pursuer, as the successful party in the action against Adams, was entitled to the whole expenses incurred by him, including his whole expenses at the trial, in respect these expenses were the expenses to which the pursuer would have been entitled had Adams been the only defender; and (2) that Dunlop was entitled to recover from the pursuer his whole expenses down to the trial, and to one-half only of the expenses incurred by the defenders at the trial, this being the amount of his outlay.

2D DIVISION. (SEE 2 F. 987.)

These were two actions of damages for slander brought by Andrew Rennie Crawford, architect, 101 West Nile Street, Glasgow, respectively against John K. Adams, joiner, Westmuir Street, Glasgow, and R. Murray Dunlop, writer, 136 Wellington Street, Glasgow. Dunlop was Adams' law-agent, and the actions were founded on statements in certain letters written by Dunlop on the instructions of Adams, but containing expressions which, according to the pursuer, shewed that Dunlop adopted the statements as his own.

The Court allowed an issue in each action (2 F. 987), and the actions were tried together before the Lord Justice-Clerk and a jury at the sittings in July 1900.

In the action against Adams the pursuer obtained a verdict with £50 as damages; in that against Dunlop the verdict was for the defender.

When, on 20th October, the cases came before the Court on the motions to apply the verdicts, questions were raised as to how far either of the successful parties was entitled to full expenses, looking

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to the circumstances that the pursuer had succeeded in one only of the actions and that the defenders had been represented by the same counsel and agents. The Court intimated that these questions might conveniently be settled upon a consideration of the Auditor's reports. The following interlocutors were then pronounced:—

In the action against Adams:—"Apply the verdict against the defender for payment to the pursuer of £50 sterling, and decern: Find the pursuer entitled to expenses, and remit to the Auditor to tax the same and to report."

In the action against Dunlop:—"Apply the verdict; assoilzie the defender: Find him entitled to expenses, and remit to the Auditor to tax the same and to report."

The Auditor dealt with the accounts of expenses thus:

The pursuer's account of expenses in the action against Adams:—In this action the pursuer, *inter alia*, charged the whole expenses incurred by him in connection with the preparation for and the conducting of the trial. The Auditor taxed the account in the ordinary way and allowed the whole amount of the account so taxed. At the discussion upon the Auditor's reports the defenders did not maintain that the amount so allowed was greater than it would have been had Adams been the only defender.

Dunlop's account of expenses in the action in which he was the successful defender:—The defenders were represented at the trial by the same counsel and agent, and their expenses were, *quoad* the preparation for and the conducting of the trial, entirely joint expenses. Dunlop included the whole of the defenders' expenses at the trial in his account. The Auditor in the first place taxed Dunlop's account in the ordinary way as if Dunlop had been the only defender; he then ascertained the total amount of the expenses connected with the trial, *i.e.* from the allowance of issues until the motion to apply the verdict. The total of these expenses, as already taxed, was £82, 19s. 8d. The Auditor then deducted £41, 9s. 10d. (being one-half of that amount) from the total amount of Dunlop's account as already taxed, and allowed the balance.*

The defenders objected to the Auditor's reports. They maintained that if the pursuer got the whole expenses incurred by him at the trial, Dunlop was entitled to the whole expenses of the defence at the trial; that if Dunlop got a half only of the expenses of the defence at the trial, the pursuer was entitled to half only of his expenses at the trial. The defenders admitted that Dunlop had paid only one-half of the expenses of the trial, Adams having paid the other half.

At advising,—

LORD TRAYNER.—The pursuer raised two actions of damages for slander, one against the defender Adams as having authorised and instructed the other defender (who was his law-agent) to write the letters complained of, and the other against the law-agent on account of statements in one of the letters made as of his own knowledge, and not merely as the agent of

* The Auditor appended the following note to his report on Dunlop's account:—"NOTE.—The circumstances of the present case seem to bring it under the rule laid down in *Robertson* v. *Stewart*, 15th July 1875, 2 R. 970, which the Auditor has therefore endeavoured to apply in the taxation of this account, and, as will be seen, a sum of £41, 9s. 10d. taxed off the account represents the extent to which the rule has been applied."

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Adams. Separate issues were adjusted, but the trials were taken together. In the case against Adams the pursuer was successful; in the other case the verdict was for the defender.

In taxing the account of the pursuer's expenses in the case against Adams the Auditor has allowed the whole expenses; but in taxing the account for Dunlop he has allowed the full expenses down to the trial, but only half of the expenses after that date. The defenders object to this mode of dealing with the accounts, and maintain either that only one-half of the expense of the trial should be allowed to the pursuer, or that the whole expense of the trial should be allowed to Dunlop. I think that the Auditor is right in what he has done, and that the objection to his report should be repelled. It is the fact, not disputed, that the expense allowed to the pursuer by the Auditor is just what it would have been had there been only one defender. That expense is what Adams has been found liable for, and for that expense accordingly the pursuer is now entitled to decree. On the other hand, Dunlop, being associated in his defence with Adams, had to pay, and did pay, only one-half of the amount of counsel's fees and other expenses of the trial. If he gets that half of these expenses, he gets all he expended, and all that the pursuer occasioned by his action in which he was unsuccessful. If the whole of Dunlop's account as stated by him was allowed, that would be giving him more by one-half than the expense he has incurred, or if he shared the surplus with Adams, that would be in effect giving decree in favour of Adams for one-half of the expense of the trial, to which he is not and has not been found entitled. The Auditor has given the pursuer the whole expense to which he was put by having to proceed against Adams—nothing more. He has given Dunlop the whole expense to which he was put, and which he disbursed, in the action in which he was successful—nothing less. The result, in my opinion, is that the Auditor has carried out exactly what we determined in the matter of expenses, and that the principle on which he has proceeded is right.

The LORD JUSTICE-CLERK, LORD YOUNG, and LORD MONCREIFF concurred.

THE COURT approved of the Auditor's reports.

HENRY ROBERTSON, S.S.C.—JOHN VEITCH, Solicitor—Agents.

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Salaman v. Rosslyn's Trustees.

FREDERICK SEYMOUR SALAMAN, Pursuer (Respondent).—*Johnston, Q.C.—Crabb Watt.*

THE RIGHT HON THE EARL OF ROSSLYN AND OTHERS (Rosslyn's Trustees), Defenders (Reclaimers).—*Dundas, Q.C.—Clyde.*

Trust—Trust-deed granted by solvent proprietor to prevent dilapidation of family estates—Bankruptcy—Voluntary Trust-deed—Supervening Bankruptcy.—In 1893 a Scotch Earl, on the narrative that he had contracted large debts, and that V, his father-in-law, had agreed to lend him £40,000 in order to pay off certain unsecured debts, on the express condition that he should grant a trust-disposition of his whole estates for the purposes after written, and that he had agreed to do so, disponed to himself, his father-in-law, and another person, his whole heritable and moveable estates *acquisita et acquirenda*, with power to sell, in trust for the following purposes:—(1) For payment of the £40,000 advanced, and of future advances; (2) for payment of debts then due by the granter; (3) for such alimentary payments

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as the trustees should see fit to make to the granter and his family; (4) on the granter's death to convey the residue to the granter's widow and children, subject to his appointment, and failing appointment, to the child succeeding to the title. The trust was declared to be irrevocable by the granter unless with the consent and concurrence of the trustees, but it was declared that with such consent and concurrence it might be brought to an end, and the residue reconveyed to the Earl subject to the debts and liabilities then affecting it.

The trustees at once entered into possession, and recorded the disposition in the Register of Sasines.

In 1898, the Earl having, on his own petition, been adjudicated bankrupt in England, a trustee in bankruptcy was appointed upon his estates.

The trustee in bankruptcy then sued the trustees under the trust-disposition (1) for declarator that the estates comprehended in the trust-disposition had vested in the pursuer; (2) for decree ordaining the defenders to denude in his favour to such extent at least as would enable the pursuer to meet the liabilities of the bankrupt out of the estates; and (3) for an accounting by the defenders.

The trustees in their defences stated that all the unsecured debts incurred prior to the date of the trust-deed had been paid out of V's advances.

Held (*aff.* judgment of Lord Pearson) that the trust-disposition had *in hoc statu* been superseded by the bankruptcy, that the trustees were bound to denude of the estate and effects, subject to any valid securities over the estate and effects, and on satisfaction of such rights of lien or indemnity as they might have, in favour of the trustee in bankruptcy, and that they were bound to count and reckon with him for their intromissions,—*diss.* Lord Young, who held (1) that the truster being solvent when he granted the disposition, was entitled to divest himself absolutely of his estates, and create a trust for behoof of his family, and had effectually done so to the exclusion of claims by future creditors, but that the disposition of *acquirenda* was invalid; and (2) that V had right, as matter of contract, to have the trust executed by the trustees according to the law of Scotland till its termination.

Averments which *held* not relevant to support a conclusion for reduction of the trust-disposition.

2D DIVISION. Lord Pearson.

THE EARL OF ROSSLYN in September 1890 succeeded to the title and estates pertaining to the Earldom of Rosslyn. In July of the same year he had married the daughter of Robert Charles De Grey Vyner of Fairfield House, York.

On 25th July 1893 he executed a disposition of his whole heritable and moveable estates then belonging to him or which he might acquire during his life in favour of himself and his father-in-law, Mr Vyner, and Mr Bennett, solicitor in London, in trust for certain purposes after mentioned. The disposition was recorded in the Register of Sasines on 3d August 1893, and subsequently the trustees entered into the possession and management of the estates. Mr Bennett having resigned in September 1896, was succeeded by Mr Cullimore, solicitor in Chester; and in 1898 Lord Alwyne Compton was assumed into the trust.

In the autumn of 1897 Lord Rosslyn filed a petition in bankruptcy in London, the receiving order in which was pronounced on 11th November 1897. The adjudication in bankruptcy followed on 8th June 1898, on which date Frederick Seymour Salaman was "duly appointed and approved as trustee of the property of the Earl of Rosslyn" under the Bankruptcy Acts, 1883 and 1890.

On 30th December 1898, Mr Salaman, as trustee in the bankruptcy, raised the present action in the Court of Session against the trustees acting under the trust-disposition, concluding (1) for reduction of the

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trust-disposition, "at least to the extent to which said pretended disposition exists or is pleaded as a bar to the satisfaction of the pursuer's rights in or claims to the property and estate of the" Earl; (2) whether decree of reduction was granted or not, for declarator "that the means and estates, heritable and moveable, conveyed by the said pretended disposition are now, so far as unaffected by valid securities, vested in the pursuer as trustee foresaid, unencumbered by any trust in the person of the defenders created by said pretended disposition"; (3) for decree ordaining the defenders "to denude and divest themselves of the said means and estate, and to convey the same to the pursuer" "to such extent at least as may be necessary to enable him to pay the just creditors of the" Earl of Rosslyn; (4) for an accounting by the defenders of their intromissions with the trust-estate, and for payment of the true balance in their hands to the pursuer, "or at least of so much thereof as may be required to satisfy the claims of the just creditors of the" Earl, or failing such accounting, for payment of £10,000, which should in that case be held to be the true balance, or at anyrate of such sum as might be required to satisfy the creditors; (5) and alternatively to the foregoing conclusions, for payment of £10,000, or such sum as might be required to satisfy the claims of the just creditors of Lord Rosslyn.

The trust-disposition was in the following terms:—"I, the Right Honourable James Francis Harry St Clair Erskine, Earl of Rosslyn, considering that I have contracted debts and liabilities to a large amount, part of which is secured over my landed estates of Ravenscraig, Dysart, Roslin, Tyrie, and others, in the counties of Fife and Edinburgh, and upon other assets and funds belonging to me, and part of which is unsecured; and that in order to pay off certain unsecured debts I arranged to borrow a sum of £40,000, less or more, from Robert Charles De Grey Vyner, of Fairfield, in the county of York, Esquire, my father-in-law, who agreed to lend the same to me upon my granting in his favour a bond and assignation and disposition in security, or bonds and assignations and dispositions in security, over my said landed estates and certain policies of insurance on my life and other funds and assets, and upon the express condition that I should also grant a trust-disposition in manner and for the purposes underwritten, which I have agreed to do; and further, considering that the said Robert Charles De Grey Vyner has already advanced to me sums amounting to upwards of £16,000 to account of the said sum of £40,000, and that I have at or previous to the date hereof granted and delivered to him a bond and disposition and assignation in security for the said sum of £16,000, and that he agreed to advance to the trustees under these presents, for the purposes of the trust hereby created, such further sums as may be necessary for the payment of my debts, but not exceeding (along with the said sum of £16,000 already advanced), the said sum of £40,000 in all, unless the said Robert Charles De Grey Vyner shall be willing to make advances to the trustees in excess of that sum,—upon the said trustees, with or without my concurrence, granting in his favour a bond or bonds and dispositions and assignations in security for the sums so to be advanced: Therefore, in pursuance of the said arrangement, I do hereby dispone, convey, assign, transfer, and make over to and in favour of the said Robert Charles De Grey Vyner, Rowland Nevitt Bennett, Esquire, of Number 2 New Square, Lincoln's Inn, London,

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solicitor, and myself, the said Earl of Rosslyn, and to such other person or persons as may be appointed or assumed by the said trustees or by the survivors and survivor of them, or by the trustees or trustee acting for the time under these presents, and to the acceptors and survivors, and acceptor and survivor of the persons before named or to be named and assumed as aforesaid, as trustees or trustee for executing the trust hereby created (hereinafter designed as 'the trustees')—the majority of the said trustees, while there shall be more than two, being always a quorum, and to the assignees of the trustees or trustee, All and Whole" the lands and estates of . . . and his whole other heritable property wherever situated then belonging to him, or which might thereafter be acquired by him; as also his whole moveable estate of whatever kind then belonging or which might be acquired by him during his life. "And I bind myself and my foresaids, when required, to deliver to the trustees all such portions of the personal or moveable means, property, and effects hereby conveyed as cannot be transferred otherwise: Which conveyance before written, and all or any conveyances or deeds to be hereafter executed by me, are hereby granted, or to be granted, subject to all debts at present secured thereon or upon any part or parts thereof, and subject to all arrangements or agreements made between me and creditors holding securities: But declaring always that these presents, and any further deed or deeds to be granted by me in pursuance of the foregoing obligation, and the whole lands and others, and estate, property, and effects hereby conveyed, are so granted and conveyed in trust for the following uses and purposes, viz.:—(In the first place), The trustees shall enter into possession of, and proceed, as soon as may be, to sell, realise, and convert into money, the whole lands and other estate, property, and effects (including plate) before conveyed, or such part or parts thereof as the trustees shall think proper, and that either by public roup or private bargain, and in such manner and at such price or prices as the trustees shall see fit; but declaring that during my lifetime the trustees shall not without my concurrence sell the chapel of Rosslyn and ground connected therewith, nor any furniture, pictures, or articles of virtu (not being plate) belonging to me: And the trustees shall during my life and the subsistence of the trust as after mentioned hold the whole trust-estate under their management, including the prices and proceeds of such portions thereof as may be sold, and all rents, income, and profits or accumulations thereof (after meeting all expenses) for payment of all the just and lawful debts now due by me, and for fulfilment of all obligations incumbent on me at the date hereof, and all interest due or accruing on such debts, and specially including the said advances made or to be made to me or to the said trustees by the said Robert Charles De Grey Vyner, and in general all or any advances which may be made by the trustees or any of them individually, or any sums for which they or any of them may become personally responsible, and also any sums which may be borrowed by the trustees in terms of the powers after specified; And the trustees shall pay the said debts and fulfil the said obligations in such order as they shall think expedient, having always due regard to the legal order and ranking of such debts as are secured on the trust-estate or any part thereof; and the trustees shall accordingly from time to time apply the trust-estate under their management, including as aforesaid, in payment of debt accordingly;

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and subject to the fulfilment of the foregoing purposes, the trustees shall hold the whole residue of the trust-estate under their management for the uses and purposes after mentioned: (In the second place), While the said lands and others, or any other part or parts of the trust-estate, shall remain unsold, the trustees shall manage and administer the same in such way and manner as they in their uncontrolled discretion shall think proper; and in particular, and without prejudice to the foregoing general power of management and administration, the trustees shall (*First*) pay the expenses of these presents," and of the management of the trust; (*Second*) payment of the expenses incidental to the management of the estates, premiums on policies of insurance, &c., "and generally, all charges and expenditure which the said trustees shall in their uncontrolled discretion judge it necessary or expedient to incur, and may incur, in the management and preservation of the trust-estate while unsold as aforesaid; and with regard to Rosslyn Chapel, the trustees shall keep a separate account of the whole revenues that may be received or drawn by them in connection therewith, and shall apply the whole of the said revenues, if required by me, in the keeping up of the services in the said chapel and the payment of the incumbent, or for other purposes in connection with the said chapel, in such manner as I shall from time to time direct; . . . (*Fourth*) the trustees shall be entitled, but not bound, during my life or the subsistence of the trust, or so long as they think fit, to allow me or my wife and family to occupy and possess rent free the mansion-house of Dysart, . . . or any other house forming part of the trust-estate, . . . and with the furniture and other effects therein, or, if they shall see fit, to let the same for such period and on such terms as they shall see proper; and further, the trustees shall be entitled during my life or the subsistence of the trust, but shall not be bound, to pay from time to time such sums to me, or, if they see fit, to my wife, for the purpose of meeting maintenance and housekeeping expenses, as they in their uncontrolled discretion shall see fit: Declaring that any sum or sums so paid shall be held to be paid for alimentary purposes only, and shall not be capable of anticipation or assignment by me, or liable for my debts or deeds or to the diligence of my creditors; and (*Lastly*), subject to the foregoing purposes and upon my death, or as soon thereafter as the said advances made or to be made by the said Robert Charles De Grey Vyner, and any other advances that may be made by the trustees or by any of them, and so soon as all sums due to the trustees or any of them, as trustees foresaid or as individuals, or for which they or any of them may be personally responsible, shall have been paid, and they shall be freed and relieved of all obligations undertaken by or legally incumbent upon them or any of them, the trustees shall hold the whole residue of the trust-estate which may then remain under their management for behoof of my widow and children, or such one or more of my widow and children exclusive of the others or other, in such shares and proportions and subject to such trusts and provisions, limitations, and conditions as to vesting, payment, or otherwise, as I shall appoint by any writing under my hand or by my last will, but not in contravention of any obligations undertaken by me in the settlements made on the occasion of my marriage, or in any relative deed or deeds, and failing such appointment, or in so far as the same shall not extend, then for such one of my issue as shall on my death succeed to the

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title and dignity of Earl of Rosslyn, and his heirs and assignees; and upon the termination of the trust, in the terms before referred to, the trustees shall denude of the residue of the trust-estate, and pay over, dispone, reconvey, and deliver the same to the person or persons entitled thereto, under the burden of all debts and charges then affecting the trust-estate, provided always that before denuding the trustees or any of them shall be entitled to obtain a full and complete discharge."

Power was given to the trustees to work all minerals in the estates, and full and uncontrolled power to sell and dispose of any part of the trust-estate, without prejudice to any of the powers before mentioned. The trust-disposition contained this provision,—"And I declare these presents to be irrevocable by me unless with the consent and concurrence of the trustees acting under these presents for the time; but it is hereby expressly declared that, with such consent and concurrence, this trust may at any time be brought to a close, and the residue of the trust-estate then in the hands or under the control of the trustees may be conveyed and made over to me, if the trustees shall think that proper or desirable in the circumstances, but subject always to the burden of all debts and liabilities then affecting the same: . . . And I consent to registration hereof for preservation and execution."

The pursuer averred;—(Cond. 5) "The said Earl continued his course of reckless extravagance and gambling, and by the month of July 1893 he became still further involved in gambling and kindred debts to the amount of over £40,000. In the course of the period between his succession to the said estates and July 1893, it became manifest to the defenders, the said Earl and the said Mr Vyner and their advisers, and the friends and relations of the Rosslyn family, that measures would have to be concerted for protecting the said Earl and his family against his extravagance, and for saving any part of the estates that remained from the diligence of creditors, present and future. . . . The defenders thereupon, in contemplation of the bankruptcy of the said Earl, devised a scheme by which they intended to secure the defender Vyner against the advances he had made or might make to the said Earl, and at the same time prevent the general body of creditors of the said Earl from receiving payment out of his estate by diligence or otherwise in the future, but preserve said estates so far as not dilapidated for the benefit of the said Earl and his family." (Cond. 6) "In pursuance of said design the said Earl, on or about 25th July 1893, executed the deed or disposition under reduction, . . . conveying his whole estate to himself, his said father-in-law, and the latter's solicitor, Bennett, in trust for his own behoof and for behoof of his family."

(Cond. 7) " . . . The only consideration given by the defender Vyner was a loan of £16,000, and a promise of a future loan, both of which have been paid or are amply secured. The other defenders gave no consideration. . . . The pursuer believes and avers that the said estates were sufficient, if they had been properly managed or managed in the interests of all creditors, to meet all claims against them." (Cond. 10) "Said deed remained a latent deed until it was disclosed in the said Earl's bankruptcy proceedings. The creditors represented by the pursuer contracted with the said Earl on the faith of his being and remaining absolute owner of his whole means and

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estate. Under the said deed, however, but unknown to the creditors whom the pursuer represents, the defenders entered upon the possession and management of the Rosslyn estates, and they have continued said possession and management ever since." (Cond. 12) " . . . The unsecured creditors are chiefly tradesmen, and their debts, along with claims lodged by some moneylenders, amount to about £10,000, none of which have been paid or are secured. These claims extend in date from the year 1891 down to the date of the receiving order. . . ." (Cond. 13) " The said deed was a fraudulent device concerted between the bankrupt and his father-in-law and his father-in-law's agents, in contemplation of the said Earl's bankruptcy, for the purpose, or at all events with the effect, of screening the bankrupt's estate and reserving it for the bankrupt and his family's behoof, and of excluding the true and just creditors of the bankrupt from any estate left over after satisfying his father-in-law's advances. . . . The said deed was executed in the circumstances condescended on, and at a time when the said Earl was insolvent, and known by the defenders to be so." (Cond. 16) " . . . The defenders, through their agents, who also act for the Earl, have intimated that the said deed is a bar to the pursuer recovering even the reversion of the said Earl's estate after satisfying the secured creditors. The said Earl himself founds upon said deed as evidence of his having no estate available for his creditors. But for the carrying out of said scheme as condescended on, the pursuer believes and avers that the Rosslyn estates are even now sufficient to meet the claims of the creditors represented by the pursuer. . . ."

The pursuer pleaded;—(1) The said deed being a fraudulent conveyance and alienation of the whole of the said Earl's estate, executed when insolvent, or so as to create insolvency, and being to the prejudice of his just and lawful creditors, it ought to be reduced as concluded for. (2) The said conveyance and alienation being to conjunct and confident persons, without true, just, and necessary causes, and without a just price really paid and granted after or in contemplation of contracting lawful debts from true creditors, it is void and null under the Act 1621, cap. 18, or the common law, and should be reduced in terms of the conclusions of the summons. (3) *Separatim*, the said deed falls to be reduced in so far as it conveys and alienates estates belonging to the bankrupt beyond the amount of advances made at its date. (4) The said conveyance and alienation being in contravention of the Act 1696, cap. 5, it ought to be reduced. (5) The said deed having been a fraudulent device for relieving the bankrupt of his financial embarrassments and preserving his estate for his wife and children to the exclusion of lawful creditors, it ought to be reduced and decree pronounced in terms of the declaratory conclusions. (6) The said deed being a mere security writ in favour of the defender Vyner, and *separatim* having been granted without any onerous consideration, except to the extent of £16,000, it ought to be reduced *quoad excessum* and decree pronounced in favour of the pursuer in terms of the declaratory conclusions. (7) *Esto* that the bankrupt was solvent at the date of the deed challenged, its effect being to create insolvency as regards unsecured creditors, it ought to be reduced. (8) The defender, the said Earl of Rosslyn, having been adjudged bankrupt, and the pursuer being vested in his estate for the benefit of his creditors, the defenders are bound to denude thereof in his

favour, and to count and reckon with him in respect of the estate alienated as aforesaid. No. 48.

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The defenders averred;—(Ans. 7) "Explained that the consideration given by the defender Mr Vyner amounted to £45,000 (inclusive of the said loan of £16,000), together with such other sum or sums as might be advanced by him. Explained further that said loan of £16,000 and the further advances made by him, amounting in all to the said sum of £45,000, have not been paid off, and are not amply or sufficiently secured, and that there is a large arrear of interest thereon. Explained further that Mr Vyner has had to make further advances to meet deficiency of revenue. The total sum now due to Mr Vyner, including arrears of interest, amounts to £58,000 or thereby. Mr Vyner has been paid no interest on any part of the sums due to him since Martinmas 1895." (Ans. 12) "Denied that the claims of the creditors represented by the pursuer extend in date from 1891. Explained that all unsecured debts incurred prior to the date of the trust-deed were paid out of the funds advanced by Mr Vyner."

The defenders pleaded;—(1) No title to sue. (2) The pursuer's averments being irrelevant and insufficient in law to support the conclusions of the summons, the action should be dismissed. (4) The deed under reduction having been granted for full consideration and *in bona fide*, the defenders are entitled to absolvitor. (5) The said deed not being gratuitous, but having been granted in respect of obligations imposed on and undertaken by the Earl of Rosslyn as a condition of the advances made to him by the defender Vyner, is not reducible on the grounds contended for by the pursuer. (6) The said trust-deed having been granted by the Earl of Rosslyn when solvent, and for full consideration, and the said Earl being completely divested thereby of his estates, the defenders should be assoilzied. (7) The said deed, in so far as the same confers right or benefit on Lady Rosslyn, being truly the deed of the defender Mr Vyner and not of the Earl of Rosslyn, the same is not reducible at the pursuer's instance. (8) The said deed having been duly delivered to the trustees, and infeftment having been taken thereon years prior to the Earl of Rosslyn's sequestration, the defenders should be assoilzied. (9) In any view, until the advances made by the defender Mr Vyner on the security of, *inter alia*, the said trust-deed, and all interest thereon, and all expenses of carrying on the trust, are repaid, the defenders are entitled and bound to continue to administer the estate conveyed thereby, and the said advances, interest, and expenses being still due and unpaid, the present action is premature, and should be dismissed.

Having heard parties in the Procedure-roll, the Lord Ordinary (Pearson), on 19th April 1900, pronounced the following interlocutor:—"Finds that the pursuer has set forth a sufficient title to sue this action: Finds that no relevant or sufficient grounds are averred for reducing the trust-deed libelled, but that the same has been superseded by the bankruptcy of the Earl of Rosslyn, and that the trustees are bound to denude of the estate and effects thereby conveyed by him, and to make over the same to the pursuer for the purposes of the said bankruptcy, subject to any valid securities over the same, and to such rights of lien or indemnity as the trustees may have, and that they are bound to count and reckon with the pursuer for their intromissions as trustees foresaid with the said estate and effects: And before further answer appoints the defenders, by the third sederunt day in May next, to lodge (first) a minute condescending on the trust-estate

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presently vested in them or under their control as trustees foresaid; and (second) an account of their intromissions as trustees with the said estate and effects; and thereupon appoints the cause to be enrolled for further procedure: Reserves all questions of expenses, and grants leave to reclaim."*

* "OPINION.— . . . The defenders challenge the pursuer's title to sue. In my opinion his formal title is sufficiently instructed by the documents produced, taken in connection with the English Bankruptcy Act, 1883, and particularly sections 56, 57, and 134, and sections 44, 54, and 168 thereof.

"No question was argued before me as to which law was to be applied in dealing with the merits of the case on the assumption that the formal title was sustained. It was assumed that the pursuer's position as trustee in an English bankruptcy is analogous to that of a trustee in a Scottish sequestration, and the questions of relevancy, and also those relating to the position of the various parties interested under the trust-deed as affected by the supervening bankruptcy, were dealt with as questions of Scots law to be determined by reference to our own authorities.

"The trust-deed sought to be reduced, while it is a unilateral deed, bears to be granted in pursuance of an arrangement between the Earl and Mr Vyner."—(His Lordship narrated the provisions of the trust-disposition.)

"Of this trust-deed the pursuer now seeks reduction—either total reduction, or alternatively and at least 'to the extent to which said pretended disposition exists or is pleaded as a bar to the satisfaction of the pursuer's rights in or claims to the property and estate' of Lord Rosslyn. Secondly, and whether reduction is granted or not, there is a conclusion for declarator and denuding;—for declarator that the trust-estate is now, so far as unaffected by valid securities, vested in the pursuer as trustee, unencumbered by any trust in the person of the defenders, and for denuding thereof 'to such extent at least as may be necessary to enable him to pay the just creditors' of the Earl. Thirdly comes a conclusion for count and reckoning, and for payment of £10,000 or such other sum as may be the true balance of the trust-estate, 'or at least of so much thereof as may be required to satisfy the claims of the just creditors' of the Earl.

"These conclusions are, upon the statement of them, peculiar and unusual, so far as regards the lesser alternative which appears in each. But they are so framed in order to meet the alternatives (1) of the deed being reduced absolutely at common law or under the statutes, which would be followed by an accounting for the trustees' whole intromissions and payment to the pursuer of the whole balance; and (2) of the deed being held to be merely superseded by the English bankruptcy, so that the estate must be made available to the trustee for the purposes of that bankruptcy, but may revert to the trustees when these purposes are served.

"In considering, first, the relevancy of the statements made in support of the reductive conclusions, I observe that the case for insolvency presented by the pursuer discloses quite clearly a case of practical insolvency or present inability to meet current obligations, and not of absolute or ultimate insolvency. This is plain from the averments contained in the seventh and sixteenth articles of the condescendence, which indeed amount to an affirmation of solvency in the absolute sense of that term. Then again, this is not a deed which operates to make a solvent person insolvent, or makes any disposition of the estate to the prejudice of the then lawful creditors. On the contrary, its primary purpose is for payment of such creditors, and there is no residue unless and until they are all paid in full with interest. To that extent this is a deed which an insolvent person is quite entitled to grant, and mere insolvency is no bar to the efficacy of it (2 Bell's Comm. 387). These considerations are of themselves sufficient to exclude the remedy of total reduction which the pursuer seeks. Both under the Statute 1621 and at common law, the insolvency which must be

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The defenders reclaimed, and argued;—The Lord Ordinary was wrong in holding that the trust-deed was superseded by the bankruptcy. This was not a trust-deed for creditors. The deed of 1893 placed the trustees in funds provided by Mr Vyner for the purpose of paying off Lord Rosslyn's creditors. But it conveyed Lord Rosslyn's estates to the trustees in security of the advances by Mr Vyner, and not for behoof of the creditors. The conveyance of the estates was part of the bargain on which the advances were made, and did not constitute a trust for creditors at all. This conveyance, with its absolute powers of administration and realisation, constituted an absolute security in favour of Mr Vyner, preferable to any sequestration, and there was nothing to prevent a man making a good security by way of trust.[1] The defenders were trustees in an onerous contract with Mr Vyner, and could not denude till the debt to him was paid. It was part and parcel of the consideration given for the advances that Mr Vyner should have the nursing of the security. It

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averred and proved in order to a successful challenge is absolute insolvency. In addition there must be a relevant averment of fraud; and although the word is used, in describing what is said to have been a fraudulent device to disappoint just creditors, I am unable to hold that fraud is relevantly averred. It is indeed alleged that the intention was to secure Mr Vyner in his advances, and at the same time prevent the general body of creditors from receiving payment out of the estate by diligence or otherwise in the future. But this is negatived by the terms of the trust-deed itself. Again, the thirteenth article of the condescendence, which summarises the matter, describes the deed as a fraudulent device concocted in contemplation of bankruptcy 'for the purpose or at all events with the effect' of screening the bankrupt's estate and reserving it for him and his family. Then the deed is said to have remained a latent deed. Yet it is not disputed that it was recorded in the Register of Sasines within a few days after its execution; and the pursuer himself avers that the trustees entered upon the possession and management of the estates, and have so continued ever since. The only other ground of reduction suggested is under the second part of the Act 1696, regarding undue preferences by way of infeftment for future debts. But the advances which the pursuer founds on in this part of his argument are, as I understand it, advances to the trustees for creditors, and not to the bankrupt; and to these the statute seems to have no application. I therefore hold that the pursuer's averments are not relevant to infer total reduction of the trust-deed on any of the grounds pleaded.

"As to the lesser alternative, of reduction of the trust-deed so far as it constitutes a bar to the pursuer's rights, it appears to me to be quite unnecessary. A supervening sequestration—and I assume that the same effect must be attributed to an English bankruptcy—completely supersedes a private trust, and the trustees are bound forthwith instantly to denude in favour of the trustee named in the sequestration (2 Bell's Comm. 391). I am not aware that in practice it has ever been held necessary in such a case to reduce the trust-deed. On the contrary, I apprehend that, according to the statement of the rule, the supervening sequestration does not extinguish the trust, but suspends it; and that after the purposes of the sequestration have been served, the trust may revive for the attainment of its ulterior purposes. The trust-estate will be made accessible to the trustee in bankruptcy, and he will take it subject to all valid securities, constituted either prior to the trust or by virtue of the provisions of the trust-deed itself and the infeftment of the trustees, or by the trustees themselves in the exercise

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[1] Murray v. Palmer, Dec. 15, 1864, 3 Macph. 250, 37 Scot. Jur. 119.

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was a further consideration stipulated for by Mr Vyner that there should be a provision for his daughter and her children, though the question whether the reversion in their favour was good was merely academic, seeing that the estate was insufficient to pay off the advances, and there could be no denuding till they were repaid. But the provision in favour of the wife and children was not a voluntary and non-onerous one by a husband *stante matrimonio;* it was part of the contract with Mr Vyner, and was therefore good. Further, Lord Rosslyn being solvent in 1893, and there being then no provision for his eldest son owing to the disentail of the estates, the provision which he then made for him, from which he would take no benefit till after Lord Rosslyn's death, was good. The trustees, without admitting any obligation, were quite willing to exhibit their accounts.

Argued for the respondent;—The trust-deed was an attempt to vest voluntarily the estate without consideration in conjunct and confident persons, and as such was reducible, but it was sufficient to plead that it was no bar to the trustee in bankruptcy assuming control of the estate. This was a deed for behoof of creditors, for the payment

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of the powers conferred on them. In this view, it does not appear to me to be material whether the pursuer in fact represents creditors whose debts were prior to the trust-deed. He represents subsequent creditors, and their interests are not provided for under any of the provisions of the deed, but must be vindicated in the bankruptcy proceedings. I do not know whether there will ultimately be a conflict between their interests and the interests of the bankrupt's wife and children under the residuary purpose of the trust. But I see nothing to prevent that question being worked out in the bankruptcy, for existing preferences will be saved, and, in so far as the wife and children have a valid security by reason of the trust, it will be available to them. At all events, I do not think that question could be properly tried in this action, to which they are not parties. If it were to be tried it would, I suppose, turn on the onerosity of the reversionary provision regarded either in itself or as the consideration stipulated for by Mr Vyner in favour of his daughter and her issue, as the counterpart of his obligation to advance the £40,000. But even in the latter view I do not see that this would entitle Mr Vyner to have the trust maintained as against a trustee in bankruptcy. Still less can he take up this position in the character of a legally secured creditor, as apparently the defenders do for him in their ninth plea. His preference will be preserved to him so far as it is a legal preference, and he cannot contend that because he stipulated for security, the trust must stand until he gets payment. His rights as creditor will be unimpaired; though no doubt in his character of trustee his intromissions with and administration of the money borrowed may, like all other acts of the trustees, be examinable. This, however, is appropriate to an accounting.

"The difficulty presented by the conclusions for count and reckoning is this—that the pursuer does not particularly disclose the extent of his pecuniary interest. He desires to recover such a sum as may be required to satisfy the claims of the Earl's just creditors. But if his right to denuding is absolute, as I think it is, it follows that there must be a general accounting, and if it should turn out that the creditors ranked in the bankruptcy are paid in full, he will hold the reversion for behoof of whom it may concern. That question is not *hujus loci*, as there may be no reversion. Nor do I consider it a good answer to the demand for an accounting to say that the secured debts will in all probability exhaust the estate. If he has a title to sue a count and reckoning, I do not think it is incumbent on him to shew beforehand that there will be a balance in his favour.

"I have pronounced findings giving effect to the above views. I would

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of debts, and, sequestration supervening, the trustee in bankruptcy superseded the trustees under the deed.[1] The fact that the deed was granted on the conditions contained in it did not make it the less a trust-deed for creditors. No contract with Mr Vyner could exclude the statutory right of the trustee in bankruptcy to administer. Mr Vyner was merely a heritable creditor, and could foreclose if he liked, but the deed gave him no right as against the trustee in bankruptcy to perpetuate the trust. The estate being handed over to the trustee in bankruptcy, could not affect Mr Vyner's interests; all valid securities under the deed would be protected. Nothing that the trustees had done up to now, *intra vires* of the deed, was challenged. The deed ceased to be a contract with Mr Vyner and became a provision by Lord Rosslyn for himself, his wife, and children, at the point where it provided them with a home. It was simply thereafter a settlement in trust by Lord Rosslyn for himself and family. There was a distinct severance between the provisions and machinery for payment of debts and the provisions for disposal of residue. A man could not put his estate *extra commercium* unless he actually alienated it, and a spendthrift could not be put under trust to the effect of putting his estate beyond the reach of his future creditors unless he was absolutely divested. No doubt his estate might be put under trust to work off his debts and to provide an alimentary provision for himself and family, but the trust would be good only so long as not interfered with by sequestration. The question whether the reversion in favour of the widow and children was good against creditors could be worked out in the bankruptcy.

At advising,—

LORD JUSTICE-CLERK.—The Earl of Rosslyn being embarrassed in consequence of the contraction of debt, in 1893 conveyed his whole estates to trustees in consideration of an advance made to him by his father-in-law, Mr Vyner, of £40,000, for the purpose of meeting his then existing liabilities. Under the conveyance, when the debts were paid the trustees were to hold "the whole residue of the trust-estate which may then remain under their management for behoof of my widow and children, or such one or more of my widow and children exclusive of the others or other, in such shares and proportions, and subject to such trusts and provisions, limitations and conditions as to vesting, payment, or otherwise, as I shall appoint

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have dismissed the reductive conclusions, but for a suggestion on the part of the pursuer that they may prove to be incidentally useful in the accounting, and I am willing to leave that chance open. I am not sure that I appreciate the view so put forward, and I rather think it was based on the possibility of objections to the acts and deeds of the trustees, which, however, would furnish no good ground for reducing the trust-deed in whole or in part.

"As to the matter of procedure, it seems to me the proper course is to ascertain the amount and particulars of the estate held by the defenders. A proof will, of course, not be excluded if the accounting should raise disputed questions of fact."

[1] 2 Bell's Comm. 391; Napier's Trustee v. Lord de Saumarez, Feb. 28, 1899, 1 F. 614; Campbell and Beck v. Macfarlane, June 11, 1862, 24 D. 1097, 34 Scot. Jur. 545; Lockie v. Mason, Feb. 14, 1837, 15 S. 547; Nicolson v. Johnstone and Wright, Dec. 6, 1872, 11 Macph. 179 (Lord Deas, p. 185), 45 Scot. Jur. 110; Rattray v. White, March 8, 1842, 4 D. 880, 14 Scot. Jur. 332.

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by any writing under my hand or by my last will, but not in contravention of any obligations undertaken by me in the settlements made on the occasion of my marriage, or in any relative deed or deeds, and failing such appointment, or in so far as the same shall not extend, then for such one of my issue as shall on my death succeed to the title and dignity of Earl of Rosslyn, and his heirs and assignees."

In 1897, the Earl having again become seriously embarrassed, filed a petition in England under which he was sequestrated, and the present pursuer was appointed trustee on the bankrupt estate. The practical question now at issue is, whether the trustee in bankruptcy is entitled to require the trustees to denude of the estate, so that he may enter into the control and management of the estate in the interest of the creditors whom he represents, and if so on what conditions. On the main question I concur in the Lord Ordinary's opinion, that the Earl's supervening bankruptcy supersedes the private trust established by the unilateral deed of the bankrupt, and that the trustee in bankruptcy is entitled to take possession for the protection and working out of the interests of the creditors who have claims against the Earl. In short, the ingathering of all that can be made available for the creditors is the proper right and duty of the trustee, and a voluntary trust cannot be allowed to stand in the way. The sequestration does not of course destroy the trust created by the trust-deed, nor relieve the bankrupt from his obligations under it. It suspends its operation only, so that the estate may be dealt with now in the interest not only of any person favoured by the deed, if he can maintain in law in the sequestration any right against the estate, but of all persons who have legal claims of debt against the bankrupt. After the trustee has fulfilled the duties incumbent on him under the statute, in adjudicating on claims, and satisfying those that are legally established, he will be of course bound to hold for those who have right thereto any reversion that may remain over, and it may be admitted or decided in the sequestration that he must reconvey to the trustees of the Earl. But that matter is entirely in the future, and does not require to be dealt with now. The bankruptcy trustee is now entitled to the declarator that he asks for, and to decree of denuding, subject to the reservations contained in the summons, and all reservation of proper outlays which the trustees have made in the management of the estate. And he is also entitled to a full accounting, that he may ascertain what, if anything, is available for the creditors now.

All questions of protected security or preferable claim will remain open, and the proper proceeding for having these dealt with is the process of sequestration.

I would move your Lordships to adhere to the decision of the Lord Ordinary.

Lord Young.—The pursuer is trustee in the bankruptcy of Lord Rosslyn appointed in June 1898. The defenders are trust disponees under a disposition by Lord Rosslyn executed in July 1893, and which has been acted on ever since. The purpose of the action is to obtain for the pursuer as trustee in bankruptcy possession of the property disponed to and now possessed by the defenders as trustees under the disposition. Whether

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that purpose can be attained wholly, or to any and what extent, under all or any of the conclusions of the summons, must be the ultimate and only practical question in the case.

The pursuer's title to sue, though objected to in the record, was not disputed in the argument before us. Nor was it, I think, disputed that in so far as we may now consider and dispose of any question in the case, we must do so on the assumption that at the date of the disposition Lord Rosslyn was *sui juris* and at liberty to dispose of his property as he pleased gratuitously or onerously. If his circumstances at that time were such as to expose his disposition in whole or in part to challenge by his creditors as having been executed to their prejudice in violation of any statute or rule of the common law, the pursuer's title to sue the action of challenge is, as I have said, admitted. He does so challenge the disposition and asks decree of reduction accordingly. The Lord Ordinary, however, has held "that no relevant or sufficient grounds are averred for reducing the trust-deed libelled," thus in effect repelling the first seven pleas in law for the pursuer, and your Lordship having expressed concurrence in this view, I, for reasons which will appear before I conclude, say no more upon it now, only pointing out that taking it along with the finding, in which your Lordship also concurs, that the defenders "are bound to denude of the estate and effects thereby conveyed by him, and to make over the same to the pursuer for the purposes of the said bankruptcy, subject to any valid securities over the same, and to such rights of lien or indemnity as the trustees may have," the result seems *prima facie* to be that the trust-deed challenged must stand unreduced, but with the pursuer—the trustee in bankruptcy—substituted for the trustees therein named, who must denude in his favour. If the trust purposes expressed in the deed are reduced, the deed is reduced, and if the purposes (or any of them) are to stand unreduced—that is, are to subsist in force, there must be a trustee to execute them.

In the course of the hearing it occurred to me that it would have been more regular if the Lord Ordinary had refrained from pronouncing judgment on the legal merits of the case under any of the conclusions of the summons until the facts had been judicially ascertained. Towards the conclusion of the hearing I ventured to express the impression which I had that it would at least be more satisfactory that before pronouncing any decision under the conclusion for an order to denude, we should have distinct information regarding the trust property which the defenders received under the disposition, what at the date of the bankruptcy was and what is now in their possession, and also regarding the trust purposes which have been completely (or partially) executed by them. The Lord Ordinary, indeed, desired this information, as appears from the order with which his interlocutor concludes. It occurred to me that this order ought to have preceded a finding on the legal question whether or not the defenders are bound to denude of the trust property in their possession, and transfer it to the pursuer with (or without) the trust duties committed to them, and for the performance of which they received it. The impression remains, although understanding that none of your Lordships share it with me, I do not press it or say more about it, but proceed to state my opinion on the legal findings in the Lord Ordinary's judgment necessarily on the footing

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and in the view that we may, and indeed must, give our decision upon them, looking only to the terms of the trust-disposition, and the pursuer's averments, in so far as, but only in so far as, admitted by the defenders. We can pronounce judgment now on no other footing.

1. The first finding is that the pursuer has a good title to sue, and this is, as I have already said, not disputed.

2. The second is that no relevant grounds of reduction are averred, and your Lordships are, I understand, of opinion that this finding is sound. I should, I incline to think, abstain from expressing any opinion upon it, and for this reason, that as we are deciding the case upon the terms of the deed, and on the footing that the facts are as averred or admitted by the defenders, it is unnecessary to decide a question of relevancy of averment, the only facts before us or of which we can now take account being, in my opinion, manifestly insufficient to support the conclusion for reduction.

3. The third is, that the trust-deed libelled "has been superseded by the bankruptcy of the Earl of Rosslyn." His Lordship's reason for this finding is thus expressed in his opinion: "A supervening sequestration—and I assume that the same effect must be attributed to an English bankruptcy—*completely supersedes a private trust*, and the trustees are bound forthwith instantly to denude in favour of the trustee named in the sequestration—(2 Bell's Comm. 391)." I think his Lordship has misapprehended either the meaning of the passage in Bell's Comm. to which he refers, or the character of the trust-deed in question. The passage in Bell's Comm. occurs in Book VI., part iii., which part iii. is titled "Of extrajudicial settlements between insolvent debtors and their creditors." After referring to two decisions, Mr Bell (Book VI., part iii., cap. 1, sec. 3 (4)) proceeds,—" . . . It is settled by these cases that when sequestration is awarded after a private trust it completely supersedes that trust, and that the trustees are bound forthwith instantly to denude in favour of the trustee named in the sequestration." It is too clear to admit of dispute that the "private trust" there referred to as superseded by sequestration is a private trust by an insolvent debtor to realise his estate and divide the proceeds among his creditors. The instances of such trusts are numerous, and the law applicable to them familiar, and indeed trite. That with which we have now to deal is of a different character—so different that I should characterise it, not as an arrangement between an insolvent and his creditors, but as a family trust created by the head of a family for the purpose of preserving the family estates from dilapidation to which they were exposed, and the reasonably founded apprehension of which had caused alarm to himself and all who were interested in the welfare of the family. The circumstances may be taken from the pursuer's averments on record, particularly in condescendences 5 and 6, of course rejecting or disregarding any allegation of fraud or deceit. They amount to this, that Lord Rosslyn was a spendthrift, with a propensity, which in the past he had found irresistible, to gambling and costly sports, which had put him into the power of money-lenders, one of whom he had satisfied with a mortgage of family property for over £100,000, leaving others with unsecured claims upon him for over £40,000. Notwithstanding his weaknesses, I should be disposed to credit him with sufficient sense to perceive and realise the pecuniary results of the life which he

had been leading for the three preceding years, and to understand and appreciate (at least when pointed out to him) that the continuance of that kind of life for even a brief future, with the family estates left in his hands exposed to attachment for his future debts, might lead to their exhaustion and the family ruin.

Such are the circumstances in which Lord Rosslyn was in July 1893, five years before his bankruptcy, advised to execute, and did execute, the deed which the Lord Ordinary has held to be superseded by his bankruptcy. We must assume that he knew the circumstances, understood the advice which was given to him by his father-in-law and his own family solicitors, and was of sound disposing mind. He was by the deed divested absolutely of the Rosslyn family estates (Ravenscraig, Dysart, &c.), and there is nothing else to take account of; for although there is a general disposition of *acquirenda* there are none in possession or expectation, and if there were I should hold the disposition of them invalid and inoperative. I was surprised when I read it in the deed. I characterise Lord Rosslyn's divestiture as absolute, for although the corresponding investiture of the defenders is in trust, it is by the deed distinctly provided that it shall subsist during his life, however long he may survive, and that there shall never be restoration to him. The language of the deed convinces me that the complete divestiture of Lord Rosslyn was intended, and it seems to me, as it apparently did to the family solicitors, that the estates could not otherwise be protected against the consequences of a continuance or resumption by the Earl of the habits which I need not again characterise.

The questions then are—(1st) Was the intended protection lawful so as to be capable of accomplishment? and (2d) Is the trust-deed in question fitted and adequate to accomplish it?

1st. On the first of these questions I have already, sufficiently I think, expressed my opinion. Any proprietor who is *sui juris* and of sound disposing mind may lawfully alienate his whole property, or so much of it as he thinks fit, so that it shall no longer be subject to his debts and deeds. It is of course true that so long and so far as any man's property is left within his power and reach, it is within the power and reach of his creditors, and can be put beyond their reach only by being put beyond his.

2d. If the first question is answered in the affirmative, it follows that the second must also be so answered, unless, indeed, the deed is a very gross conveyancing blunder. If the intended lawful and accomplishable purpose is not effected, the deed has certainly been blundered, even though it should be found to effect some other. No other has been suggested or occurs to me.

In what I have hitherto said I have taken no account of Mr Vyner's part in the deed and of the onerous contract relation between him and Lord Rosslyn thereby constituted. I thought it right to express my opinion that, irrespective of the view of contract and onerosity, and taking the deed as gratuitous on Lord Rosslyn's part, it is valid to divest him of the family estates to the effect which I have pointed out. By "gratuitous" I mean only this, that in executing the deed Lord Rosslyn was influenced only by his own judgment that it was, in the circumstances, a right and becoming thing for him to do. He was in July 1893 as free to place his property, or

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any portion of it, beyond his own and his creditors' reach by putting it into an irrevocable family trust as by putting it into a similar trust for any lawful purpose—religious, charitable, national or local, or making a direct gift of it to an individual.

But account must be taken of Mr Vyner's position and rights, and the quality of onerosity thereby impressed on the trust in question, with respect not only to his own rights but also to those of the Rosslyn family under it. He was legitimately interested in the family, consisting of his daughter (the Countess) and his grandchildren, and no doubt also in his son-in-law on their account, and possibly his own, notwithstanding his youthful follies which had occasioned so much trouble and alarm. He was willing to advance £40,000 and more if needed to relieve the Earl of the unsecured debts that were pressing upon him, but only on the condition that the Earl should execute the deed which the family solicitors advised for the protection of the family estates against any future indiscretions of his and secure them to his wife and family after his death. It would not be true or just to Mr Vyner to regard him as a party who desired a good investment for £40,000 or £50,000. His desire plainly was to prevent the Earl again resorting to such lenders as he had been in the habit of doing, and even to prevent the estates being burdened to any stranger lender. He could afford and was willing, which a stranger lender would not be, to lie out of the money, and even to allow the interest to run into arrear for years, hopeful that by good management of the estate by selected trustees, economical family expenditure, and protection against freaks of extravagance by the Earl, he, or others for him (probably his Countess daughter or her children), might receive as much as he expected when he advanced the money really on their account and prompted by his affectionate interest in them. Be these views of Mr Vyner's feelings and motives true or imaginary, we must take it as true that he advanced £45,000 on the contract arrangement with Lord Rosslyn expressed in the deed. Of this sum £16,000 was advanced before the deed was executed and £29,000 thereafter. The purpose of the loan is stated in the deed to be "in order to pay off certain unsecured debts" of Lord Rosslyn's.

The pursuer avers (Cond. 7) that "the only consideration given by the defender Vyner was a loan of £16,000 and a promise of a future loan, both of which have been paid or are amply secured." The defenders on the other hand aver (Ans. 7) that Mr Vyner's advances amounted to £45,000, that none of the capital has ever been repaid to him, or any interest since March 1895; and that the amount now due to him (capital and interest together) is £58,000 or thereby. They also explain (Ans. 13) "that the whole of the Earl of Rosslyn's unsecured debts at the date of said deed (1893) were paid off and discharged by means of the advances obtained from Mr Vyner." For the reasons which I have already stated, I think we can pronounce no judgment now except on the footing that the defenders' averments in fact are or may be true. It was stated to us by their counsel at the hearing, and not denied on the part of the pursuer, that the facts I have just referred to as being averred by them appeared on the face of the accounts which they had furnished to the pursuer before this action was raised.

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The question which I desire to consider is this—Is the contract between Lord Rosslyn and Mr Vyner under and in pursuance of which the deed of July 1893 was executed by the former a legitimate and valid contract between borrower and lender? If it be it must be upheld and implemented according to its terms. The pursuer impeaches and asks reduction of it on the seven grounds specified in his first seven pleas in law. In these are embraced I think all the grounds on which creditors can impeach an alienation by their debtor of his property to their prejudice. The Lord Ordinary has, as I have already observed, repelled them all by his finding "that no relevant or sufficient grounds are averred for reducing the trust-deed libelled." I have declined to express an opinion on the relevancy of the pursuer's averments for the reason which I have also already explained viz., that if we are to take the pursuer's case for reduction on the footing that it rests on his averments in so far as admitted by the defenders, and without any evidence beyond the defenders' admissions, it is not even arguable. The result, in my opinion, is that the contract between Lord Rosslyn and Mr Vyner in pursuance of which the deed was executed was legitimate and valid, the terms of it being, of course, taken to be as expressed in the deed.

Then it is a Scotch deed regarding chiefly, if not exclusively, Scotch landed property, and certainly creating a trust to be executed in Scotland, so that in considering its construction and import we are not dealing with anything foreign to our experience and presumed legal knowledge. What, then, in our judgment, is its meaning and import? for the accomplishment of that is the contract on which Lord Rosslyn borrowed and Mr Vyner lent £45,000. I have, I trust, distinctly stated my opinion that it is a Scotch deed, and that construed according to Scotch law it divests Lord Rosslyn absolutely of the whole family estates, so that they were not thereafter subject to his debts and deeds or to attachment by his creditors, and that the defenders cannot terminate the trust, and denude of any property held by them so long as Lord Rosslyn lives, or after his death, unless and until the advances made by Mr Vyner shall have been paid. The language of the deed to this effect is clear. The defenders have informed us that the whole debts due by Lord Rosslyn at the date of the deed—not heritably secured on the estates—were paid—I understood in 1893, and certainly long before the bankruptcy. We have not been distinctly informed regarding the extent to which the defenders have hitherto been able, by sales and judicious or fortunate administration, to pay off and clear the estates of old burdens. That they should, as far as possible, and, in their judgment, judicious, do so is one of the trust duties put upon them by the deed, Mr Vyner's desire (shared by Lord Rosslyn himself) plainly being that after Lord Rosslyn's death his family should have the estates as lightly burdened as the trustees could make them by their management and administration during his life after 1893. I think this is the import of the deed construed according to the law of Scotland, and that we should, if at any time required to judge of the trustees' duties and of their conduct in the performance of them, do so on that construction of the deed.

The residue clause is not as clearly expressed as it might have been, but without deciding any question that may conceivably arise under it when

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the time arrives,—that is, after Lord Rosslyn's death,—I may say now that I read it as meaning that the residue shall go to Lord Rosslyn's widow and children subject to his power of selection or apportionment by any writing under his hand or by his last will, and failing any such, then to such one of his issue as shall succeed to the earldom. Questions under this clause may arise when the time comes for acting on it, especially if Lord Rosslyn shall make an obscure apportionment by his last will or other writing. But the time cannot come till his death and the payment of Mr Vyner's debt, which is now over £60,000. Suppose there is no one then in existence to claim the residue under the clause except "such one of my issue as shall on my death succeed to the title and dignity of Earl of Rosslyn," no selection or apportionment could be applicable. The Lord Ordinary, if I rightly apprehend his opinion, supposes a possible conflict between the succeeding Earl or any others claiming the residue and money-lenders to whom the deceased Earl was indebted, and then goes on to say,—"I see nothing to prevent that question being worked out in the bankruptcy,"—meaning the existing bankruptcy. He adds,—"At all events I do not think that question could be properly tried in this action, to which they are not parties." In the event which I have supposed, the right of the succeeding Earl would rest on an onerous deed executed in pursuance of a contract between his father and grandfather, which, if lawful, it is the duty of the defenders, as trustees, to protect and satisfy when the time for satisfaction arrives.

The Lord Ordinary has not decided or expressed an opinion on the question whether or not Mr Vyner is entitled as matter of contract right to have the trust continued till the period of termination and denuding specified in the deed, thinking (if I rightly apprehend what he says) that this is a matter for the decision of the pursuer subject to the orders of the English Bankruptcy Court. Should it be held by the proper tribunal having jurisdiction in the matter that it is Mr Vyner's right to have the trust continued while Lord Rosslyn lives and his debt is unpaid, I assume that, in the Lord Ordinary's opinion, it is to be administered, not by the trustees named in the deed, acting subject to the jurisdiction and orders of the Court, but by the pursuer as a trustee in bankruptcy, acting subject to the orders of the English Court having jurisdiction in bankruptcy proceedings. Suppose that the Bankruptcy Court should order the pursuer to use the property of which the defenders on our order had denuded in his favour to pay the claims lodged with him, which he says amount to about £10,000 (cond. 12), and restore the remainder (if any) to the defenders to be again held by them under the trust-deed. What then? More debts incurred by Lord Rosslyn to tradesmen and money-lenders, another bankruptcy order, with the pursuer or some other nominated as trustee, and, of course, another order of this Court on the defenders to denude, and so on *ad infinitum*, or rather *ad finitum* of the Rosslyn estates. In short, it comes to this, that if the Lord Ordinary's view of the law on which his findings with which I have been dealing proceed be sound, the trust-deed in question is, and was from the first, an absolute nullity, at least as regards its expressed and principal, if not only objects, viz., the protection of the Rosslyn estates, and the security of Mr Vyner for the large advances made by him on contract for that protection.

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With respect to the conclusion for accounting, it is perhaps sufficient to say that the defenders have expressed their willingness to lay their accounts before the pursuer, and have indeed done so. But while I approve of their doing so, and indeed should have preferred to see the accounts, and also any objections which the pursuer might think proper to state, before pronouncing any judgment in the case, I am not prepared to hold that the defenders are liable to account to the pursuer. Whatever they received and held as trustees under the deed is, in my opinion, free from liability for the debts of the disponer contracted subsequent to its execution in July 1893, and as administering trustees they are, so far as I can see, under no liability to account to the pursuer. But the defenders, acting as they are, I think very becomingly, doing, in frankly disclosing their accounts, it may be satisfactory to see exactly what they have in possession before deciding whether they are bound to transfer all or any of it to the pursuer. I repeat, however, in conclusion, that assuming the deed of 1893 to stand unreduced, I do not see how they can possibly be possessed of anything of which they are bound to denude in favour of the pursuer.

LORD TRAYNER.—I agree practically with the views expressed by the Lord Ordinary, and have little if anything to add. The deed under which the reclaimers derive their title is a conveyance in their favour by Lord Rosslyn of the entirety of his estate, and its purpose, to state it generally, is (1) to secure Mr Vyner's advance of £40,000, and any advance by the trustees; (2) to provide for the payment of creditors of the granter; (3) to provide a certain income (if the trustees think fit) for the benefit of the granter and his family; and (4) to make a provision out of the residue of the estate, if any, for the granter's widow and children, subject to his appointment, and failing such appointment, then for the child succeeding to the title. I make no question at present how far these provisions are good against creditors, considering the circumstances under which the conveyance was made, for none of these are impaired by anything which the Lord Ordinary has done. All legal and valid rights conferred by said conveyance preferable to the general body of creditors have been in the meantime preserved, and may be made good (if they can ever be made good) in the sequestration.

The chief point urged on behalf of the reclaimers was this—that Mr Vyner would not have made the advances he did except on the condition that the whole estate of Lord Rosslyn was handed over to him or the trustees named in order that they might manage it so as to make it reasonably probable that under such management the estate might be made to yield payment of the advances, and probably produce a reversion. They further urge that this was the contract which Lord Rosslyn made for onerous causes, and that with that contract the Court should not interfere. I am unable to accede to that view. So far as the deed is an effectual conveyance—I mean effectual to constitute rights which are preferable to creditors—it will no doubt be sustained. But I know of no authority for the proposition that any contract, whether of the nature of factory or otherwise, made by a bankrupt (I assume during his solvency) can exclude the control and management of a trustee in bankruptcy when bankruptcy has

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supervened. The trustee represents the rights and interests of the whole body of creditors, and to him alone is entrusted the realisation and distribution of the bankrupt's estate. Every other title to manage the bankrupt's estate is superseded by the title which the law confers on the trustee in bankruptcy. The Lord Ordinary's interlocutor appears to me to be carefully expressed, so as to protect all the legitimate interests of the reclaimers. But in case it might be supposed that the trustees are bound to denude in favour of the pursuer before their legitimate claims have been satisfied, I think the finding of the interlocutor might be varied to the extent of finding that the trustees are bound to denude of the estate, "subject to any valid securities over the same, and on payment or satisfaction of such right or lien or indemnity" as they may have. With this slight variation, which is nothing more than verbal—for I am satisfied it is what the Lord Ordinary meant—I am of opinion that the interlocutor reclaimed against should be affirmed.

LORD MONCREIFF.—The Lord Ordinary has found that there are no relevant or sufficient grounds for reducing the trust-deed libelled, "but that the same has been superseded by the bankruptcy of the Earl of Rosslyn, and that the trustees are bound to denude of the estate and effects thereby conveyed by him, and to make over the same to the pursuer for the purposes of the said bankruptcy, subject to any valid securities over the same, and to such rights of lien and indemnity as the trustees may have."

The Lord Ordinary finds further that the defenders are bound to count and reckon with the pursuer, and orders them to lodge a minute condescending on the trust-estate and an account of their intromissions with it. He has pronounced no order of denuding. Subject to a slight qualification, I substantially concur in the interlocutor of the Lord Ordinary.

The trust-deed executed by Lord Rosslyn in 1893 is one of an exceptionally wide character. It is a unilateral deed. By it Lord Rosslyn divests himself absolutely of the *universitas* of his estates, present and future, in favour of trustees, of whom he himself is one. He conveys not only specified estates, but all lands and heritages "in Scotland, England, or elsewhere, now belonging to me or which shall belong to or be acquired by me during my life so far as not comprehended in the foregoing special conveyance; and also all moveable or personal estate, funds, property, or effects of whatsoever kind or wheresoever situated, now belonging or which shall belong to or be acquired by me during my life." He thus left himself nothing to satisfy any future debts. If not then insolvent, he made himself so by granting the trust. The trust is partly a trust for certain creditors, partly for management and maintenance of Lord Rosslyn himself and his family during his life, and partly for his widow and family after his death. *Prima facie* it is just such a private trust as is necessarily superseded by sequestration (2 Bell's Comm. 390). The law and reasons for the law are thus stated by Professor Bell:—"A trust-deed completed so as to vest the estate in the trustee beyond the reach of reduction on the bankrupt laws will still be ineffectual to bar those creditors who have not acceded to it from proceeding judicially to have the estate sold and distributed according to the legal rules of ranking and sale or sequestration. The creditors

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having the radical right under such a trust may not have confidence in the disclosure made or intended, and may think that no means of discovery short of a judicial examination on oath of the bankrupt and his relations and confidants can serve to bring his affairs sufficiently to light; they may not have confidence in the trustee to administer the estate, and above all they may be wearied out by the delay, the expense, and the inefficiency of the ill-adapted processes of the common law for effecting a final distribution of the funds." And again he says—"It is settled that when sequestration is awarded after a private trust it completely supersedes that trust, and that the trustees are bound forthwith instantly to denude in favour of the trustee named in the sequestration." What may have been the inducing cause of granting the deed does not seem to me to affect the question. It is said to be onerous to certain effects. It is not necessary to consider that question at present. If the deed confers any preferential rights on Mr Vyner (who is otherwise secured by heritable bonds for all advances) or others, such rights will receive effect in the sequestration. They are reserved; all that is proposed is to transfer *in hoc statu* the control and management of the trust-estate to the trustee in the sequestration.

At the same time the trustees cannot be called on to denude until they are reimbursed for outlays and expenses which they have incurred for the benefit of the trust-estate (Bell's Pr. sec. 1998-10 and sec. 1453); and it may be that questions of some difficulty will arise in the accounting as to the payments in respect of which they are entitled to plead retention. I therefore agree that the Lord Ordinary's interlocutor should be affirmed, with a slight variation to the effect that the trustees are only bound to denude after such claims of lien and indemnity as they may succeed in establishing in the accounting have been satisfied.

THE COURT pronounced this interlocutor:—"Recall the interlocutor reclaimed against: Find that the pursuer has set forth a sufficient title to sue this action: Find that no relevant or sufficient grounds are averred for reducing the trust-deed libelled, but that the same has been superseded by the bankruptcy of the Earl of Rosslyn, and that the trustees are bound to denude of the estate and effects thereby conveyed by him, and to make over the same to the pursuer for the purposes of the said bankruptcy, subject to any valid securities over the same, and on payment or satisfaction of such rights of lien or indemnity as the trustees may have, and that they are bound to count and reckon with the pursuer for their intromissions as trustees foresaid with the said estate and effects; and remit to the Lord Ordinary to proceed with the cause," &c.

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HENRY STEEL, Pursuer (Respondent).—*Salvesen, Q.C.—Guy.*
ROBERT FITZROY BELL, Defender (Appellant).—*Campbell, Q.C.—Chisholm.*

Contract—Executory Contract—Liquidate Penalty—Work not completed in stipulated time—Alterations on original plan—Alterations ordered after date fixed for completion of work.—A builder, by the terms of his contract

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with the proprietor of a house for mason-work, undertook to have the whole work contracted for "entirely completed," by the 1st May 1897, under "a penalty of 10s. per day that the mason-work remains unfinished beyond that date." It was a condition of the contract that the proprietor should have power "to make any alteration on, and to increase, lessen, or omit any portion of the work"; and it was also provided that extra work should "form no ground for deviating from the date above fixed for the completion of the . . . work, unless specially certified by the architect at the time."

The work contracted for was not completed till fourteen months later than 1st May 1897. During the progress of the work alterations of the original plan were ordered and carried out to an extent which brought up the price due to the builder from £1491 to about £2500. Part of this extra work was not ordered till after 1st May 1897.

In an action by the builder against the proprietor for a balance of the price due, the defender pleaded that, in virtue of the penalty clause in the contract, the pursuer was liable to him in liquidated damages of 10s. per day from 1st May 1897 till the completion of the work, and that he was entitled to take credit for the amount in settling with the pursuer. The pursuer contended that the alterations ordered rendered it impossible for the work to be completed in time, and that the penalty clause was therefore void.

From the proof it appeared that the pursuer had not applied for and did not produce any certificates from the architect entitling him to an extension of time in respect of alterations, but the defender did not take objection to the pursuer leading evidence of justification for delay. To what extent the alterations were ordered before and after 1st May 1897, or what effect they had in delaying the work, did not appear.

Held (*dub.* Lord Young) that the *onus* was on the pursuer to shew that the non-completion of the work within the stipulated period was due to the act or omission of the defender; that he had failed to do so; and that the defender was entitled to enforce the penalty clause.

Sheriff of Roxburgh, Berwick, and Selkirk.

THIS was an action in the Sheriff Court of Roxburgh, Berwick, and Selkirk, at Duns, at the instance of Henry Steel, builder, Greenlaw, Berwickshire, against Robert Fitzroy Bell, of Temple Hall, Berwickshire, concluding for £348, 9s. 3d., as the balance of a sum due to the pursuer under a contract for mason and brick-work in connection with large additions to Temple Hall.

The only question now reported is the defender's claim to deduction of a liquidate penalty alleged to have been incurred by the pursuer's failure to complete the work within the time specified in the contract.

The general conditions and regulations signed by the pursuer as relative to the contract between the parties, of date 13th May 1896, contained the following clauses:—"(14) The work shall be commenced so soon as the contractor shall receive possession of the site or sites for same, and the contractor shall be allowed from the time of receiving possession one week for the delivery and arrangement of his plant and materials, and at or upon the expiration of said period of one week the said works shall be commenced and carried on with all due diligence and in regular progression, so that the following portions of the work may be completed at or before each of the following dates, viz., that the principal wing, namely, that part of house fronting eastwards, have the walls made ready for the roof by the 1st of October next, and the remaining part of the building, viz., that part of the mansion facing northward, be made ready for the roof by the 1st January next, and the whole shall be entirely completed at or before the 1st day of May

1897, failing of which a penalty of 10s. per day that the mason-work remain unfinished beyond that date. Extra work, if any, shall form no ground for deviating from the dates above fixed for the completion of the respective portions of the work, unless specially certified by the architect at the time. (15) The architect shall have power to delay or suspend the work during unsuitable weather, or for any other sufficient reason, but the works shall be recommenced after receiving due notice from the architect. The time lost by such delay shall be added to the time allowed for completion. [Articles 21 and 22 are quoted in the opinion of the Lord Justice-Clerk.] (27) Power is reserved to make any alterations on, and to increase, lessen, or omit any portion of the works as may be thought fit, and the value of such alterations, additions, or deductions is to be calculated in strict accordance with the rates in the schedule of measurement signed as relative to the contract, and upon which the original tender is based. Any extras to which the schedule rates cannot be applied will be valued by the architect at current market prices for such work."

The pursuer's offer, as accepted, was to do the excavation, mason, and brick-work in connection with the alterations at the price of £1491, 5s. 10d., but during the progress of the work alterations on the original plans and specifications and additions to the original buildings were ordered by the defender and carried out by the pursuer, with the result that the sum ultimately due to the pursuer admittedly amounted to about £2500.

None of the work was finished at the times stipulated in the contract, and the whole was not completed till July 1899, fourteen months after the stipulated time. The defender averred that this was owing to the dilatoriness of the pursuer, and that he was entitled to claim the penalty for that period; but that he was willing to restrict it to £150, or 10s. per day for 300 days, and he claimed to set off that sum against the sum sued for.

The defender pleaded, *inter alia*;—(5) The pursuer having failed to complete his contract within the specified time, he is liable to the defender in the penalty provided therefor by the contract, and the sum claimed by the defender in respect thereof being well within the amount so due, the defender is entitled to take credit for the same in the settlement with the pursuer.

The pursuer averred that the delay in completing the alterations and additions was caused by the repeated alterations of the plans.

Proof was allowed and led, bearing out the facts as already stated. It was proved that additions and alterations to the building were ordered by the defender and made by the pursuer subsequent to 1st May 1897, though it did not appear to what extent. It did not appear how far the delay in giving orders for alterations was caused by the pursuer's delay in executing parts of the work. No certificates by the architect entitling the pursuer to an extension of time in respect of alterations were applied for or produced by him. The further nature of the proof is sufficiently disclosed in the opinions of the Court.

On 16th March 1900, the Sheriff-substitute (Dundas) pronounced an interlocutor, which, so far as bearing on the defender's right to enforce the penalty clause, found that there fell to be deducted from the sum due to the pursuer the sum of £150 in name of penalty for breach of contract.

The pursuer appealed to the Sheriff (Vary Campbell), who, on 1st

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June 1900, pronounced an interlocutor, *inter alia*, finding "in law, and on a construction of the written contract for the mason-work at Temple Hall, that the defender is not entitled to enforce the penalty clause therein contained, by reason of his not having given his full orders for the work before 1st May 1897, being the date for completion of the whole work, and from which the penalty was intended to run." *

The defender appealed, and argued;—By the pursuer's delay he had incurred the stipulated penalty, which was liquidated damages.[1] The *onus* was on the pursuer to shew that his failure to finish in time was due to extra work or alterations ordered by the defender, and he had not done so. He could not plead extra work in the absence of certificates by the architect authorising an extension of time on that account.[2] Even if it were true, which was not proved, that the alterations ordered had made it impossible to finish in time, it would not avoid the penalty clause.[3] If it had not been for the pursuer's delay —due to failure to begin timeously and want of adequate staff—the work would have been completed by 1st May 1897, and no further orders would have been necessary.

Argued for the pursuer;—There was no case here for stipulated damages, though there might be for common law damages, which was not pleaded. The penalty clause related to the completion of the whole work by 1st May 1897, and if, as here, orders for new work were given after that date, it rendered completion of the whole in time impossible, and the penalty clause flew off. The fact that part of the work was not ordered till afterwards was evidence that the delay was due to the defender, and shifted the *onus* on to him to shew that the work could have been finished in time, and that he had given the pursuer every facility to do so. The order of extra work beyond the specification in the contract prevented the application of the penalty clause.[2] The only difference between this case and *Dodd*[2] was the clause as to certifying extra work. But that clause referred only to the work originally contracted for, and not to work ordered afterwards. The clause must be read as if it contained the proviso that such extra work must be ordered in time to enable it to be finished in the stipulated time. This was the case kept open by the case of *Jones*,[3] where the point reserved was whether an employer who had not done all he could (*e.g.* had not given his orders in time) to enable the contractor to finish in time could enforce the penalty clause.[3]

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* "NOTE.— . . . . It is difficult, if not impossible, for me to find out on the evidence how much new work was ordered after 1st May 1897. It is enough, however, as to the penalty clause, that the pursuer had admittedly not received his full orders by 1st May 1897, and so could not by any possibility have completed the whole work by that date. I think accordingly, that the defender cannot enforce the penalty clause, but I shall reserve to him any claim he may have for damages as for breach of contract by unreasonable delay.—*Russell* v. *Da Bandeira* (1862), 32 L. J., C. P. 68; *Dodd* v. *Churton* [1897], 1 Q. B. 562; Hudson on Building Contracts, pp. 240-1."

[1] Elphinston v. Monkland Iron and Coal Co., June 29, 1886, 13 R. (H. L.) 98 (*per* Lord Watson); Johnston v. Robertson, March 1, 1861, 23 D. 646: Law v. Local Board of Redditch, L. R., 1892, 1 Q. B. 127.

[2] Dodd v. Churton, L. R. [1897], 1 Q. B. 562.

[3] Jones v. St John's College, L. R., 1870, 6 Q. B. 115.

Where the delay was caused by his fault he could not enforce the penalty clause, his only remedy being an action of damages at common law.[1]

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LORD JUSTICE-CLERK.—The facts which have to be dealt with in deciding this case are not complicated, and may be shortly stated. The pursuer took a contract to erect certain buildings for the defender for a price fixed, But it was part of the agreement (1) that at certain periods named specified portions of the work were to be completed, viz., the principal wing, namely, that part of the house fronting eastwards, to have the walls made ready for the roof by 1st October 1896, and the remaining part of the building, viz., that part of the mansion-house facing northwards, to be made ready for the roof by the 1st of January 1897, and the whole to be entirely completed at or before the 1st day of May 1897, failing which a penalty of 10s. per day that the mason-work remained unfinished beyond that date; (2) that extra work, if any, should form no ground for deviating from the dates above fixed for the completion of the respective portions of the work, unless specially certified by the architect at the time. (3) "Art. 21. The contractor must distinctly understand that in case any detail or other drawing, sketch, written or verbal instruction, be given for any part of the works whatever, and it be found that the proceeding with the works in accordance with such detail or other drawing, sketch, written or verbal instructions, shall cause any additional expense, whether in the particular trade to which the said detail or other drawing more particularly relates, or cause extra work in other trades, then the contractor must immediately intimate the same to the architect and state what extra expense, according to schedule rates, is, in his opinion, involved by proceeding with such works. The contractor must not execute any extra work of any kind whatsoever unless upon the written authority of the architect, or any plan or drawing expressly given or signed by him as an extra." (4) "Art. 22. The contractor shall, for any extra work which cannot from its character be properly measured and priced, render to the architect a weekly statement of such. No payment for day work will be allowed unless supported by such vouchers." (5) "Art. 27. Power is reserved to make any alterations on, and to increase, lessen, or omit, any portion of the works as may be thought fit, and the value of such alterations, additions, or deductions, is to be calculated in strict accordance with the rates in the schedule of measurement signed as relative to the contract, and upon which the original tender is based. Any extras to which the schedule rates cannot be applied will be valued by the architect at current market prices for such work."

Such being the character of the contract, the facts as ascertained by the proof seem to be (1) that the pursuer failed to have the work stipulated for completed at any of the respective dates; (2) that he holds no certificates from the architect sanctioning deviation from any of the dates, no such certificates having been applied for; (3) that during the course of the work the pursuer was repeatedly and strongly remonstrated with by the architect,

[1] M'Elroy & Sons v. Tharsis Sulphur and Copper Co., Nov. 17, 1877, 5 R. 161; Robertson v. Driver's Trustees, March 2, 1881, 8 R. 555.

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both verbally and in writing, for delay caused by the pursuer not putting a sufficient working staff on the building; and that it is not shewn that the pursuer made any reply to the architect's remonstrances, although these began ten days after the pursuer got possession of the ground, and were continued throughout the whole course of the work; and, although it was pointed out to him that penalty days were running, no reply was made or excuse offered; (4) that the work was not finished till a very long period after the contract time; (5) that the pursuer was required to do a very large quantity of work both in the way of alterations and additions; (6) that some of this extra work was ordered after the final date when the work should have been finished under the contract; (7) that the defender limits his claim of set off under the penalty clause to three hundred days, which is considerably less than the number of days which passed beyond the stipulated time for completion of the work before the building was handed over.

These seem to me to be all the facts necessary for the consideration of the general question now before the Court, which is whether the defender is entitled as against the balance due to the pursuer to assert his right to £150 as representing three hundred days during which the work remained uncompleted after the date stipulated in the contract.

The pursuer contends against any allowance being made on various grounds. First, he points to the very large extent of the alterations, which he gauges by pointing out that the sum due to the pursuer is increased by the alterations and extras by about 70 per cent. The contention is, that such extensive alterations would make it impossible to complete the work by the time named in the contract. I am not satisfied that this has been proved as matter of fact, but even if it were, the contract provides for definite extension of time, if such extension should be necessary in consequence of the extent of extra work ordered. That contention must therefore, in my opinion, be rejected. If the pursuer required such extension, and did not apply for it, the defender's rights under the contract cannot be curtailed by evidence founded on calculation whether the time necessary for the alterations on the contract work would carry the work beyond the date. The time to be allowed for the work is flexible, if there are alterations ordered, and the equity to which the contracting party is entitled if the work is altered is thereby provided for.

But then it is contended that no extra work could be required of the pursuer after the date when the work was to be completed, on the footing that the penalty clause was to remain in force, unless notice by plans or otherwise was given to the pursuer of all such work before the date for the completion of the contract, and this contention the Sheriff has given effect to. I am unable to agree with the learned Sheriff on this matter. Any such view leads to most anomalous results. The alterations and extras upon a building during erection may become necessary or expedient, or may be found advisable for reasons of appearance, after considerable part of the work has been done, and where the contractor has by delay in the execution of the first portions of the work exhausted the time prescribed while large portions remained undone, he would thereby, if the contention of the pursuer was sound, preclude the person for whom the work was being done

from having any alterations made as it advanced at a later date. I cannot hold that the pursuer, by his own default, can place the defender in a less advantageous position as regards extra work than he would have been if the work had been completed in its different stages in accordance with the agreement. If he, without excuse, occupies more time than the contract allows him, he cannot complain if while he is still at work alterations are called for under the contract. He has both as regards the time before the date specified, and as regards the time after, the right to deduction from the running of the penalty days of all days which are certified by the architect as being additional time to which he is entitled in respect of their having been occupied in doing extra work as required by the contract, and therefore he suffers no injury by having to do extras ordered on the parts which have to be done after the specified date for completion.

The pursuer in this case has not been confined in stating his answer to the defender's claim for the contract penalty to proof by certificates of the architects. He has been allowed to prove any case he could make to excuse the non-fulfilment of the work at the specified time. He has, in my opinion, failed to prove any facts to justify his delay. The defender has limited his claim to 300 days, although the actual time was longer, and in my opinion he is entitled in the settlement with the pursuer to have the amount applicable to that number of days, viz., £150, deducted from the amount brought out as due to the pursuer for the work done.

I therefore think that the interlocutor of the Sheriff should be recalled, and judgment pronounced in terms of the interlocutor of the Sheriff-substitute, except in regard to the claim for the making of the reservoir, which has been settled by joint minute of the parties.

LORD YOUNG.—I think that this case is attended with great difficulty, and I am doubtful with regard to the conclusion at which the Sheriff-substitute has arrived, and the opinion which your Lordship has expressed. I cannot, however, say that I am more than doubtful, and as the case is special, and as I understand that my brethren are of the same opinion as your Lordship, I do not dissent.

LORD TRAYNER.—The only question we are asked to determine under this appeal is whether the defender is entitled to set off a sum of £150 claimed by him as incurred and due by the pursuer under the penalty clause in the contract against the balance due to the pursuer under the contract for work done. I have come to be of opinion that he is, but I have not reached that conclusion without considerable hesitation. The proof for the pursuer is not satisfactory, and several points—as I think material points—have not been cleared up as they should and might have been. For example, it is impossible to discover from the proof (1) what extent of the contract work was completed by the 1st May 1897; (2) what orders for alterations on or additions to the work, as set forth in the specification, were given after that date; (3) how far alterations or additions, ordered before 1st May 1897, hindered the pursuer from completing his contract work before that date; and (4) how much time, after 1st May 1897, was occupied with additions or alterations on the specified work. These matters not having been cleared

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up (as I think it was the pursuer's duty to do), the case appears to me to stand thus:—By the terms of the contract the pursuer undertook to have the principal wing of the building ready for the roof by 1st October 1896, the remaining part of the building ready for the roof by 1st January 1897, and the whole work contracted for "entirely completed" by the 1st of May 1897, under a penalty of 10s. per day that the mason-work remained unfinished beyond that date. Further, by the contract the defender had reserved to him power "to make any alteration on, and to increase, lessen, or omit any portion of the works," while it was provided that extra work, if any, should "form no ground for deviating from the dates above fixed for the completion of the respective portions of the work, unless specially certified by the architect at the time." Now, whether the pursuer was wise to enter into a contract which imposed on him obligations of this stringent character may be a question, but it is not one which we can consider. The fact is, that he made this bargain, and he must fulfil it. That he did not fulfil it is the one fact in the case which is clear beyond doubt on the proof before us. The pursuer himself says,—"I was to have finished the whole job by May 1897. At that time the walls were not all ready for the roof, but shortly afterwards I had the north wall ready for the roof," so that, at each of the three dates fixed by the contract, the pursuer was greatly behind hand with the work which at these respective dates should have been done. The work was not completed until July 1898, some 440 days after the period fixed by the contract for completion. Apparently, therefore, the pursuer incurred, and was liable for, the penalty of 10s. a day for the whole of that time. The only answer which it occurs to me could avoid this result is that the non-completion of the work was due to the defender,—that he, by act or omission, rendered performance impossible. No such answer is put forward in any of the seven pleas in law stated for the pursuer on record, but it was maintained in argument before us. The answer thus stated fails in my opinion upon the fact, and it is with reference to it that I think the pursuer's proof is defective in the particulars I have already enumerated. But there is more in the case against the pursuer on this point than his failure to make his proof as clear and distinct as he should have done. There are some things proved which go to exclude such an answer to the defender's claim. For example, at a very early stage in the pursuer's operations he was blamed by the architect for delay in commencing and pushing forward parts of the work, and to these complaints on the part of the architect there is not one word of reply. Indeed these complaints were reiterated through the whole job, and no reply was ever made by the pursuer, either excusing himself or blaming the defender for the delay. Again, on 2d December 1897, the architect wrote the pursuer notifying that "sixty-eight days' penalty had run," and even when the matter of penalty was thus brought prominently before him the pursuer does not, any more than formerly, suggest that the delay was excusable in itself, or was due to the defender, or that the penalty had not been incurred.

It is quite true that alterations were made by the defender on the original estimate, and that the amount of the contract price was considerably increased. But it appears from the architect's evidence that this was "caused by the use of more expensive work rather than by an additional

quantity of work." Again, however, one turns to the contract, and there it is distinctly stipulated that extra work, if any, should not warrant any deviation from the date fixed for completion, unless certified by the architect. As this latter provision (the architect's certificate warranting or granting an extension of time) is not urged by the defender against the pursuer, the effect of the want of such certificate need not be considered. It was open to the pursuer (from the attitude the defender has taken) to prove that he was delayed beyond the contract time by reason of alterations ordered at a time which made fulfilment of his contract impossible. This he has not done.

I cannot assent to the view urged upon us, and which apparently is the view adopted by the Sheriff, that any order or alteration made or given after the 1st May 1897 *per se* struck the penalty clause out of the contract. As I have said, it is not established how many alterations were ordered after that date, nor what was their character. For anything that appears, any such orders were given after 1st May 1897, because the pursuer was so much behind already with his work that such alterations were necessarily delayed until then. That would not absolve the pursuer, but would rather accentuate his liability.

The result of my consideration of the case, therefore, is that there is a plain obligation imposed on the pursuer by his contract, non-performance of which involved liability for a certain fixed penalty; that non-performance is clearly proved, and, indeed, admitted; that the penalty, therefore, was incurred; and that no relevant or sufficient answer to the defender's demand for the penalty has been established. The defender has restricted his claim for penalty to £150, and for that sum I think he is entitled to credit in his settlement with the pursuer.

LORD MONCREIFF.—I have felt a good deal of difficulty about this case, because undoubtedly considerable alterations were made by the defender upon the original plans, so considerable that I think it is plain that the whole work, inclusive of the alterations and additions, could not have been completed by the 1st of May 1897, the limit named in the contract for the completion of the whole work.

The proof before us does not tell us at what times the various alterations were ordered, or enable us to judge to what extent the execution of the work was delayed by those orders. All we know is that several extensive alterations were made by the defender's orders, and that most of them were made after the 1st of May 1897.

The Sheriff "finds in law, and on a construction of the written contract for the mason-work at Temple Hall, that the defender is not entitled to enforce the penalty clause therein contained, by reason of his not having given his full orders for the work before 1st May 1897, being the date for completion of the whole work, and from which the penalty was intended to run"; and in his note he says,—"It is difficult, if not impossible, for me to find out on the evidence how much new work was ordered after 1st May 1897. It is enough, however, as to the penalty clause that the pursuer had admittedly not received his full orders by 1st May 1897, and so could not by any possibility have completed the whole work by that date."

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I think that the law so laid down by the learned Sheriff proceeds upon a misconstruction of the 14th and 27th conditions of the contract between the pursuer and the defender, and a misapplication of the case of *Dodd* v. *Churton*.[1]

By the conditions of the contract in that case the building was to be completed by 1st June 1893 under a penalty of £2 per week for every week that any parts of the works remained unfinished after that date as liquidate damages, and there was a provision that any authority given by the architects for any alteration or addition in or to the works should not vitiate the contract. The defendant, the employer, maintained that that provision meant that, notwithstanding that alterations and additions were ordered, the contractor was bound to complete the whole work within the time named in the contract. The Court of Appeal decided in favour of the contractor, but solely on the ground that the condition to which I have referred, that the contract should not be vitiated by orders for alterations or additions, would not bear the construction which the defendant sought to be put upon it, and that therefore the defendant having given orders which made it impossible for the contractor to complete the work by the time mentioned in the contract, he was thereby disentitled to claim the penalties for non-completion.

The penalty clause in the contract in this case is very different, because it not only contemplates that orders may be given for extra work, but it provides that such orders shall form no ground for deviating from the dates fixed for the completion of the respective portions of the work unless specially certified by the architect at the time. This shews that the contractor undertook to perform any extra work that might be ordered, and that if he thought that such alterations or extra work would prevent his completing the whole work by the specified dates, it lay upon him at the time to obtain from the architect a certificate that he should be entitled to an extension of the time for the work so ordered. It will at once be seen how different this condition is from the condition in *Dodd* v. *Churton*.[1]

Now, these being the conditions of the pursuer's contract, I think the burden was upon him to shew that the alterations ordered by the defender were such as to free him from the penalty clause. This he has failed to do. First, he did not apply for, and has not produced, any certificates granted by the architect entitling him to an extension of time in respect of alterations. Secondly, he has not proved at what dates the alterations were ordered, or afforded us any means of judging what effect they had in delaying the work. And thirdly, it is distinctly proved in the case that during the period before the 1st of May 1897, by which time the whole work should have been completed, the pursuer, notwithstanding repeated remonstrances and orders from the architect, obstinately refused to put sufficient men on the work, with the result that, for instance, the north walls, which should have been ready for the roof on 1st January 1897, were not ready until the month of July of the same year, two months after the whole work should have been completed.

The work was not finally completed until upwards of 400 days beyond the

[1] L. R. [1897], 1 Q. B. 562.

time when it should have been completed. The defender restricts his claim for penalties to 300 days, amounting to £150. We have no means of judging whether the allowance made by the defender correctly represents the additional time which was necessarily occupied by the contractor in consequence of the alterations ordered. But the burden being on the pursuer in this matter, and he having entirely failed to shew the extent to which the delay was caused by the alterations, and, in particular, having failed to shew that any alterations were ordered before the 1st of May 1897 which would have prevented him completing the work by that date, I am of opinion that the defender is legally entitled to plead the penalty clause to the extent to which he asks that it should be enforced. Accordingly I am for recalling the judgment of the Sheriff, and reverting to the judgment of the Sheriff-substitute.

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THE COURT recalled the interlocutor of the Sheriff, and reverted to that of the Sheriff-substitute of 16th March 1900, finding, *inter alia*, that from the sum due to the pursuer the sum of £150 fell to be deducted in name of penalty for breach of contract.

DALGLEISH & DOBBIE, W.S.—CAIRNS, M'INTOSH, & MORTON, W.S.—Agents.

JAMES GILCHRIST & COMPANY, Pursuers (Respondents).—*Macrobert.*
WALTER SMITH, Defender (Appellant).—*D. Anderson.*

No. 50.
Jan. 9, 1901.
Gilchrist & Co. v. Smith.

Expenses—Abandonment of Appeal after printing by respondents.—An appeal from a Sheriff Court was abandoned before the case appeared on the roll for discussion. The respondents moved for full expenses, stating that they had printed certain correspondence passing between the parties, of importance in the case. This they had done without asking the appellant what he proposed to print. The Court *refused* to allow the respondents the expenses of printing.

1ST DIVISION.
Sheriff of Ayrshire.

JAMES GILCHRIST & COMPANY, salt merchants, Glasgow, brought an action in the Sheriff Court of Ayrshire against Walter Smith, grain merchant, Irvine, in which, after sundry procedure, the Sheriff-substitute pronounced an interlocutor approving of the Auditor's report on expenses, and decerning against the defender therefor. On 12th July 1900 the defender appealed to the Court of Session, and on 16th October the case was sent to the Short-roll.

On 9th January 1901, before the case had been put out for hearing, the appellant enrolled the case in the Single Bills, and moved that the appeal be dismissed, with modified expenses to the respondents.[1]

The respondents moved for full expenses, on the ground that they had incurred expense in printing certain correspondence passing between the parties, which was necessary for their case.[2] They admitted that they had printed without communicating with the appellant.

LORD PRESIDENT.—It appears to me that no cause has been shewn for departing from the ordinary rule in this case. If a respondent, who is not the party whose duty it is to print the papers, desires to do so at an early

[1] Robertson v. Robertson's Executors, Nov. 8, 1899, 2 F. 77.

[2] Smith-Sligo v. Knox, Nov. 2, 1880, 8 R. 41; Little Orme's Head Limestone Co. v. Hendry & Co., Nov. 25, 1897, 25 R. 124.

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stage, he ought to communicate with the appellant and ascertain what he intends to print. Otherwise the result will be—or, in the ordinary course, ought to be—that the appellant will at the proper time print the necessary papers, and there will be double and superfluous printing.

LORD ADAM concurred.

LORD KINNEAR.—I quite agree. I think that if a respondent prints without notice and without inquiry, he takes the risk of the prints turning out to be useless, and in that case he cannot recover the expense of printing useless prints from his opponent.

LORD M'LAREN was absent.

THE COURT found the respondents entitled to £3, 3s. of expenses.

HENRY BOWER, S.S.C.—R. & R. DENHOLM & KERR, S.S.C.—Agents.

No. 51.
Jan. 9, 1901.
Reid v. Reid.

MRS AGNES JANE GRANT OR REID, Petitioner.—*Crabb Watt.*
ALEXANDER REID, Respondent.—*Kennedy*—*M'Clure.*

Parent and Child—Custody—Petition for custody pending action of adherence.—Guardianship of Infants Act, 1886 (49 *and* 50 *Vict. cap.* 27), *sec.* 5.—Circumstances in which the Court, on an application by a wife under the Guardianship of Infants Act, 1886, made an interim order giving her the custody of her three daughters, all under seven years of age, and an infant son, without ordering inquiry into the facts, and while an action at her instance against her husband of adherence, and, alternatively, for separation and aliment, with conclusions for the custody of the children, was pending in the Outer-House.

1ST DIVISION. MRS AGNES JANE GRANT OR REID, wife of Alexander Reid, spirit-merchant, Bearsden, Dumbartonshire, presented a petition, in which she prayed the Court to find her entitled to the custody of her four children—Agnes, aged six; Sarah, aged four; Ethel, aged three years; and Alexander Percy, aged six months—and to make an order decerning and ordaining her husband to deliver the said children to her.

In the petition Mrs Reid averred that she was married to the said Alexander Reid in 1893, and had lived happily with him until August 1900, from which date there had been constant difficulties between them. In December 1900 she received a letter from his law-agent, in which it was stated that her husband insisted on her leaving his house. She obeyed this order, and found a home with her father. She was permitted to take her youngest child with her, but the other three were removed from her custody. She further averred that her husband had an income of £1500 a year, and that his business necessitated his absence from home all day. Her averments concluded with the following statement:—"In these circumstances the petitioner has had to raise an action of adherence, and, alternatively, of separation and aliment, which action also contains a conclusion for the custody of the children of the marriage, and for aliment for them. It will be some months, however, before it is possible to get a decision in said action, and the petitioner is under the necessity of making the present application, which is based upon the common law and the Guardianship of Infants Act, 1886 (49 and 50 Vict. cap. 27), in order to get an order of the Court for the custody of her children immediately. She is not in a

position to make any averments regarding the fitness or unfitness of her husband for their custody. She believes and avers that they are not in his custody. They are very young girls, and are in need of their mother's care, and, it is averred, are unhappy away from her; and the petitioner is entitled in the meantime to have their custody, and their interests demand that they should be with her. The petitioner will give her husband such reasonable access to said children as the Court may think proper." *

Answers were lodged for the husband, in which he made, *inter alia*, the following statement:—"The respondent had serious differences with the petitioner, and was much dissatisfied with her conduct both as a housekeeper and towards their three elder children, before as well as after August 1900. The respondent disapproved strongly of corporal punishment, and has had cause frequently to remonstrate with the petitioner for thrashing the three elder children. On several occasions he has had to interfere and take them away from her. She has beaten the eldest daughter, who has always been delicate, with special frequency and severity, and without cause. She has disobeyed the respondent's expressed wishes in this respect, and resented his remonstrances and interference on the child's behalf."

Argued for the petitioner;—A sufficient *prima facie* case had been made out for an order *ad interim* without inquiry. The petitioner was not bound to wait until her action of adherence was ready for proof.[1] The case of *M'Callum* v. *M'Callum*[2] was not in point, because the ground of that decision was that no order could, in the circumstances, be pronounced without inquiry, and it was undesirable to have two inquiries into the same facts. Here the conduct of the husband was obviously unreasonable, and the natural home of young girls under seven was with their mother. An interim order might therefore be pronounced without any proof.

Argued for the respondent;—No order should be pronounced, because the case was before the Lord Ordinary. An order for custody in such circumstances, though competent, would only be pronounced in exceptional cases.[2]

LORD PRESIDENT.—It appears to me that we are in a position, on the papers before us, to dispose of this case to the only extent to which it is now competent to deal with it—that is, *ad interim*, until some further order shall be pronounced either here or by the Lord Ordinary.

The spouses apparently lived together until August 1900, when their fourth child was born, and then the husband, for some unexplained reason, took a dislike to his wife, and ordered her to leave his house. She says that she had no option but to comply with that order. But assuming that she was bound to leave, it is a very different question what effect the giving of the order by the husband, and her obeying it, should have on the interim custody of the children. It is stated in the petition that she has raised an

* The Guardianship of Infants Act, 1886 (49 and 50 Vict. cap. 27), section 5, enacts,—"The Court may, on the application of the mother of any infant, . . . make such order as it may think fit regarding the custody of such infant, and the right of access thereto of either parent, having regard to the welfare of the infant and the conduct of the parents, and the wishes as well of the mother as of the father."

[1] Stevenson v. Stevenson, Jan. 30, 1894, 21 R. 430.

[2] M'Callum v. M'Callum, Jan. 24, 1893, 20 R. 293.

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action of adherence, and alternatively of separation and aliment, against her husband, with conclusions craving that she should be found entitled to the custody of the children, and if it were necessary for the decision of the present question that there should be an inquiry, there would be great force in the consideration, on which the Court proceeded in the case of *M'Callum*,[1] that it would be inexpedient to have separate inquiries in the petition for custody and in the action in the Outer-House. That might be a very valid reason, but it does not exist in this case if there is sufficient material in the papers before us to enable us to make what is, after all, only an interim order. There is no allegation, far less any *prima facie* evidence, of any misconduct on the part of the wife which would render her unfit to have the custody of her children, three of whom are girls of tender years, who should therefore, *prima facie*, be under the care of their mother, while the fourth is an infant boy. The husband alleges that there was a difference of opinion between himself and his wife as to the chastisement of the eldest girl, but no case involving cruelty to the child is alleged.

Under these circumstances the first consideration is the welfare of the children, though no doubt the wishes of the spouses are also to be taken into account. I think that the natural place for girls of such tender age is with their mother, especially in a case like this, where the father is engaged in business and away from home for the greater part of the day, so that he could not devote much attention to them.

If a decree of separation is pronounced hereafter, the Lord Ordinary will regulate the custody of the children, and it may be that the proof will put a different complexion on the case. It is, of course, understood that any order which we pronounce now is only *ad interim*, and does not in any way interfere with the power of the Lord Ordinary to regulate the custody of the children as he may see fit upon the facts proved before him. In the circumstances stated, and on the *prima facie* aspects of the case, I see no ground for depriving the mother—against whom no allegation of misconduct or unfitness is made—of the custody of her children, and accordingly I am in favour of granting the prayer of the petition, subject to the qualifications which I have just mentioned.

LORD ADAM and LORD KINNEAR concurred.

LORD M'LAREN was absent.

THE COURT found the petitioner entitled to the custody of the children until the Court or the Lord Ordinary should otherwise direct.

W. A. FARQUHARSON, S.S.C.—SIMPSON & MARWICK, W.S.—Agents.

No. 52.
Jan. 10, 1901.
Pollock v. Mair.

JAMES POLLOCK, Pursuer (Appellant).—*M'Lennan.*
JOHN MAIR, Defender (Respondent).—*Craigie.*

Process—Appeal for jury trial—Proof or jury trial—Wrongous dismissal of farm servant—Claim for wages.—In an action of damages for wrongous dismissal brought in a Sheriff Court by an agricultural labourer

[1] 20 R. 293.

against his employer, the Sheriff allowed a proof. The pursuer appealed for jury trial. The Court, in respect (1) that the claim though nominally for damages was really for the wages which the pursuer would have earned had he not been dismissed, and (2) that the bulk of the evidence would be that of local witnesses, *refused* the appeal and *remitted* the case to the Sheriff for proof.

No. 52.
Jan. 10, 1901
Pollock v. Mair.

JAMES POLLOCK, yearlyman, Killantrae, Wigtownshire, brought an action of damages in the Sheriff Court at Wigtown, against John Mair, farmer at Killantrae, concluding for payment of £80.

1st DIVISION
Sheriff of Dumfries and Galloway.

In this action Pollock made the following averments:—That the pursuer had been employed as a yearlyman by defender for some years back, and sometime prior to Whitsunday 1900 he and defender entered into a verbal agreement whereby pursuer was to be engaged by defender as a yearlyman, to do all the work usually performed by yearlymen, from Whitsunday 1900 to Whitsunday 1901, and occupy a house at Killantrae. He was further bound to supply two milkers, viz., Elizabeth Pollock and Janet Pollock. In return for these services, defender bound and obliged himself to pay pursuer at the rate of 12s. 6d. per week, and farther give him three tons of coal and two carts of potatoes. The wages to be given to his milkers were to be 3s. per week for milking, the said Elizabeth Pollock to get 7s. 6d. per week for out-door work, except during harvest, for which she was to get £3, and the said Janet Pollock was to get 1s. 3d. per day for each day she was engaged, except during harvest, for which she was to get £3, 10s. The defender unwarrantably, and in breach of his contract, dismissed the pursuer and the two Pollocks from his services. Although he was thereupon informed that they desired to fulfil their engagement, he persisted in ordering them away and forced them to leave, and they have thus suffered loss and damage to the extent claimed, through loss of wages and loss of character and reputation. Pursuer had always been willing to perform the contract entered into by him with defender. Pursuer is entitled at anyrate under the contract condescended on to the sums in the subjoined account, being the wages payable for the period of engagement and unpaid by defender.—(Here followed a detailed statement of wages still unpaid, amounting in all to £56, 8s. 3d.)

Mair denied that he had dismissed Pollock and his helpers as averred, and stated that they had without excuse left his service and never offered to return, putting him to much inconvenience and expense in finding others to complete his harvest work, milk his cows, and carry on his farm operations, and farther that the pursuer unwarrantably retained possession of a cothouse. Without prejudice to his rights and pleas, he tendered the sum of £9, 12s. 10d., with expenses to date, in full of all claims.

The pursuer pleaded;—(1) The pursuer, having been dismissed by defender from his service without due notice and without justifiable cause, is entitled to decree for the sum craved in name of wages or of damages. (2) Defender having failed to implement the contract entered into by him, and pursuer, and those for whom he was responsible, having suffered loss and damage thereby, defender is liable in the sum craved.

On 20th November 1900 the Sheriff-substitute (Watson) allowed a proof.

The pursuer appealed to the Court of Session, and moved for an order for issues. The respondent moved that the case should be sent

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back to the Sheriff Court for proof, and argued;—The case was specially suited for trial in the Sheriff Court, as the witnesses all belonged to the locality. It was also in substance a claim for the loss of specific wages, not a general claim of damages for injury to character. There was no doubt that the Court had the power to refuse jury trial,[1] and had exercised that power in cases of trifling and local character like the present.[2]

Argued for the appellant;—Issues should be ordered. When an appeal was made from the Sheriff Court for jury trial the case should be considered as if it had been commenced in the Court of Session.[3] If so, then no reason could be suggested for refusing to send the case to a jury, except perhaps that the damages claimed were small, but that was not a sufficient ground.[4]

LORD PRESIDENT.—There is no doubt that this Court has power, when a case is appealed for jury trial, to send it back for proof in the Sheriff Court, if that appears to be the most expedient way of dealing with it, and this certainly does seem, *prima facie*, to be a case which ought not to be sent to a jury. In one sense it is an action of damages, because it includes a claim for "loss of character and reputation," but there is no separate or specific case of slander or defamation stated, and in substance it is a claim by a servant against his master for loss of wages through wrongful dismissal. The pursuer seems to recognise that the measure of the damages must be the wages which he has lost, because after making a general claim he says, in condescendence 5, that he is in any event entitled to the sums subjoined, being the wages due for the period of his engagement. He is thus really claiming for loss of wages; whether he did obtain work elsewhere, or could have obtained it for the unexpired period of his employment, we of course cannot tell at this stage. The question is eminently suited for trial in the Sheriff Court. The bulk of the evidence will be of local witnesses, and where the gross claim is for £80, and the real damage apparently £56, it would be very inexpedient to allow the case to be tried by a jury, implying the necessity of bringing the local witnesses here. Again, the case may involve the consideration of local customs, of which the Sheriff-substitute is likely to be the best judge. On the whole, I think we should refuse the appeal and send the case back to be tried in the Sheriff Court.

LORD ADAM.—As I understand the law, even in a proper action for damages, that is, in an action for a random sum for injury sustained, the party has not an absolute right to jury trial. The law is that such a case goes before a jury unless the party who objects to that course shews some good reason why it should not. That rule applies to a case of this kind, which is brought here from the Sheriff Court by an appeal for jury trial. I agree that the smallness of the amount claimed as damages is not in itself

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[1] Tosh v. Ferguson, Oct. 27, 1896, 24 R. 54.

[2] Bethune v. Denham, March 20, 1886, 13 R. 882; Mitchell v. Sutherland, Jan. 23, 1886, reported as a note to Bethune.

[3] Crabb v. Fraser, March 9, 1892, 19 R. 580, *per* Lord President.

[4] Willison v. Petherbridge, July 15, 1893, 20 R. 976; Mackintosh v. Commissioners of Lochgelly, Nov. 3, 1897, 25 R. 32; Jamieson v. Hartil, Feb. 5, 1898, 25 R. 551.

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a sufficient reason for not sending a case before a jury. But that is not the present case. Here there is sufficient reason for not sending it to a jury in the fact that the damages claimed are to be ascertained by calculating the amount of wages which the pursuer would have earned had he remained in the defender's service, and also that the whole evidence will be that of local witnesses.

LORD KINNEAR.—I am of the same opinion. I adhere to the opinion of this Division as expressed by the Lord President in *Tosh* v. *Ferguson*,[1]—"At this time of day it is of course impossible to dispute that the Court has power to send back to the Sheriff Court for trial there a case appealed under the 40th section of the Judicature Act. But then it is necessary to observe that that has only been done when circumstances could be pointed to which rendered the Sheriff Court peculiarly appropriate as a tribunal for ascertaining the facts," and also agree with the remark made by Lord Adam that the smallness of the sum claimed is not a reason for refusing jury trial, because the minimum sum for appeal has been fixed by the Legislature, and we have no power to increase it. The question must depend on the circumstances of the particular case. The appeal will not be refused unless the circumstances render the Sheriff Court a better tribunal than a jury. But I have no doubt that in this case the Sheriff Court will be the better tribunal, and that a proof there will be more satisfactory and less expensive than a jury trial here.

LORD M'LAREN was absent.

THE COURT dismissed the appeal, and remitted the case to the Sheriff-substitute to proceed in terms of his interlocutor of 20th November.

ROBERT BROATCH, L.A.—JOHN C. BRODIE & SONS, W.S.—Agents.

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Innes v. Fife Coal Co., Limited.

JOHN INNES, Pursuer (Appellant).—*Watt, Q.C.*—*M'Clure.*
THE FIFE COAL COMPANY, LIMITED, Defenders (Respondents).—*Sol.-Gen. Dickson, Q.C.*—*Clyde.*

Reparation—Negligence—Railway—Failure to fence Siding near Cottages.—An engine-driver, in the course of backing some trucks down a siding, ran over and killed his own son, a child two years old, who was playing with other children in the siding. He brought an action for *solatium* against his employers, in which he averred fault in respect that they had failed to provide a shunter to assist him in backing the trucks, and had left the siding unfenced, although there were houses belonging to them and let to their workmen immediately adjoining, and the only access to a bleaching-green used in connection with these houses was across the siding. *Held* that the action was relevant.

1ST DIVISION. Sheriff of Fife and Kinross.

JOHN INNES, engine-driver, Lumphinnans, Fife, brought an action in the Sheriff Court at Fife, at Dunfermline, against the Fife Coal Company, Limited, concluding for £250 as *solatium* for the death of his son.

The pursuer averred that in connection with the defenders' works at Lumphinnans there was a branch line of railway belonging to

[1] 24 R. 55.

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them running from their No. 1 pit to the North British Railway. Close to the pithead there was a siding off the branch line of railway used by the defenders for shunting operations. Adjoining the siding, and in close proximity to it, were two rows of miners' houses occupied at a rent by the pursuer and other workmen in the employment of defenders. The siding was on a level with the adjoining ground, and was entirely unfenced. On the other side of the siding from the houses was a bleaching-green in connection with the houses, the only access to which was across the siding. The children in the houses were in the habit of playing on the bleaching-green, and on and near the siding, a fact which was known to the defenders and their managers. On 30th March 1900, in accordance with instructions, the pursuer proceeded to make up a race of waggons of double coals, and, in order to do so, ran his locomotive and four waggons of double coal along the siding. No guard or shunter was provided. At the time when the shunting operations were being carried on a number of children belonging to workmen in the employment of the defenders, among them James Innes, aged two years, son of the pursuer, were playing about on the siding. It was impossible, owing to the curve in the siding, and to his view being in consequence obstructed by the waggons in front of him, for the pursuer to see the children who were playing about. James Innes, son of the pursuer, was caught between the upper rail of the siding and the front wheel of the foremost waggon, and was so severely injured that he shortly afterwards died.

"Said accident was caused through the negligence of the defenders in respect that they did not provide a suitable and sufficient fence to said siding. . . . Further, in the absence of a sufficient fence, it was the defenders' duty to have appointed a guard or shunter to superintend or take charge of said shunting operations, and to make certain that the line was clear for the passage of waggons."

The defenders denied fault, and averred that the accident was due to the pursuer's carelessness.

On 6th July 1900 the Sheriff-substitute (Gillespie) allowed a proof.

On appeal the Sheriff (Chisholm) adhered.

The pursuer appealed to the Court of Session, and moved for an order for issues.

Argued for the respondents;—(1) The action was irrelevant. (2) As the pursuer's own act had caused the accident, he was not entitled to *solatium*. The maxim *volenti non fit injuria* applied.[1]

Counsel for the appellant were not called upon.

LORD PRESIDENT.—The only question which we have at present to decide is whether this case should be dismissed as irrelevant, or whether it should be sent to a jury. We have no right to anticipate what the evidence may be—we can only consider whether a relevant case is stated on the record. The material allegations of the pursuer are that he, being an engine-driver in the employment of the defenders, was shunting his locomotive with four waggons along a siding, which was open and unfenced, that he had no guard or shunter associated with him, that some children were playing on and near the siding, one of them being the pursuer's own

[1] Membery v. Great Western Railway Co., May 14, 1889, 14 A. C. 179, *per* Lord Bramwell.

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son, aged two years, and that this child was caught between a rail and one of the waggons which was being pushed by the engine, and received injuries from which he died. In close proximity to the siding there were certain houses, let by the defenders to their workmen, one of them to the pursuer. It appears to me that the defenders must, in letting these houses to their workmen, be taken to have been aware that the ordinary incidents of occupation by persons of the working class would occur there. The siding was not fenced, and even if there had been nothing more in the case, I think that we could not, in the absence of evidence, have held that the children living in these houses were trespassers when they played on or near to the siding. But the pursuer further avers that there was on the other side of the siding from the houses a bleaching-green used by the persons occupying them, and that the only access to it was across the siding. Under these circumstances, it was not unnatural that the persons living in the houses and their children should frequently cross the siding. I do not think that the parents of the children were chargeable with neglect in not preventing them from playing near to or on the siding, especially as the defenders in letting their houses to their workmen must be taken to have been aware of the ordinary family conditions of persons of that class, who cannot keep servants to look after their children.

Accordingly, if a child of another workman had been killed on the occasion in question, I think the defenders would have had no answer to a claim against them, and if this be so, the only remaining question arising on the pursuer's averments is whether the fact that he is the father of the child who was killed should prevent him from obtaining *solatium*. Taking the case upon his averments, I do not think that this should debar him from obtaining an issue. It is true that the defenders allege that the pursuer drove his waggons backwards with too great force, and also that a shunter was associated with him, but these allegations cannot affect the relevancy of the pursuer's statements, although if proved at the trial they may have a very material, possibly a determining, effect on the verdict.

On the whole matter, and taking the case as stated by the pursuer on record, I do not think that we would be justified in preventing it from going before a jury.

LORD ADAM and LORD KINNEAR concurred.

LORD M'LAREN was absent.

THE COURT ordered issues.

P. R. M'LAREN, Solicitor—DAVIDSON & SYME, W.S.—Agents.

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Rose v. Cameron's Executor.

JOHN ROSE AND OTHERS, Claimants and Real Raisers (Appellants).—*Campbell, Q.C.—Kennedy.*

DONALD CAMERON (Cameron's Executor), Claimant and Respondent.—*Dundas, Q.C.—Fleming.*

Donation—Donatio mortis causa—Deposit-receipt—Delivery—Expectation of death.—A took a deposit-receipt from a bank in these terms,—"Received from A and B (payable to either or survivor), £1000 to their credit." The deposit-receipt was found in A's repositories at his death.

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Evidence on which *held* that no donation *mortis causa* had been proved.

Question whether delivery is essential to donation *mortis causa*.

Opinion (*per* Lord Young) that, in order to constitute donation *mortis causa*, it is essential that the gift be made in expectation of death, and that there be delivery or its equivalent.

2D DIVISION. Sheriff of Ross, Cromarty, and Sutherland.

KENNETH CAMERON, sometime carpenter at Lews Castle, Stornoway, died at Dantryfail, Achterneed, Ross and Cromarty, on 24th October 1899. Dantryfail was the residence of his niece, Mrs May Frank, with whom he had latterly resided. After his death there were found, pinned together, in a desk belonging to the deceased, in the room which he occupied at Dantryfail, three deposit-receipts by the National Bank of Scotland, all dated Stornoway, 10th May 1899, in these terms, viz.:—(1) "Received from Mr Kenneth Cameron, Lews Castle, Stornoway, and Mr John Rose, farmer, Strathpeffer (payable to either or survivor) One thousand pounds sterling to their credit in deposit-receipt with the National Bank of Scotland, Limited." (2) "Received from Mr Kenneth Cameron, Lews Castle, Stornoway, and Mrs May Frank, Strathpeffer (payable to either or survivor) One thousand pounds sterling to their credit in deposit-receipt with the National Bank of Scotland, Limited." (3) "Received from Mr Kenneth Cameron, Lews Castle, Stornoway, and Mr William Cameron, his nephew (payable to either or survivor), Six hundred and fifty pounds sterling to their credit in deposit-receipt with the National Bank of Scotland, Limited." John Rose, Mrs May Frank, and William Cameron were nephews and a niece of the deceased.

In January 1900 the said John Rose, Mrs May Frank, and William Cameron, raised an action of multiplepoinding in the Sheriff Court at Dingwall, the fund *in medio* being the amount of the deposit-receipts, viz., £2650.

The pursuers claimed the whole fund *in medio*, averring that the deceased "intended to make, and did in point of fact make, a donation to them of the respective sums represented by the deposit-receipts."

Donald Cameron, Kenneth Cameron's executor-dative, claimed the whole fund *in medio* for distribution among the deceased's next of kin, averring that the deposit-receipts formed part of his estate at the date of his death.

A proof was led.

It appeared that the deposit-receipts were found in the deceased's repositories, and that they had never been shewn or mentioned to the alleged donees, or to anyone, by the deceased. The receipts had been taken in similar terms by the deceased eight years previously, and renewed annually down to 1899. It did not appear that the deceased, down to his death, was ever otherwise than in good health.

Kenneth Cameron, a brother of Mrs May Frank, deponed that he and the deceased had had a conversation one evening, suggested by a paragraph in a newspaper, as to a disputed will, in the course of which deceased said,—"There are ways of a man leaving his money to whom he likes without making a will; by making a will the Government wants so much duty"; and that on the following morning he said,—"I am leaving your sister Mrs Frank well off. I am leaving my money for your sister, and for John Rose and William Cameron."

The claimant William Cameron deponed that on one occasion the deceased told him,—"I have lots of money, and in different places. I said, 'That was very good.' He said, 'Yes; I am going to leave

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some money for you.' . . . From what he said I knew he had at least £1000. He did not say how he was leaving it. He did not say he was leaving money to any other body."

Mrs May Frank deponed,—" . . . I have the farm of Dantryfail, and deceased visited me there once before he came to live with me. He wrote me frequently since I went to Dantryfail. He assisted me to rebuild the house. We were on very friendly terms. In July of 1897 he came to live with me permanently from Stornoway. We had repeated conversations about money. . . . My uncle was three or four months with me before he spoke about money. It was I who commenced the conversation. I told him that I thought he should make his will so as to save bother after his death. He said that he did not make a will, but that he had made out three bills in favour of three parties whom he was leaving his money to. He did not mention the names of the parties, but he held up his hands, and pointed and said that there were three, one out of each family of his sisters' and brothers' families. . . . He was about a year in the house before he mentioned their names. He held up his hand and said he made a bill with John Rose's name and his own, and my name and his own, and William Cameron's name and his own, and that we would get possession of it at his decease. . . ." She further deponed that on another occasion she said to him "to make things secure so as not to be a bother after his death, and he said,—'Will you do as I tell you?' I said,—'If I can, I will.' He said,—'Go to your banker for what is left for you, and get your money; and let others do the same, for you don't need to tell anybody what is left for you.'" She further deponed that the deceased had never told her the precise terms or contents of the bills, and had never shewn them to her.

John Rose deponed that the deceased had given him £200 before his death (which, however, he did not claim), and that when he gave it he added,—"I am leaving you a few hundreds more besides that. . . . He said he would leave a few hundreds more than that, but he did not mention the sum. I have no recollection of any other conversation with him about the money. . . ."

On 24th July 1900 the Sheriff-substitute (Shennan) pronounced an interlocutor, which, after finding that the pursuers had failed to prove facts and circumstances shewing on the part of the deceased an intention of direct *de præsenti* donation, proceeded,—"Finds in law that the sums contained in the said deposit-receipts were *in bonis* of the deceased at the time of his death, and fall to his executor: Therefore repels the claim for John Rose, Mrs May Frank, and William Cameron, and ranks and prefers the claimant Donald Cameron, deceased's executor, to the whole fund *in medio:* Finds all parties entitled to their expenses out of the fund *in medio.*"

The pursuers and real raisers appealed to the Court of Session, and argued;—Delivery was not essential.[1] Nor was it essential that the gift be made in expectation of death.[2] The evidence, particularly of Kenneth Cameron, shewed that the deceased intended a gift otherwise than by will. The deposit-receipts not being good as wills, the interpretation which gave effect to them as evidence of donation was to be preferred to the interpretation which made them of no effect.

[1] M'Farlane's Trustees v. Miller, July 20, 1898, 25 R. 1201.
[2] Blyth v. Curle, Feb. 20, 1885, 12 R. 674.

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Unless, therefore, delivery was necessary, which it was not, donation had been proved.

Counsel for the defender and respondent were not called on.

LORD JUSTICE-CLERK.—It is unnecessary to go into many of the questions discussed in this Court, especially as to whether delivery is or is not requisite in order to constitute donation *mortis causa*. This case depends upon the evidence led. The only elements in the case not in dispute are that these deposit-receipts are made out in favour of the pursuers, and that they were not in their possession at the date of the testator's death. Accordingly, it is necessary that the pursuers' case should be supported by evidence of intention on the part of the deceased of *de præsenti* donation. Without going into the evidence I think that its effect is to shew, not that the deceased intended to make a donation, but that he intended to make a testamentary disposal of parts of his estate in such a way as to evade paying Government duty.

On the whole matter I have come to the same conclusion as the Sheriff-substitute.

LORD YOUNG.—I also concur in the judgment of the Sheriff-substitute, which I think clearly right. I have referred to Snell's Principles of Equity, and I find that at the very commencement of his dealing with the subject of *donatio mortis causa* he says (twelfth edition, p. 197)—"It is essential to the validity of a *donatio mortis causa* that it should be made 'in the expectation of death'; and such a gift being always made on the condition that the gift shall be absolute only in case of the donor's death, it is revocable during his life—so that, if he recover from the illness or resume possession of the gift, it will be defeated. Also to the validity of a *donatio mortis causa* there is the further and all essential requisite of delivery; for if the intention be expressed in writing, but no delivery takes place, the document, even though signed by the donor, will be ineffectual as a *donatio mortis causa;* and although it might possibly be good as a declaration of the trust, still that is not at all likely, at least in the general case; for what is clearly intended to operate in one way, and fails to do so, is not, as a rule, construed by the Court to operate in another way in favour of a volunteer; but if there is an effectual delivery the gift will be good although the writing should not be attested at all, and even although the gift should be unaccompanied with any writing whatever; and an antecedent delivery to the donee, although in the character of bailee and not of donee, will apparently suffice, if the quality of the possession is changed before the death." Now, if we apply this, in my opinion, correct statement of the law to the present case we find that it is not stated that the donor was anticipating death or was ever unwell when the donation was made, and the case as presented is therefore in the same position in point of law as if the granter of the deposit-receipt had been a young and vigorous man. Further, in order to constitute *donatio mortis causa* I am of opinion that delivery or its equivalent is necessary. Of course, a man may come under an obligation to give by a deed which is enforceable against him in his lifetime or against his executor after his death, and the

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Court will sustain an action founded on such an obligation, but a verbal statement of intention to give is not a thing which the Court will listen to or enforce. I think abundance of authority to that effect might be cited. Here we have no evidence of donation except that this old gentleman took out three deposit-receipts, each of them in name of himself and one of the pursuers, payable to either or survivor. The deposit-receipt may be a document expressing an intention to give a person a sum of money, but it is not a gift of that sum. The alleged donee is not asking the Court to protect him in anything he has got possession of. He has neither the money nor the document that would enable him to uplift the money. I agree with your Lordship that there is no evidence of any intention to make a donation. I think it plain on the evidence that what the old gentleman had in view was that on his death, if he had not devised the money otherwise, the sums in the deposit-receipts should be taken by the pursuers. But there was nothing to prevent him making a will and providing that the pursuers should not get the sums in question. But a will would not affect a donation *mortis causa*.

I am therefore of opinion that the Sheriff-substitute has come to the right conclusion in deciding that there is no evidence on which the Court can find that donation *mortis causa* or otherwise has been proved.

LORD TRAYNER.—I am also of opinion that the Sheriff-substitute's judgment is right. There have been a good many points treated on by Mr Kennedy on which I do not think it necessary to express any opinion. It is enough for the decision of this case to hold, as I do, that the appellants have failed to shew that the deceased made the donation in their favour on which their claim is based.

LORD MONCREIFF.—I am of opinion that the Sheriff-substitute has come to a sound conclusion. I think that it is unnecessary in this case to decide whether delivery is essential in order to constitute *donatio mortis causa*. The decisions on the point are not uniform, and any judgment in regard to it would require careful consideration. Even assuming that delivery is not necessary, I think it plain that there must be clear and complete evidence that the donor intended to make a donation *mortis causa*. I am of opinion that the pursuers have entirely failed to make that clear. On the evidence I am inclined to think that the deceased, in acting as he did, intended no more than to make bequests to the pursuers in such a way as to evade the Government duties on the legacies. He failed to carry out his intention, whatever it may have been, in such a way that legal effect can be given to it. He neither made a donation *mortis causa*, nor bequeathed effectual legacies. The sums in the deposit-receipts must therefore go to his executor.

THE COURT found in fact and in law in terms of the interlocutor appealed against, repelled the claim for John Rose, Mrs Frank, and William Cameron, and ranked and preferred Donald Cameron, as executor of the deceased Kenneth Cameron, to the whole fund *in medio*.

RONALD & RITCHIE, S.S.C.—MACKENZIE & BLACK, W.S.—Agents.

No. 55. MRS HELEN STRANG WATSON AND ANOTHER, Pursuers.—*M'Lennan—A. M. Anderson.*

Jan. 12, 1901. Watson v. North British Railway Co.

THE NORTH BRITISH RAILWAY COMPANY, Defenders.—*Salvesen, Q.C.—Grierson.*

Administration of Justice—Process—Jury Trial—Motion for new trial—Juryman in employment of successful party—Jury Trials (Scotland) Act, 1815 (55 *Geo. III. cap.* 42), *sec.* 6—"*Essential to the justice of the case.*"—In an action of damages brought against the North British Railway Company by the widow of a merchant who had been run over and killed on the line at Slamannan Station, a jury in Edinburgh returned a verdict for the defenders.

The pursuer moved for a new trial, on the ground that one of the jury was an employee of the defenders. The Court refused the motion, *holding* that the mere fact of one of the jury being an employee of the railway company did not make it "essential to the justice of the case" under section 6 of the Jury Trials (Scotland) Act, 1815, that there should be a new trial.

1ST DIVISION. Lord Kincairney.

MRS HELEN STRANG NASH or WATSON, Slamannan, widow of James M'Ghie Watson, merchant there, and his daughter, brought an action against the North British Railway Company concluding for payment of £2000 as damages for the death of Mr Watson.

The pursuers averred that Mr Watson was run over and killed at Slamannan Station on the defenders' line, and that the accident was due to the defective lighting of the station.

The case was tried before the Lord President and a jury, and resulted in a unanimous verdict for the defenders.

The pursuers afterwards ascertained that George Deans, Wellington Street, Portobello, who had served on the jury, was in the employment of the defenders. This was not known to the pursuers' or to the defenders' agent or counsel at the time of the trial. It appeared that Deans was employed in the engineer's department of the North British Railway, and that his main duties were to check gas and water meters. He had nothing to do with Slamannan Station, which was lighted by oil lamps. The number of persons employed by the North British Railway Company was about 18,500.

The pursuers moved for and obtained a rule for a new trial, on the ground that Deans had served on the jury.*

Argued for the pursuers;—It was essential to the justice of the case that there should be a new trial. The disqualification of one of the jury was a sufficient ground for setting aside a verdict.[1] Here the relationship of master and servant existed, and that was at common law sufficient to disqualify. Thus it was laid down by Lord Coke that that relationship was a ground of challenge *propter affectum*.[2] The pursuers were not bound to establish that the verdict was con-

* The Jury Trials (Scotland) Act, 1815, enacts (section 6)—"That in all cases in which an issue or issues shall have been directed to be tried by a jury, it shall be lawful and competent for the party who is dissatisfied with the verdict to apply to the Division of the Court of Session which directed the issue for a new trial, on the ground of the verdict being contrary to evidence, on the ground of misdirection of the Judge, on the ground of undue admission or rejection of evidence, on the ground of excess of damages, or of *res noviter veniens ad notitiam*, or for such other cause as is essential to the justice of the case."

[1] Bailey v. Macaulay and Others, July 11, 1849, 19 L. J., Q. B. 73; Sutherland v. Prestongrange Coal Co., March 2, 1888, 15 R. 494.

[2] Coke upon Littleton, 157, cited in Chitty's Archbold's Practice, 14th ed. i. 619.

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trary to evidence. It was "essential to the justice of the case" that there should be a new trial, not because the verdict was wrong, but because it had been arrived at in an illegal and incompetent manner. Nor were they bound to shew that the mind of the juryman was in fact biassed. Possibility of bias was enough, as in the case of declinature of Judges, or disqualification of Justices of the Peace or county councillors.[1] The English authorities were collected and discussed in the opinion of Lord Stormonth-Darling in *Blaik*,[1] and established that a decision could not stand where taken part in by any person who was disqualified by interest. [Lord Kinnear referred to *Wildridge* v. *Anderson*.[2]]

Argued for the defenders;—The pursuers appealed to the provision authorising a new trial for a cause essential to the justice of the case. They were therefore bound to shew that the justice of the case required a new trial, and they had not done so, because they did not dispute that the verdict was right. Apart from this, the interest alleged on the part of the juryman was merely nominal, and not a disqualification. No case at all approaching the present could be found. The only case in which a verdict had ever been upset on the ground of interest on the part of one of the jury was that of *Bailey* v. *Macaulay and Others*.[3] There the juryman was practically trying his own case. The passage by Lord Coke referred to by the pursuers related to the challenge of jurymen—an entirely different matter. *Sutherland* v. *Prestongrange Coal Company*[4] did not touch the present case, and the precise limitations of the doctrine on which that case was decided were shewn in *Hope* v. *Gemmell*.[5]

LORD PRESIDENT.—This motion for a new trial is made under section 6 of 55 Geo. III. c. 42, which enacts,—"That in all cases in which an issue or issues shall have been directed to be tried by a jury, it shall be lawful and competent for the party who is dissatisfied with the verdict to apply to the Division of the Court of Session which directed the issue for a new trial," upon certain specified grounds which are not applicable to the present case, "or for such other cause as is essential to the justice of the case." I quote the section because it appears to me that the success or failure of the motion must depend upon its provisions. The case might have been different if the objection to this juryman had been stated by way of challenge, but now the sole question is, whether the fact that he was at the time of the trial a servant of the defenders makes it "essential to the justice of the case" that there should be a new trial. The *onus* of shewing this lies upon the pursuers, and one would expect that persons maintaining such a proposition should be in a position to allege that the verdict was wrong as being contrary to the evidence, but in the present case the pursuers make no such allegation. Accordingly, their contention assumes the somewhat paradoxical form that because a particular juryman served on the jury, it is essential to the justice of the case that a right verdict should be set aside. I should have great difficulty in holding that after a jury

[1] Blaik v. Anderson, Dec. 20, 1899, 7 S. L. T., No. 302.
[2] Nov. 26, 1897, 2 Adam, 399, 25 R. (Just. Cases) 27.
[3] 1849, 19 L. J., Q. B., 73.
[4] March 2, 1888, 15 R. 494.
[5] Nov. 17, 1898, 1 F. 74.

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trial, when it is admitted, or not disputed, that the verdict was right, it could be challenged on the ground of being contrary to the justice of the case. And I may add that I think the pursuer's counsel exercised a wise discretion in advising that the verdict of the jury could not be assailed as being contrary to the evidence. I presided at the trial, and I have no hesitation in saying that the pursuers entirely failed to establish any fault on the part of the defenders or their servants—a consideration which might of itself be sufficient for the disposal of this motion. But as the case has been fully argued, I may express my opinion on the question raised as to the alleged disqualification of the juryman, keeping in view that the point is, whether his presence on the jury makes it essential to the justice of the case that a right verdict should be set aside. The question comes to be whether the fact that this juryman was in the service of the defenders, *i.e.*, one of an organisation of about 18,500 men, gave him such an interest in the company's success, that he would be likely to endeavour to obtain a verdict in their favour whether they were right or wrong, instead of fairly trying the case as he was sworn to do. It would be a very strong thing to hold that the mere fact of a man being a member of such an organisation, gave him such an interest in the company as would or might lead him to return a verdict contrary to the evidence in order to benefit the company. If the subject-matter of the trial had been one in respect of which the particular servant had a personal duty—if, for instance, in this case the man who was responsible for the lighting of Slamannan Station when the accident occurred, had sat on the jury, it might have been more easy to maintain that he might be biassed by personal interest, but in the present case the juryman had no duties with regard to that station—indeed, he had never seen it.

It appears to me that none of the grounds for a new trial enumerated in section 6 of 55 Geo. III. c. 42, exist in this case, nor do any of the authorities cited support the pursuers' contention. In the English case of the provisional committee man[1] the juryman was substantially sitting as a judge in his own case, because if the defendants, who were also members of the provisional committee, were liable, so was he. Again, the case of *Sutherland* v. *Prestongrange Coal Co.*[2] was pressed upon us, but the circumstances of it were entirely different from those of the present case. There a juryman, while sworn to give a verdict according to the evidence led before the jury, went on an intervening day and inspected the colliery at which the accident had taken place, interrogating the persons whom he found there. He conducted a trial on his own account, came back to the Court armed with the results of his inquiry, and in all probability pressed upon the rest of the jury the views which he had formed in that extra-judicial proceeding. The Court considered that there would be a great risk of a failure of justice where the juryman had held what was really a trial within a trial. In contrast to this case is that of *Hope* v. *Gemmell*,[3] relative to a right of way over a road near Inveresk, where, on the evening of one of the days of the trial, a juryman walked over and looked at the road, and a

[1] Bailey, 19 L. J., Q. B. 73.
[2] 15 R. 494.
[3] 1 F. 74.

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motion was made for a new trial on that ground. The Court there, distinguishing the case from that of *Sutherland* v. *Prestongrange Coal Co.*,[1] held that the mere fact of a juryman having walked over and looked at the road in question was not likely to bias his judgment, and that it was not essential to the justice of the case that there should be a new trial. Other authorities were referred to in the argument, but they seem to me to be entirely different from the present case.

On these grounds I am of opinion that no sufficient cause has been shewn for setting aside the verdict of the jury, especially as it is not alleged that that verdict was wrong.

Something was said as to the duty of the parties to challenge persons called to serve on a jury who may have an interest in the case. I do not know what the practice is now, but the agents used to make inquiries in regard to the jurymen before the trial, and to instruct counsel to challenge those to whom they objected when they were called to enter the jury-box. I do not wish to make it a ground of judgment that this was not done in the present case, but I think it would be very undesirable to encourage a practice of not making inquiries as to the jurymen summoned with a view to challenging those who might be regarded as objectionable when they were called to serve, and afterwards seeking to have the verdict set aside on the ground that one of them was interested in the case.

LORD ADAM.—I think it is very material to keep in view the stage at which this motion is made. There has been a trial, and a verdict returned, and, as your Lordship has pointed out, certain grounds are set forth in section 6 of 55 George III. cap. 42, on which a new trial may be granted. I need not enumerate the various grounds; they wind up "or for such other cause as is essential to the justice of the case." It is under that clause of the section that this motion is made, and the party making it must shew that it is essential to the justice of the case that there should be a new trial. I do not see how Mr M'Lennan can succeed unless he shews that the presence on the jury of a person employed by one of the parties makes the whole trial incompetent. It may very well be that that might be the result if a juryman sat who was legally disqualified, and the pursuer's case might be different if he could establish that the mere fact of employment, no matter whether the employee be one of a large body or not, makes it incompetent for him to sit on a jury in a case in which his employer is interested. But there is no authority for that; the only authority cited is Lord Coke, who says that it is a competent ground of challenge of a juryman that he is a servant of one of the parties. I should think Lord Coke was speaking of a time when the relationship of master and servant was a very different thing from that which exists between a railway company and its employees. But all he says is that the relationship is a good ground of challenge, and the question whether the fact that the juryman is one of a body of 18,500 railway servants is necessarily of itself a good ground of challenge is a question which will never arise, because such a challenge, if made, would never be disputed.

[1] 15 R. 494.

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If, then, it was not incompetent that the juryman should sit, in the sense of his presence vitiating the whole proceedings, is a new trial essential to the justice of the case? In the English case of *Bailey* v. *Macaulay and Others*[1] the juryman was practically a party to the case, because a verdict against the defendants would have been really a verdict against him. That case comes under the head of a cause essential to the justice of the case. But this is not a case of the same kind; the interest here is of the most shadowy description. What interest has a clerk in a railway company that the company should succeed in an action of damages brought against them? But here comes in the importance, as your Lordship has remarked, of considering the ground on which alone a new trial could here be granted. It must be essential to the justice of the case. Now, the verdict was right; that is not disputed, and it is not said that the presence of Deans on the jury induced a wrong verdict. How can it then be essential to the justice of the case that it should be set aside?

The case of *Sutherland* v. *Prestongrange Coal Company*[2] was a case where a juryman failed to fulfil his oath to try the case according to the evidence led, and conducted a trial for himself, and saw how the operations which resulted in the accident were carried out. That was held to justify a new trial, but, in contrast to that case, where in *Hope* v. *Gemmell*[3] a juryman went to walk over and look at a road which was in question in a right of way case, the motion for a new trial was refused. I do not think these cases bear out the pursuers' contention, and agree with your Lordship that the rule should be discharged.

LORD KINNEAR.—I agree with your Lordships, and think it is necessary to distinguish two entirely different grounds on which a motion of this kind may be made. If, on the one hand, it is said that the juryman who had sat was disqualified by some statutory enactment or some fixed rule of law, then it might be necessary to set aside the proceedings, even although it were admitted that the jury had arrived at a right verdict. The absolute disqualification of one of the jurymen might possibly vitiate the whole proceedings, and I should be disposed to think that if a juryman had such an interest in the case as to bring him within the rule stated by Lord Stormonth-Darling in *Blaik* v. *Anderson*,[4] that no man can be judge in his own cause, or if he had an interest essentially the same as that which he was trying, as in the case of *Bailey*,[1] it may be that such cases would fall within the same rule. But it is not said, and could not be said, that there is any statutory enactment, or any fixed rule of law, to exclude one out of a body of 18,500 persons in the employment of a railway company from sitting on a jury in a case to which the company is a party. That is not even suggested, and therefore the pursuers have to fall back on the provision of the statute, whereby a new trial may be granted if it is essential to the justice of the case. Now, in considering a motion on that ground, we are in a totally different position, because the first thing the unsuccessful party has to do is to shew that it is essential to the justice of the case that there should be a new trial. Now, on that point there is a difficulty to begin with, because it is not disputed, and is

[1] 19 L. J., Q. B. 73. [2] 15 R. 494. [3] 1 F. 74. [4] 7 S. L. T., No. 302.

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stated by your Lordship as the Judge who presided at the trial, that the verdict was perfectly just. By that I understand not merely that the verdict was one which we would not have upset as contrary to evidence, but that your Lordship concurred in it as the only verdict at which the jury could reasonably have arrived. I share the difficulty expressed by your Lordships in seeing how it can be essential to the justice of any case to set aside a just verdict, and order a new trial which may possibly result in an unjust verdict. But I am not disposed to rest my judgment exclusively upon that. It is quite right that we should consider the general question raised. I have no doubt that an interest less than that of a party to the cause, or one essentially the same, might be sufficient to induce the Court to set aside the verdict if it were shewn that that interest was such as would be likely to bias the mind of the juryman. But it is out of the question to say that in this case there is any interest of that kind. The juryman was one of 18,500 servants of the defenders. He was a clerk, whose duties had nothing to do with the workings which led to this accident, or the place at which it happened. I am quite unable to see that his relation to the defenders was such as necessarily, or even probably, to bias his mind. In all the cases in which the question has been considered whether interest in the cause disqualified persons in a judicial position, it has been held that there must be a real and substantial interest, and that a merely technical and nominal interest will not disqualify. All the authorities on that point are considered in a case to which I referred in the course of the argument, *Wildridge* v. *Anderson*.[1] It was there held that a nominal interest, that of an *ex officio* trustee, was not sufficient to disqualify a magistrate from trying a case of malicious destruction of the trust property. A question of a similar kind was raised in a case between the Lord Advocate and the Commissioners of Supply of Midlothian, in which one of the Judges proposed declinature, on the ground that he was himself a Commissioner, and there the Court held that the interest alleged had no real substance, could not possibly affect the judicial mind, and declined to sustain the declinature.

On the whole question, I agree with your Lordships that there is no technical reason, and there cannot be any just or equitable reason for setting aside a just verdict.

LORD M'LAREN was absent.

THE COURT discharged the rule, and applied the verdict.

DONALDSON & NISBET, S.S.C.—JAMES WATSON, S.S.C.—Agents.

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JAMES PORTEOUS, First Party.—*Johnston, Q.C.—Cullen.*
ALEXANDER PRICE HAIG, Second Party.—*Rankine, Q.C.—Constable.*

Servitude—Thirlage—Statutory Commutation—Dry Multures—Discontinuance of mill—Thirlage Act, 1799 (39 *Geo. III. cap.* 55).—*Held* that (1) commuted payments in lieu of thirlage and services fixed by a verdict under the Thirlage Act, 1799, and (2) dry multures continue to be exigible notwithstanding the discontinuance of the mill.

[1] 2 Adam, 399, 25 R. (Just. Cases) 27.

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1st Division.

Spottiswoode v. *Pringle*, July 14, 1849 (unreported but noted in Rankine, Land-Ownership (3d ed. p. 400), *followed*.
Forbes' Trustees v. *Davidson*, July 14, 1892, 19 R. 1022, *distinguished*.

THIS was a special case in which the question for the decision of the Court was whether the proprietor of lands who had a title to a thirl mill which had ceased to exist was nevertheless entitled to exact payment of (1) the sums commuted for thirlage by a verdict obtained under the Thirlage Act, 1799 (39 Geo. III. cap. 55),* and (2) dry multures.

The parties to the case were James Porteous of Turfhills in the county of Kinross, first party, and Alexander Price Haig of Blairhill, second party.

The following facts were stated in the case:—

"(1) The first party is heritable proprietor of the lands of Turfhills in the county of Kinross, conform to disposition in his favour, dated 10th and recorded 12th November 1892. Included in the said disposition there is a conveyance of Kinross Mill, which, however, at the date thereof was no longer in existence. The said mill was formerly a thirl mill, and the lands of Carsegour, Middle Tillyochie, and East Tillyochie, of which the second party is proprietor, were formerly astricted thereto. . . .

"(3) In 1806 and 1809 petitions were presented under the said Act [Thirlage Act, 1799] by, *inter alios*, the proprietors of the lands of Carsegour and the Tillyochies for commutation of their thirlage. The rights of thirlage stated by the applicants consisted principally of multures and knaveships, but also included services in assisting in building and repairing certain parts of the mill house, maintaining the roof, casting the dam, upholding certain parts of the troughs, and driving millstones, which services the applicants had been in the practice of rendering. The whole of these were found by the Sheriff in terms of the statute relevant to pass to the knowledge of the juries. After certain procedure, verdicts were finally pronounced by the juries on 23d November 1807 and 9th January 1810 respectively, commuting the thirlage of, *inter alia*, the said lands of Carsegour, Middle Tillyochie, and East Tillyochie, and the verdicts were registered as directed by the statute in the Particular Register of Sasines, &c., for Kinross on 3d December 1807 and 11th January 1810 respectively.

"(4) After the commutation had been made as aforesaid, the owners of the said mill, which came to be held along with the estate of Turfhills, received payment from the predecessors of the second party, proprietors of the astricted lands, of the value of the commuted multures in lieu of the old multures, sequels, and services. In or about the year 1884, Kinross Mill was burnt down. In 1890, part of the site thereof was sold by the author of the first party under reservation of all thirlage rights. In 1892, the remainder of the site, along with adjoining mill lands, passed to the first party under the disposition above referred to. The first party had sufficient space on the remaining part of the old site and the adjoining mill lands on which to erect a new mill, but he has at present no intention of doing so. On 10th March 1900, the first party obtained an assignation of the verdicts obtained on 23d November 1807, and 9th January 1810.

"(5) Payment of the commuted multures and services continued

* The sections of this Act are fully narrated in the opinion of the Lord President, *infra*, p. 351.

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to be made by the second party and his predecessors to the owners of the mill and the site thereof up till 1897. Since that time, the second party has refused to make the said payments, on the ground that they are no longer due.

"(6) The second party has also, since the said date, refused to make payment of the sum which was previously paid by the proprietors of Carsegour to the proprietors of Kinross Mill as dry multure. The said dry multure was paid for bear growing on the lands of Carsegour, which were free from ordinary thirlage in regard to the said crop. In respect of the 14th section of the Act 39 Geo. III. c. 55, the said dry multure was not referred to the juries in 1807 and 1810. It consisted of 3 firlots of oats and 2 firlots of bear, and had been paid from time immemorial.

"(7) The second party admits that the first party has a valid progress of titles to the mill and mill lands; and that, as regards his title to demand and receive the commuted payments and dry multure—assuming these to be still exigible—no other exception can be taken to the previous titles than that which arises upon the disposition in favour of the first party.

"(8) The first party contends that he and his assignees and successors in the said commuted payments and dry multures are entitled to exact the same in all time coming, and that such right does not depend upon the existence of the said mill. As regards both the commuted payments and the dry multure, the second party contends that these are of the nature of servitudes, which are necessarily extinguished, or, at anyrate, which cannot be enforced, by reason of the destruction of the mill, which was the dominant tenement. With respect to the commuted payments, the second party further contends that, as these were partly fixed in commutation of the suckener's services in upholding the mill and its appurtenances, the millowner is bound to uphold the mill as a condition of exacting them."

The parties submitted for the opinion and judgment of the Court the following question of law:—"Is the first party entitled to exact payment from the second party (1) of the sums commuted in the said verdicts so far as applicable to the second party's lands, and (2) of the dry multure applicable to the said lands?"

Argued for the first party;—(1) The statutory commutation operated a complete extinction of thirlage. There was no condition imposed by the statute that the mill should be maintained, and that was natural, seeing that the commuted annual payments represented the value of the thirlage to the proprietor of the mill, that was, the multures, less the expense of grinding the grain and keeping up the mill—in other words, the net profit made by him. Accordingly, if he had still to keep the mill going—making no gain by doing so—he would clearly be getting less than the statute intended to give him. The language of the statute throughout left no room for doubt that not only multures as such but the servitude of thirlage—for it was to all intents a servitude—was meant to be abolished once and for all by the verdict of the jury. The effect of a verdict having been obtained was to give each suckener the right to grind his corn where he liked, to build a mill for himself if he liked. If he were absolutely free, why should the mill owner not be equally free? The reason of the thing was altogether against the continuance of the mill, which would be of no advantage to anyone. It would be absolutely anomalous to impose or continue on the mill owner an obligation which no one had

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an interest to enforce. That would be directly contrary to the scope and spirit of the statute, which was a remedial one, and ought to be liberally construed.[1] The case of *Spottiswoode*,[2] to which the second party had called the attention of the Court, was precisely in point. The case of *Forbes*,[3] on the other hand, was concerned with the construction of a private contract, not of the statute. (2) In the case of dry multures, the existence of a mill was immaterial. The right to pay and to exact them was founded on prescription, and once established neither party could go back to the right of thirlage. By their actings parties had effected a commutation similar in result and just as permanent as the statutory commutation. There was nothing in reason or equity to suggest that there was any obligation to keep a going mill as a condition of exacting dry multures, a condition which would be barren of benefit to either party.[4]

Argued for the second party;—(1) It was a question whether thirlage was strictly a servitude,[2] but whatever its proper legal quality might be, it seemed reasonable that before a mill owner could exact mill dues or their equivalent, he should shew that he had a mill to which the suckener could bring his grain. It might be that a suckener could not insist on a mill being built, but it did not follow from that that the mill owner if he sought to exact payment of thirlage or commuted dues was not bound to keep his mill going. The subsumption of the statute appeared to be that a mill should continue in existence. Clearly the commuted payments could not be fixed unless there was a mill going at the time when the jury gave their verdict. There was no provision in the statute relieving the mill owner from continuing to keep it going. The statute did not in terms enact the permanent abolition of the servitude of thirlage. That did not appear to be its object at all, but only the valuation or ascertainment by a jury of the proper amounts to be paid annually by the sucken ers. The servitude remained, but the form in which it was prestable was changed. The statute did not create any new right in its place, or real burden on the thirled lands or otherwise. If the old right still remained, then the old conditions also remained, including that of keeping a mill. The second party had examined the session papers in the case of *Spottiswoode*,[2] and that decision was undoubtedly against the present contention. On the other hand, the more modern case of *Forbes*[3] was very clearly in favour of it, for although the question there did not arise directly under the statute, and the decision turned on the terms of a deed of submission, still there was no distinction in principle between the present case and it. (2) Dry multures, again, were founded on the continued payment for the prescriptive period, and obviously if before the forty years expired the mill ceased to exist, the payments would also cease to be made. In the same way after the prescriptive period had passed the continued existence

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[1] Duchess of Sutherland v. Reid's Trustees, Feb. 25, 1881, 8 R. 514, Lord President, p. 516.

[2] Spottiswoode v. Pringle, July 14, 1849, not reported, but noted by Rankine, Land-Ownership (3d ed.) p. 400, Hope Collection of Session Papers, 359, No. 11.

[3] Forbes' Trustees v. Davidson, July 14, 1892, 19 R. 1022.

[4] Stair ii. 7, 16; Ersk. Inst. ii. 9, 28; Bell's Prin. sec. 1018; Kinnaird v. Drummond, 1675, M. 10,862; Stuart v. Erskine, 1741, M. 16,020 Elphinston v. Leith, 1749, M. 16,026.

of the mill was a necessary condition of the right to exact them, otherwise there being no dominant tenement, and there being no writing, the party claiming them had no title. Prescription merely fixed the customary amount, being a liquidation by consent of the thirlage dues, but that was on the assumption that something had to be paid. If there was no title, then nothing fell to be paid.

At advising,—

LORD PRESIDENT.—The first and most important question is whether a commutation under the Act of 39 Geo. III. cap. 55, such as was effected by the verdicts of 23d November 1807 and 9th January 1810, and the registration of them in the Register of Sasines, operates as an extinction of the servitude of thirlage *quoad* the lands of the heritors, or merely as a liquidation or ascertainment of the amounts to be paid annually by them in respect of that servitude upon the footing that it still continues to exist? The solution of the question depends upon the terms of the Act, which I shall now consider.

The Act proceeds upon the preamble that it is found by experience that the servitude of thirlage, and right to mill services incident thereto in Scotland, are very unfavourable to the general improvement of the country, by checking the industry of the occupiers of the ground, and by occasioning troublesome and expensive litigation, and that it is highly expedient that it should be allowed to persons subject to such servitude to compensate, or to commute, the same by a fixed annual payment in lieu and satisfaction of the right of thirlage, and of services, prestations, and restrictions thereto incident or pertaining, and in some cases to make an entire and complete purchase of the same for a fair and adequate price. This preamble would lead one to expect that provision would be made by the enacting clauses of the Act for putting an end to a servitude which produced such injurious results, either in consideration of a fixed annual payment, or of a sum down, and this appears to me to be the effect of these clauses.

Section 1 enacts that it shall and may be lawful for the proprietors of any lands or tenements thirled or astricted to any mill in Scotland, or to the proprietor of any mill to which the lands or tenements of any person are thirled or astricted, who shall be desirous to have such thirlage or astriction changed or commuted into an annual payment, to apply to His Majesty's Sheriff or Steward-Depute of the county or stewartry in which such lands or tenements and mills are situated, or to his substitute, by a petition setting forth his or their desire, and specifying the lands and tenements so thirled, which he or they is or are desirous should be freed from such thirlage. The words "changed or commuted into an annual payment," and "should be freed from thirlage," seem to me to point plainly to an extinction of the servitude, not merely to a liquidation of the amount payable upon the footing of its remaining in force.

Provision is made for an assize being summoned after certain preliminary procedure, who shall constitute a jury for the determination of the annual value of the thirlage, services, and prestations, and after hearing evidence, the jury shall by their verdict or determination "fix and ascertain the amount of such annual payment in grain of such kinds and in such quantity and amount as to the said jury shall appear to be a just, fair, an

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MRS HELEN STRANG WATSON AND ANOTHER, Pursuers.—*M'Lennan—A. M. Anderson.*

THE NORTH BRITISH RAILWAY COMPANY, Defenders.—*Salvesen, Q.C.—Grierson.*

Administration of Justice—Process—Jury Trial—Motion for new trial—Juryman in employment of successful party—Jury Trials (Scotland) Act, 1815 (55 *Geo. III. cap.* 42), *sec.* 6—"*Essential to the justice of the case.*"—In an action of damages brought against the North British Railway Company by the widow of a merchant who had been run over and killed on the line at Slamannan Station, a jury in Edinburgh returned a verdict for the defenders.

The pursuer moved for a new trial, on the ground that one of the jury was an employee of the defenders. The Court refused the motion, *holding* that the mere fact of one of the jury being an employee of the railway company did not make it "essential to the justice of the case" under section 6 of the Jury Trials (Scotland) Act, 1815, that there should be a new trial.

1ST DIVISION. Lord Kincairney.

MRS HELEN STRANG NASH OR WATSON, Slamannan, widow of James M'Ghie Watson, merchant there, and his daughter, brought an action against the North British Railway Company concluding for payment of £2000 as damages for the death of Mr Watson.

The pursuers averred that Mr Watson was run over and killed at Slamannan Station on the defenders' line, and that the accident was due to the defective lighting of the station.

The case was tried before the Lord President and a jury, and resulted in a unanimous verdict for the defenders.

The pursuers afterwards ascertained that George Deans, Wellington Street, Portobello, who had served on the jury, was in the employment of the defenders. This was not known to the pursuers' or to the defenders' agent or counsel at the time of the trial. It appeared that Deans was employed in the engineer's department of the North British Railway, and that his main duties were to check gas and water meters. He had nothing to do with Slamannan Station, which was lighted by oil lamps. The number of persons employed by the North British Railway Company was about 18,500.

The pursuers moved for and obtained a rule for a new trial, on the ground that Deans had served on the jury.*

Argued for the pursuers;—It was essential to the justice of the case that there should be a new trial. The disqualification of one of the jury was a sufficient ground for setting aside a verdict.[1] Here the relationship of master and servant existed, and that was at common law sufficient to disqualify. Thus it was laid down by Lord Coke that that relationship was a ground of challenge *propter affectum.*[2] The pursuers were not bound to establish that the verdict was con-

* The Jury Trials (Scotland) Act, 1815, enacts (section 6)—"That in all cases in which an issue or issues shall have been directed to be tried by a jury, it shall be lawful and competent for the party who is dissatisfied with the verdict to apply to the Division of the Court of Session which directed the issue for a new trial, on the ground of the verdict being contrary to evidence, on the ground of misdirection of the Judge, on the ground of undue admission or rejection of evidence, on the ground of excess of damages, or of *res noviter veniens ad notitiam*, or for such other cause as is essential to the justice of the case."

[1] Bailey v. Macaulay and Others, July 11, 1849, 19 L. J., Q. B., 73; Sutherland v. Prestongrange Coal Co., March 2, 1888, 15 R. 494.

[2] Coke upon Littleton, 157, cited in Chitty's Archbold's Practice, 14th ed. i. 619.

same." This again points to an extinction of the thirlage, not merely to the regulation of it, or the ascertainment of the sums payable under it as an existing servitude.

If I be right in thinking that the effect of proceedings being taken under the statute is to extinguish the servitude of thirlage in consideration of money payments in one form or another, it, in my judgment, follows that there can be no obligation upon the millowner to maintain the mill, and that his ceasing to do so cannot have the effect of discharging the liability of the owners of the lands which were formerly astricted, to pay the compensation for the extinction of the servitude ascertained in terms of the statute. If it had been intended that the maintenance of the mill should be a condition of the commutation money being exigible, this would have been expressed in the statute, as there could be no ground for holding such a condition to be implied. The view that the statute did not contemplate that there should be any obligation to maintain the mill after the commutation, is confirmed by the provision in sec. 5, that the jury might fix, as the place of payment of the commutation money, either the mill or some other convenient place.

The question now considered has not, so far as I am aware, been decided in any reported case, but it was decided *in terminis* by the Second Division of the Court in the unreported case of *Spottiswoode* v. *Pringle* (14th July 1849, mentioned in Rankine on "Land-Ownership," 3d edit., p. 400). From the session papers in that case it appears that Mr Sandilands of Couston, in the year 1801, took proceedings under the Act 39 Geo. III. cap. 55, against the joint proprietors of the mill of Torphichen, to which his lands were astricted, for obtaining a commutation of the thirlage by the verdict of a jury, as also that the commutation was duly effected, and the verdict of the jury duly registered in the Register of Sasines. The estates of a successor of Mr Sandilands in the lands of Couston were sequestrated in or about the year 1848, and in the sequestration Mr Pringle "as half proprietor of Torphichen Mill" made a claim for converted multures for crops 1836 to 1844, both inclusive. The trustee in the sequestration at first ranked this claim, but after a dividend had been paid upon it he discovered "that Torphichen Mill has been in ruins for a number of years past, at least during the period for which the said claim is made," and he accordingly repelled the same, "reserving his right to recover payment of the sum he paid to account thereof by mistake while in ignorance of the disability or non-existence of said mill." Mr Pringle appealed to the Sheriff of the county, Linlithgow, against this determination, and the question was fully argued in a minute of debate and answers, and, after considering these, the Sheriff found Mr Pringle entitled, "notwithstanding the destruction of Torphichen Mill, to the converted multures libelled, and to all arrears of the same," therefore recalled the judgment of the trustee appealed against, and sustained the claim of the appellant. The case was brought by appeal before the Second Division of the Court, and they, on 14th July 1849, recalled the interlocutor of the Sheriff, and found "that Mr Pringle is to be ranked for the amount of the converted multures for the years contained in the claim," and remitted to the Sheriff to proceed accordingly. The decision of the Second Division on the merits was the same as that of the Sheriff, whose interlocutor appears

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to have been recalled merely in order that the judgment might be put into a more correct form.

Although the question was not raised for decision in the case of the *Duchess of Sutherland* v. *Reid's Trustees*,[1] Lord President Inglis expressed an opinion as to the Act 39 Geo. III. cap. 55, which has an important bearing upon it. His Lordship said,—"It is important, I think, that this is in the highest sense a remedial statute. It is intended to put an end to a highly disadvantageous relation between the owners of a barony mill and of the lands thirled to it. We are therefore bound to give it a liberal interpretation in favour of the object proposed to be obtained by the statute."

The second party founded strongly upon the case of *Forbes' Trustees* v. *Davidson*,[1] but the decision in that case proceeded upon very special circumstances, and it does not appear to me to be at variance with the views now expressed. The question arose not under the Act of 39 Geo. III. cap. 55, but under a deed of submission dated in 1814, entered into between "certain proprietors connected with the sucken and thirlage of the meal-mill of Nairn," on the one part, and the proprietors of the mill on the other; and the Court held that upon a sound construction of the submission and decreet-arbitral, it was a condition of the right to exact the payments found due by the arbiter that the mill should be in a working condition, and that, as it was admitted that there was no intention to rebuild the mill, the defender should be assoilzied. The Court were of opinion that, upon a sound construction of the agreement, it provided for the relation of parties under the servitude of thirlage continuing, subject to pactional regulations, not for the termination or extinction of that servitude. I may add, that the case of *Spottiswoode* v. *Pringle*[2] does not appear to have been brought under the notice of the Court in that case.

For the reasons now given, I am of opinion that the first party is entitled to exact from the second party payment of the sums commuted in the verdicts in so far as applicable to the second party's lands, although Kinross Mill is no longer in existence.

The second question relates to dry multures, to which the Act of 39 Geo. III. c. 55, does not apply, and which consequently were not dealt with by the juries in 1807 and 1810. Dry multures are duties or money paid to a millowner by the owner or occupier of land at some time astricted to the mill, whether the grain grown on the land is or is not ground at the mill. The right to exact such multures is acquired by payment of them continuously for forty years, implying an agreement to pay and accept them. Dry multures are paid in consideration of the millowner absolving the suckener from the obligation to take his corn to the mill to be ground, and the payment is made and accepted as compensation to the millowner for the loss of profit which he sustains in consequence of the grain not being ground at his mill. The amount of the dry multure would therefore practically correspond to the difference between the insucken and the outsucken rates for grinding. This being so, the question comes to be, whether the proper inference from a course of payment for a period greatly

[1] 8 R. 514. [2] 19 R. 1022.
[3] Rankine, Land-Ownership (3d edit), p. 400.

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exceeding forty years is not that the agreement to pay and accept the dry multure was a permanent, not a temporary, arrangement, and this seems to me to be the just inference in the circumstances. But if it must now be assumed that the millowner agreed permanently to acquit the landowners from all obligations to the mill in consideration of his undertaking to pay the dry multure in perpetuity, and that the landowner assented to this, the effect was, in my judgment, to make a permanent commutation of the thirlage, resulting like the statutory commutation in the extinction of the servitude, and if the servitude was extinguished there could be no obligation to maintain the mill as a condition of the right to exact the dry multure. The conclusion that the mill was to be kept up notwithstanding the agreement permanently to pay and accept the dry multure could only be reached by supposing that it was an implied condition of the agreement that an efficient mill should be maintained on the dominant estate, and it would be contrary to good sense to read into any agreement by mere implication a condition from which neither of the parties to it could derive any benefit. For these reasons I am of opinion that the second question put in the case should, like the first, be answered in the affirmative.

LORD M'LAREN and LORD KINNEAR concurred.

LORD ADAM was absent.

THE COURT pronounced the following interlocutor :—"Answer both the questions in the case in the affirmative: Find that the first party is entitled to exact payment from the second party (1) of the sums commuted in the verdicts specified in the lease so far as applicable to the second party's lands; and (2) of the dry multure applicable to the said lands, notwithstanding that Kinross Mill is no longer in existence, and decern."

ALEXANDER MORISON & Co., W.S.—JOHN C. BRODIE & SONS, W.S.—Agents.

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MISS NELLIE TURNER THOMSON AND ANOTHER, Pursuers.—*Jameson, Q.C.—A. S. D. Thomson.*
THE EDINBURGH AND DISTRICT TRAMWAY COMPANY, LIMITED, Defenders.—*Watt, Q.C.—Chisholm.*

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MISS NELLIE TURNER THOMSON AND ANOTHER, Pursuers.—*Jameson, Q.C.—A. S. D. Thomson.*
JOHN KERR, Defender.—*Campbell, Q.C.—Glegg.*

Expenses—Defenders in conjoined actions—Liability of unsuccessful defender for expenses of successful defender.—When separate actions against independent defenders are conjoined, the Court has power to find one defender liable in expenses to the other.

Question whether this would in any circumstances be competent if the actions were not conjoined.

Opinion in the negative by Lord M'Laren.

Opinion reserved by Lord Kinnear.

A passenger in an excursion coach who was injured in consequence of the coach coming into collision with a tramway car, sued the Tramway Company for damages. In their defences the Tramway Company denied

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liability, and averred that the accident was caused solely by the fault of the driver of the coach. The pursuer then raised a second action against the owner of the coach, who also denied liability. The actions were conjoined and tried before a jury, who returned a verdict finding the Tramway Company liable in damages, but negativing liability on the part of the owner of the coach.

Held that the Tramway Company were liable in expenses both to the pursuer and to the successful defender.

In November 1900, Miss Nellie Turner Thomson and Margaret Thomson, 21 Parkhurst Road, Holloway, London, raised an action against the Edinburgh and District Tramway Company for damages for personal injuries sustained in a collision between one of the Company's cars and an excursion coach upon which they were passengers.

The Tramway Company lodged defences, in which they denied liability, and averred that "the accident was due solely to the recklessness of the driver of the said coach in attempting to pass in front of the car at the time in question."

Before the record in this action was closed, on 26th November, the pursuers brought a second action against John Kerr, Meadowbank, Edinburgh, the owner of the coach, who also denied liability, and averred that the accident was due to the recklessness of the car-driver in starting the car while the coach was passing in front of it.

On 27th November the Lord Ordinary (Kincairney), on the pursuers' motion, conjoined the actions.

The case was tried before the Lord President and a jury. The jury returned a verdict finding the Tramway Company liable in damages to the pursuers, and negativing liability on the part of the defender Kerr.

On 15th January 1901, the pursuers moved the Court to apply the verdict, to find the defenders the Tramway Company liable to them in expenses, and further to find the Tramway Company alternatively either (1) liable to relieve them of their liability for expenses to the defender Kerr, or (2) liable directly to the defender Kerr in expenses.

Argued for the pursuers;—They were entitled by either of the methods proposed to be relieved from liability for expenses to the successful defender. The last alternative was preferable, as it avoided circuity. The case of *Brownlie* v. *Tennant* [1] shewed that it was competent to give expenses to one defender against another, a view affirmed by Lord M'Laren in the case of *Rooney* v. *Cormack*.[2] The actions were conjoined by Lord Kincairney on the pursuers' motion. The defenders the Tramway Company objected to this, but did not reclaim, and it must now be taken that the Lord Ordinary was right in conjoining the actions, and that the defenders were in the same position as if they had originally been called as defenders in the same action. In *Mackintosh* v. *Galbraith* [3] the pursuer concluded against the defenders conjointly and severally. Here the pursuers' case was alternative, and thus fell within the principle of the poor-law cases referred to by Lord Trayner and Lord Moncreiff. The same principle had been applied in less special branches of the law.[4] This case was

[1] Feb. 14, 1855, 17 D. 422.

[2] Oct. 18, 1895, 23 R. 11, at p. 13.

[3] Nov. 6, 1900, *supra*, p. 66.

[4] Caledonian Railway Co. v. Greenock Sacking Co., May 13, 1875, 2 R. 671; Cowan v. Dalziels, &c., Nov. 23, 1877, 5 R. 241.

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further distinguished from the case of *Mackintosh* v. *Galbraith*,[1] because the defender called in the first action was the defender who was ultimately found liable, and the second action was the result of his trying to throw the responsibility on someone else.

Argued for the Tramway Company;—The present case was ruled by *Mackintosh* v. *Galbraith*,[1] which the pursuers had entirely failed to distinguish. The pursuers ought to bear the responsibility of calling a defender who turned out not to be liable, and could not throw responsibility upon the shoulders of another defender who was not the *dominus litis*. The position of the defenders here was entirely independent. In the case of the *Greenock Sacking Co.*[2] the defenders were landlord and tenant of the premises which had collapsed, and had a joint interest arising out of contract. In the poor-law cases the defenders necessarily admitted that one or other was liable. In this case there was no such admission, and it might well be that the collision was the result of pure accident, and not of fault, in which case neither defender would be liable.

LORD PRESIDENT.—The circumstances of this case are briefly these:—The pursuers, two ladies, were passengers in a brake, or excursion coach, belonging to the defender John Kerr. While descending the hill on the road past the Braid Hills, near where the tramway line begins, the brake crossed in front of a tramway car, and a collision took place, resulting in the back part of the brake being cut off. By this accident the pursuers were injured, and they brought an action of damages against the Tramway Company. The company did not put forward any defence personal to the pursuers, but they maintained that the pursuers were mistaken in attributing to them the fault which caused the accident, alleging that the fault lay with the driver of the brake in crossing in front of the car, and they accordingly contended that the owner of the brake, John Kerr, was the person liable to make reparation to the pursuers. The pursuers, when challenged by the Tramway Company in this pointed way to raise an action against John Kerr, very properly did so, in order to bring the company and John Kerr, one or other of whom must be liable, into the field together, so that they might fight the matter out between themselves. Thus the second action was raised in consequence of the position taken up by the company. The actions were conjoined and tried together, and the two defenders cross-examined each other's witnesses, and when the cross-examination of a witness by the pursuers' counsel was regarded by counsel for a defender as satisfactory, he adopted it as the cross-examination for his client. Both defenders are thus before the Court in what must now be regarded as one action. I agree with what Lord M'Laren said in the case of *Rooney* v. *Cormack*,[3] to the effect that this Court has jurisdiction over the whole subject of expenses in any action before it, and can give decree against one defender in favour of another where the justice of the case demands that this should be done, and, in my opinion, this is as strong a case for the exercise of that power as could well be imagined. I therefore think that the Tramway Company should be found liable in expenses both to the pursuers and to John Kerr.

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[1] *Supra*, p. 66. [2] 2 R. 671. [3] 23 R. 11.

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LORD M'LAREN.—I was anxious to hear argument on the question how far the practice had been extended of finding expenses due by one defender to another. It certainly appears from the cases of *Rooney* v. *Cormack*[1] and *Mackintosh* v. *Galbraith*[2] that where there are two or more necessary defenders, *e.g.*, in an action for the reduction of a deed where it is proper to call the disponee under the deed as well as the party who procured the granting of the deed, the one defender may be entitled to receive his expenses from the other. The same principle applies where a contractual relation exists between the two defenders, as in an action directed against landlord and tenant, *e.g.*, an action to prevent a nuisance. To that extent I am quite of opinion that our jurisdiction exists, and if I were doubtful on the point I should feel bound by the authorities cited.

In the present case there were originally two distinct and independent actions, and if they had continued to be separate I think the present motion could not have been properly made, because the Court cannot in general find a person liable in expenses who is not a party to the cause. I must except the case where the true *dominus litis* does not appear as a party. But the result of the application to conjoin the actions was to put the two actions into the same position as if they had been originally one, and they are accordingly under similar conditions to those of the cases to which I have referred. At this stage we must assume that the Lord Ordinary had good reasons for conjoining the actions, though, apart from specialties, I should rather deprecate the indiscriminate conjoining of actions raised against separate defenders. But as the Lord Ordinary's judgment was acquiesced in, it must be assumed to be right, and the case must be treated as if it had been originally raised against two defenders called in one summons, who were both bound to appear if they did not wish decree in absence to be pronounced against them. For these reasons I concur with your Lordship.

LORD KINNEAR.—I concur. I have no doubt, after hearing the statement of your Lordship in the chair as to the circumstances of the trial and the questions raised, that there would be a grave miscarriage of justice if the pursuers were called upon to pay the expenses of the successful defender, without relief against the unsuccessful defender. I think it would be a grave reproach against our system of procedure if we had not power to obviate this injustice by giving decree for expenses against the party who was really responsible for their being incurred. The authorities, however, shew that we have such power, and there is a long continued course of practice in support of the decision proposed.

I agree with Lord M'Laren in attaching importance to the conjunction of the actions, and also in holding that at this stage we must assume that they were rightly conjoined.

I wish, however, to reserve my opinion on the question whether the same result would not follow without their having been conjoined. The question does not arise, and it is unnecessary to express a definite opinion, but I am not persuaded that the same liability might not have been enforced if the

[1] 23 R. 11. [2] *Supra*, p. 66.

actions had been technically separate. It is not incompetent for the Court to impose liability for the expenses of a case upon a person who is not directly a party to it, and I am not at present prepared to agree that the principle on which that has been done might not be applied to such a case as the present.

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LORD ADAM was absent.

THE COURT applied the verdicts, and found "the pursuers and the defender John Kerr, both in the separate and conjoined actions, entitled to expenses against the defenders The Edinburgh and District Tramways Company, Limited."

WILLIAM CROFT GRAY, S.S.C.—ANDERSON & CHISHOLM, Solicitors—MACPHERSON & MACKAY, S.S.C.—Agents.

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Robertson's Trustee v. Robertson.

JOHN M'BAIN (Robertson's Trustee), Pursuer (Reclaimer).—*Ure, Q.C.—M'Clure.*

MRS MARY MARGARET ROBERTSON AND SPOUSE, Defenders (Respondents).—*Campbell, Q.C.—A. S. D. Thomson.*

Marriage-Contract — Postnuptial provision to wife taking effect stante matrimonio—Donatio inter virum et uxorem—Bankruptcy.—A husband, by deed of assignation dated June 1898, on the narrative that there was no marriage-contract between himself and his wife, and "in order so far to supply that defect and make provision for the said" wife, assigned, in the first place, to her and her heirs and assignees whomsoever the lease of the house which he and she occupied; in the second place, he assigned to her, her executors, administrators, and assigns, a policy of insurance on his life which he had taken out twenty-three years before; and, in the third place, he assigned to her the furniture in the house; declaring that he should have no right or title to the lease, and that neither the lease nor the subjects second and third assigned should be liable to his deeds or subject to the diligence of his creditors, it being further declared that the wife should be entitled to manage the said leasehold subjects in every respect as if she were still unmarried, his *jus mariti* and right of administration being excluded from these subjects as well as from the subjects second and third assigned. The deed of assignation was registered in the Register of Sasines *quoad* the leasehold subjects, and the assignation of the policy of insurance was intimated to the insurance company. The subjects assigned, which amounted in value to about £200, constituted the husband's whole property (apart from his annual income, which amounted to £120 a year), with the exception of a sum of £439 in bank, which was held to be his property, and which he uplifted two months after the date of the assignation, and, to the extent of £400, handed over to his wife. The husband's estates were sequestrated in April 1899 in consequence of the failure of a business which he was carrying on as one of a body of testamentary trustees.

In an action by the trustee in the sequestration against the wife and the husband for his interest, concluding for reduction of the assignation, *held* (*rev.* judgment of Lord Kincairney, *diss.* Lord Young) that the assignation fell to be reduced as a *donatio inter virum et uxorem*, Lord Moncreiff also holding that the assignation was reducible as a collusive attempt by the husband to put his whole property beyond the reach of his creditors while he truly retained the control of it.

Dunlop v. *Johnston*, 3 Macph. 758, aff. 5 Macph. (H. L.) 22, *followed.*

Craig v. *Galloway*, 22 D. 1211, rev. 4 Macq. 267, and *Rust* v. *Smith*, 3 Macph. 378, *commented on.*

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2D DIVISION. Lord Kincairney.

ON 2d June 1898 Donald Robertson, agent for the Highland Railway Company at Portree, executed an assignation in the following terms:—"I, Donald Robertson, railway agent, Portree, for the love, favour, and affection which I bear to Mary Margaret Ferguson or Robertson, my spouse, and residing with me, considering that no regular contract of marriage has been entered into betwixt us; therefore, in order in so far to supply that defect and make provision for the said Mary Margaret Ferguson or Robertson: In the first place, I do hereby assign to the said Mary Margaret Ferguson or Robertson, and her heirs and assignees whomsoever, a lease or tack" for ninety-nine years from Whitsunday 1835 of the house and ground described, being No. 5 Beaumont Crescent, Portree, with entry as at the date of the assignation: "In the second place, I do hereby assign unto the said Mary Margaret Ferguson or Robertson, her executors, administrators, and assigns," a policy of insurance for £100 on his life, taken out by him in 1875 in his own name, "together with the sum assured under the said policy, and all profits and bonuses and other additions accrued or that may accrue thereon: And in the third place, I do hereby assign and convey to the said Mary Margaret Ferguson or Robertson, her executors and assignees whomsoever, the whole household furniture and effects, including," &c., "which are or may be contained in the dwelling-house presently occupied by me in Beaumont Crescent aforesaid; providing and declaring always, as it is hereby expressly provided and declared, that I shall have no right or title to the lease or tack in the first place hereinbefore assigned, or to the subjects and others contained in the said lease or tack, or the rents, maills, or duties of the same, or to any part thereof, and that neither the same, nor the subjects, property, and effects in the second place and in the third place hereinbefore assigned and conveyed, shall be liable to my deeds or subject to the legal diligence of my creditors; but that notwithstanding such deeds, debts, or diligence, it shall be lawful for the said Mary Margaret Ferguson or Robertson, by herself alone, without my consent, to uplift and discharge the rents of the subjects contained in the said lease or tack, and to apply the same as she shall think proper; with power to the said Mary Margaret Ferguson or Robertson to output and input tenants, set tacks, and do everything in relation to the management of the said subjects as if she were still unmarried, the *jus mariti* and right of administration and all other right or title on my part being hereby expressly excluded so far as applicable to the said subjects, and also so far as applicable to the whole subjects, property, and effects in the second place and in the third place hereinbefore assigned and conveyed."

The assignation of the policy of insurance was intimated to the insurance company on 4th June, and the deed of assignation was recorded *quoad* the leasehold subjects in the Register of Sasines on 6th June 1898.

At the date of the assignation Donald Robertson was one of the trustees acting under the trust-disposition and settlement of John Robertson, merchant, Portree, who had died in 1890. By his trust-disposition and settlement John Robertson instructed his trustees to carry on his business, if they considered it advisable, in the interests of his widow and children. The trustees carried on the business accordingly under the style of John Robertson, and were so carrying it on at the date of the assignation.

On 1st April 1899 sequestration was awarded of the estates of the

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company trading as John Robertson, and also of the estates of John Robertson's trustees (*a*) as such trustees, (*b*) as partners of the said company, and (*c*) as individuals. John M'Bain, C.A., Aberdeen, was appointed trustee on the sequestrated estates.

On 15th November 1899 M'Bain, as trustee, brought an action against Mrs Robertson, wife of Donald Robertson, and against Donald Robertson as her curator and administrator-in-law and for any interest competent to him, concluding for reduction of the assignation, and for decree ordaining Mrs Robertson to deliver to the pursuer the titles of the leasehold property, 5 Beaumont Crescent, Portree, the policy of insurance specified in the assignation, and the furniture in 5 Beaumont Crescent.

The pursuer averred that at the date of the assignation Robertson "was insolvent." He concluded for reduction on the grounds (1st) that the assignation was a donation or gratuitous provision by Robertson to his wife, taking effect *stante matrimonio*, and therefore revocable by Robertson, and subject to reduction by the pursuer as trustee; and (2d) that the assignation was an alienation by Robertson when he was insolvent in favour of a conjunct and confident person, without true, just, and necessary cause, contrary to the Act 1621, cap. 18.

The defenders denied that Robertson was insolvent when he granted the assignation; averred that it made a moderate and reasonable provision for his wife, for whom no other provision had been made; and pleaded, *inter alia*;—(2) The assignation sought to be reduced being no more than a reasonable provision to the defender by her husband, and having been granted while he was solvent, is not reducible.

A proof was allowed. The evidence was to the following effect:—

Prior to the assignation under reduction Robertson had not made any provision for his wife by antenuptial contract or otherwise. His salary as agent for the railway company was £120 a year. The subjects carried by the assignation constituted his whole property at its date, apart from a sum of £439 standing in his name in the books of the Highland Railway Provident Savings Bank. On 19th August 1898, two months after the date of the assignation, Robertson uplifted this £439 from the bank, and in the present action, besides the conclusions already mentioned, the pursuer concluded for decree against Mrs Robertson for that sum, on the ground that Robertson, after uplifting the money, had made a donation of it to her. The defenders admitted that Robertson had paid £400 of the £439 to his wife, but they averred that it was her own property, although it had stood in her husband's name in the bank books. The Lord Ordinary sustained this defence, but the Court recalled the judgment, and granted decree for £439. In the report *infra* of the interlocutors and opinions of the Lord Ordinary and the Court the portions dealing with the question regarding this £439 are omitted, as the question came to be purely a question of fact.

Robertson stated that the value of the leasehold subjects was about £150, of the policy of insurance about £37, and of the furniture in 5 Beaumont Crescent about £50. The defenders continued to occupy the house and to use the furniture after the assignation as before. They deponed that many of the articles of furniture belonged to Mrs Robertson irrespective of the assignation.

A large part of the evidence was directed to the question of Robertson's solvency at the date of the assignation. On that question it is

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sufficient here to say that there was no evidence and no suggestion that he was then personally insolvent; that his solvency depended entirely on the solvency of the business of John Robertson, for which he, along with John Robertson's other trustees, was assumed to be personally responsible; that the balance-sheet of the business of John Robertson, as at 30th April 1898, brought out an apparent surplus of £1966, on the assumption (which was then questioned) that certain heritable properties formed part of the business assets; that in June 1898 the pursuer, as trustee, appeared to be of opinion that the business would pay 20s. in the £1 if the heritage was included (see the opinion of the Lord Ordinary, note on this page); but that on realisation the assets of the business (including the heritage) fell short of the liabilities by £486, 13s. 6d. In August 1896 the trustees had granted a guarantee to the bank for advances to the trust.

On 28th June 1900 the Lord Ordinary (Kincairney) pronounced this interlocutor:—"Finds (1) that it has not been established that the assignation sought to be reduced was a gratuitous provision or donation in favour of the female defender, but finds that it was an onerous provision in her favour; (2) that the said assignation is not reducible under the Act 1621, c. 18, in respect that it has not been proved that it was granted without true, just, and necessary cause . . . Therefore assoilzies the defenders from the whole conclusions of the summons, and decerns: Finds the defenders entitled to expenses," &c.*

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* "OPINION.—The late John Robertson, sometime merchant in Portree, died in 1890, leaving a trust-deed in which he directed or requested his trustees to continue his business, which they did under the name and style of John Robertson, merchant in Portree. The result was unfortunate, and the estates of the company and of the trustees who carried on the business were sequestrated on 1st August 1899, and the pursuer was appointed trustee on the sequestrated estates. One of John Robertson's trustees, who carried on the business and became involved in the losses incurred, was the defender Donald Robertson, who was no relation of John Robertson, but who seems to have undertaken the trust and the conduct of the business through friendship for John Robertson, and for the benefit of his widow. It is, however, not disputed that he is liable for the whole debts, and his estates are included in the sequestration. The debts which the trustee is in the course of paying were, however, not incurred by the defender Donald Robertson in carrying on business for his own benefit, but in carrying on the business of the trust.

"It appears that for some time after the pursuer was appointed trustee, he was of opinion that the business was solvent. This appears from a memorial which he submitted to counsel in or about June 1899, in which the question asked was whether the heritage which belonged to the deceased John Robertson was embraced in the sequestration, and in which it is stated that, 'if the heritable properties are carried by the sequestration, the estate will be more than sufficient to pay 20s. per £1, while, if the heritable properties are not carried, the dividend from the estates—other than the individual estates of the trustees—cannot, it is thought, exceed 10s. per £1.'

"The answer of counsel was that the heritable properties were included, and the trustee, acting on that opinion, has realised them.

"The result, however, has not been what was anticipated. The price obtained for the heritable properties fell far short of their estimated values, and the stock in trade was sold at a large discount, with the result that a state of affairs made up on 30th May 1900 shewed that the estate of John

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The pursuer reclaimed.

The nature of the arguments at the hearing sufficiently appears from the opinions of the Lord Ordinary and the Court.[1]

The pursuer intimated that he did not now insist in the conclusion for delivery of the furniture, looking to the evidence as to part of the furniture being the property of Mrs Robertson, and to the trifling value of the furniture.

At advising,—

LORD JUSTICE-CLERK.—The pursuer M'Bain is trustee on the sequestrated estate of a company trading under the name of John Robertson. The business of this firm was after John Robertson's death taken up by the defender Donald Robertson, who had been appointed trustee by John, and in Donald's hands the business was unsuccessful. The trustee in the sequestration now seeks to reduce an assignation by the defender Donald Robertson in favour of his wife, of certain leasehold property, of a policy of insurance, and certain household furniture. The gift to the wife is an absolute gift, and there is nothing of the nature of a postnuptial contract making provision to take effect at his death. The trustee contends that this gift

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Robertson was insolvent, and that there was a deficiency of £486, 13s. 6d." (His Lordship then set forth the nature of the action.)

"It is important to observe that fraud is not alleged; the word fraud is not in the record; neither is it averred that Donald Robertson knew that he was insolvent or contemplated insolvency at the date of the assignation; and it may be as well to say here that, although the circumstances are suspicious, yet it does not appear that fraud is made out, for the reason that Robertson may have thought, as the pursuer himself, after examining into the matter, did think, that the company was perfectly solvent. Erskine speaks of such a deed as sometimes granted by a husband 'under a consciousness of his own insolvency,' but I do not think so much as that can be confidently predicated of Robertson when he executed the assignation. Possibly, however, although he may have thought that the company estate was solvent, still, as the value of the heritable part of it, and also of the stock in trade, was but matter of opinion, he may have feared that his view of the estate might prove too sanguine. But the pursuer makes no such suggestion.

"The pursuer concludes for complete, not partial, reduction, and there are no pleas in support of a partial reduction. . . .

"The first question is—Is the assignation revocable as a donation *inter virum et uxorem* or a gratuitous provision, or can it be sustained in whole or in part as a provision in her favour, bearing in view that there was no marriage-contract? This question assumes Robertson's solvency at the date of the deed, and is independent of the Statute 1621, c. 18.

"There is no doubt that if the assignation was revocable by the husband, and so far as it was so revocable, it falls to be reduced to that extent at the instance of the trustee. So far as it was not revocable by the husband, it

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[1] *Pursuer's Authorities.*—Kemp v. Napier, Feb. 1, 1842, 4 D. 558, 14 Scot. Jur. 229; Dunlop v. Johnston, March 24, 1865, 3 Macph. 758, 37 Scot. Jur. 390, aff. April 2, 1867, 5 Macph. (H. L.) 22, 39 Scot. Jur. 382; Ersk. i. 6, 30; Fraser, Husband and Wife, 3d ed., pp. 949 and 1498. *Defenders' Authorities.*—Sharp v. Christie, Jan. 19, 1839, 1 D. 396; Wright v. Harley, June 2, 1847, 9 D. 1151, 19 Scot. Jur. 500; Rust v. Smith, Jan. 14, 1865, 3 Macph. 378, 37 Scot. Jur. 182; Craig v. Galloway, June 22, 1860, 22 D. 1211, 32 Scot. Jur. 553, rev. July 17, 1861, 4 Macq. 267, 23 D. (H. L.) 12, 33 Scot. Jur. 649.

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was revocable, and therefore reducible at the trustee's instance, or otherwise that it was an alienation struck at by the Act 1621, cap. 18.

I think that there is great force in the trustee's contention that the gift being to the wife *stante matrimonio*, so that she could have disposed of everything, it cannot be looked upon as a provision made by the husband, to which the equitable considerations relating to such a provision can apply. To me it appears that the two cases quoted by the Lord Ordinary, viz., *Kemp* v. *Napier*[1] and *Dunlop* v. *Johnston*,[2] directly apply so far as regards a present gift, while they both recognise the distinction where a provision is made for a benefit to the wife after the dissolution of the marriage. In *Dunlop* v. *Johnston*[2] it was held that an annuity to a wife during the subsistence of the marriage was not a natural equivalent for her legal rights as a wife. Here, in this case, what was done was a transference to the wife of the husband's estate to be administered as she should please. That seems to me to be a stronger case than the case of *Dunlop*,[2] where the procedure was to place money in the hands of trustees to pay an alimentary annuity

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is not reducible on that ground at the instance of the trustee, although it may be reducible under the Act 1621, cap. 18.

"The assignation professes to be a provision. It proceeds on the consideration that no regular contract of marriage had been entered into between the spouses, and that the deed was 'in so far granted to supply that defect, and make provision for the said Mary Margaret Ferguson or Robertson'; but it does not bear to be in full of her legal rights, nor does it bear a discharge of these rights. It is expressed in language of present gift, and the entry to the leasehold subjects is said to be at its date. The pursuer's argument was that the assignation was nothing but a donation *inter virum et uxorem*, and as such revocable, and therefore reducible *in toto*, apart from any question of solvency or insolvency.

"The decisions on this point are conflicting. The pursuer rested his argument almost entirely on the case of *Dunlop* v. *Johnston*, 24th March 1865, 3 Macph. 758, aff. 2d April 1867, 5 Macph. (H. L.) 22; a case of great authority, which must be followed if it applies. The point decided was, however, not precisely the same as that which is here raised. There a provision in a postnuptial contract by a husband to his wife of the interest of £5000, to be paid during the life of the husband, was reduced as gratuitous at the instance of his trustee in bankruptcy, but a similar provision in the same deed to take effect after the husband's death was not reduced. Apparently reduction of the whole provision was concluded for, but reduction of the latter provision, namely, that to take effect after the husband's death, was not insisted in; but I think it may be gathered from the opinions that such a provision would, had it been challenged, have been sustained as a reasonable and onerous provision. The judgment did not proceed on the ground that a postnuptial provision for a wife was not effectual in a question with creditors. The opinions, both in the Court of Session and the House of Lords, clearly indicate the opposite view. The ground of jndgment seems to have been that the obligation of the husband to provide for his wife was completely satisfied by the provision to take effect after his death, and that therefore the other provision was wholly gratuitous.

"The case of *Kemp* v. *Napier*, 1st February 1842, 4 D. 558, is similar. There, a husband provided to his wife an annuity of £200 during his life, and of £500 after his death. The provision of the annuity of £200 was

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[1] 4 D. 558. [2] 3 Macph. 758, aff. 5 Macph. (H. L.) 22.

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to the wife *stante matrimonio*. It is, as the Lord Justice-Clerk described the annuity in *Dunlop's*[1] case, "nothing but a transfer from the husband without adequate consideration," the plain purpose being to protect what is given from the diligence of the husband's creditors—a purpose which is not legitimate. Such a gift is revocable, and a postnuptial deed to attain that object cannot receive effect in a case with creditors. The Lord Ordinary in deciding that *Dunlop's*[2] case does not apply here gives weight to the case of *Rust* v. *Smith*,[3] where a husband purchased a property, and got the disponers to grant the title in name of his wife, and where this was upheld as a provision for the wife. The circumstances there were very exceptional. In the first place, as pointed out by Lord Deas, it was not left within the power of the husband and wife by destroying the deed to alter the state of matters, as they might have done had the deed been one granted by the husband; and, in the second place, it appeared in that case that the wife was carrying on an industry of her own, and thus bringing profit to her husband, and that there was ground for holding that out of these profits the

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set aside as gratuitous and a donation; but not the provision of £500, which bore to be payable after the husband's death. It is true that there was not, and could not have been, any decision on that latter point, because the wife predeceased her husband; but the opinions of the Judges to the effect that such a provision would have been sustained as an onerous provision sufficiently appear.

"I do not read these cases as deciding that a postnuptial provision by a husband could in no case be sustained during the husband's life. That could not have been held consistently with *Rust* v. *Smith*, which was decided about two months before the case of *Dunlop*, and was quoted in the argument in that case. In *Rust* v. *Smith*, 14th January 1865, 3 Macph. 378, a disposition taken by a husband in favour of his wife was sustained in a question with his trustee in bankruptcy. That disposition, of course, took effect during the husband's lifetime; and in reference to this case, Lord Fraser (Husband and Wife, p. 948), remarks: 'It is difficult to see how the soundness of this decision, so far as regards the rents during the subsistence of the marriage, can be maintained, after the case of *Dunlop* v. *Johnston*.' In the case of *Honeyman & Wilson* v. *Robertson*, 7th December 1886, 14 R. 163, which is subsequent to the publication of Lord Fraser's book, Lord President Inglis referred to the case of *Rust* v. *Smith* without disapproval, and as 'a very good example of how such a provision may be made effectual against the husband's creditors.' The present case, so far as regards the conveyance of the leasehold subjects, bears more resemblance to the case of *Rust* than to the case of *Dunlop*, because here the assignation contains the whole provision. If, therefore, I am entitled or bound to hold the case of *Rust* v. *Smith* as not deprived of authority by the decision in *Dunlop* v. *Johnston*, I rather conceive I am bound to follow the case which most nearly resembles the present, and therefore to sustain the assignation so far as it assigns the heritable subjects, if it does not exceed a reasonable provision. I have further to notice that no demand for a partial reduction was made, and no argument in support of it was submitted.

"It is to be kept in view that the assignation conveys two other subjects besides the leasehold property, namely, a policy of insurance for £100 and household furniture. Now, I do not see how the assignation of

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[1] 3 Macph. at p. 763.
[2] 3 Macph. 758, aff. 5 Macph. (H. L.) 22.
[3] 3 Macph. 378.

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husband might make "some small irrevocable provision for his wife by buying the property for her." The case was therefore highly exceptional, and I cannot hold, as the Lord Ordinary does, that the case of *Rust*[1] detracts from the authority of *Dunlop's*[2] case. I am therefore of opinion that the pursuer is entitled to reduction of the assignation on the first ground stated. This makes it unnecessary to consider the other ground of reduction stated by the trustee in the sequestration.

LORD YOUNG.—This case has been fully argued, and we took time to consider our judgment. The result of my own consideration was a disposition to agree with the Lord Ordinary; indeed, my opinion was that his Lordship's judgment ought to be affirmed. I reconsidered that opinion when I ascertained that your Lordships all held a different view, but I must own without being able to change the impression which I had formed. I do not think that it would serve any useful purpose to enter upon the details of the case. I was certainly favourably impressed with the position of the

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the policy could be held revocable as a donation consistently with the judgment in *Craig* v. *Galloway*, 22 D. 1211, rev. 4 Macq. 267. If the assignation had been of the policy only, the case would have been the same as *Craig* v. *Galloway*, assuming Robertson's solvency, and I do not see that it should make a difference that other subjects are conveyed along with it.

"There is a difficulty about the furniture. There is a question as to the ownership of some of the articles of the inventory. But I do not see how the assignation of furniture which belonged to Donald Robertson, and which was neither inventoried nor in any form delivered, can be sustained. Reduction to that effect has not, however, as yet been asked.

"The question remains whether, supposing the assignation to be a provision, it was in the circumstances unreasonable and excessive. I apprehend that if it was excessive it might *quoad* the excess be held revocable as a gratuitous donation, and therefore reducible. Now, no doubt, this may be a difficult point; but, in the first place, this question was not argued. The pursuer made no suggestion as to the extent to which it might be sustained, if sustained at all; secondly, the total amount was not great, although, it is true, it was all that Robertson had. I am disposed to think that it is usual to deal with a question of this sort somewhat liberally, and as the pursuer has not aided me by any suggestion as to what might be a reasonable sum, I have found it hard to say that a provision worth no more than about £200 can be held excessive.

"I am therefore, on the whole, disposed to reject the pursuer's argument, so far as it is founded on the law as to the revocability of donations, and so far as it proceeds on the assumption of Robertson's solvency.

"But (secondly) the pursuer goes on to contend that the defender was not solvent at the date of the assignation; that is the same as to say that the company estate was not solvent, and that the deed was therefore reducible under the Act 1621, cap. 18. This raises a different question. I think, as I have already indicated, that at the date of the assignation Donald Robertson believed, although, perhaps, not with perfect confidence, that the estate was solvent; but it is now insolvent, and was so, of course, at the date of realisation. There is no proof that it had fallen off in value between the date of the assignation and the date of realisation; and I think it must be admitted that the defender's estimate of the value of the estate was over sanguine, and that at the date of the assignation it was in fact

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[1] 3 Macph. 378. [2] 3 Macph. 758, aff. 5 Macph. (H. L.) 22.

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defender Robertson. He was in a good position in the service of the railway company, from whom he received £120 a year, but he had very little personal property. He had been carrying on the business of the deceased John Robertson as one of John's trustees, not on his own account, but for behoof of the truster's wife and family, and the result was that in 1899 it turned out that the business was unsuccessful, and there was a question whether the trust-estate would be sufficient to pay the company's debts. It seems to have been thought uncertain, in 1899, whether the heritage of the deceased John Robertson was liable to pay the debts of the company. If it was, the conclusion arrived at was that the company was solvent; if not, that there would be a deficiency. It is to be observed that Donald Robertson had no debts of his own, but he was liable for the deficiency if there turned out to be a deficiency in the trust business because of his conduct in allowing his name to be used for behoof of the truster's widow and children. Well, in 1898 Robertson was solvent, and was under no apprehension as to his liabilities except for a deficiency on John Robertson's business not then ascertained. In these circumstances I suppose that his attention was called to the fact that the business was not turning out successfully—that there was a risk—and he accordingly thought it right to make this provision for his wife. In my opinion he was entitled to do so. I think therefore that the judgment of the Lord Ordinary is right.

LORD TRAYNER.—I am unable to concur in the judgment of the Lord Ordinary.

The deed sought to be reduced is a conveyance by Robertson to his wife of the whole estate of which he was possessed at its date, and the purpose for which it was granted appears to me from the whole circumstances to be plain. I think that purpose was to put the estate of Robertson beyond the reach of his creditors, but not beyond the reach of his own enjoyment. It is said that the deed is maintainable on the ground that it was only a reasonable provision made by a husband for a wife for whom no provision had previously been made. Looking to Robertson's circumstances at the date of the deed I seriously doubt whether he was in a position to make

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insolvent. That being so, the question arises as to the effect of a postnuptial provision to a wife after the husband is insolvent. This is well known to be a debateable point. The chief authorities are probably Ersk. iv. 1, 33; Bell's Com. i. 687; and Fraser on Husband and Wife, 1498. On this question I rather take the view presented by the defender's counsel that, in the present state of the authorities, it should be held in the Outer-House that such a postnuptial provision is effectual. The question is, whether it is onerous or gratuitous. I think it is not gratuitous, but onerous. I think that not only the judgment in *Rust* v. *Smith*, but also the opinions of the Judges in *Kemp* v. *Napier* and *Dunlop* v. *Johnston*, support the view that a postnuptial provision to a wife is, or may be, onerous; and if it be onerous, like an antenuptial contract, although not to such a high degree, it rather appears to me that, so far as onerous,—that is to say, so far as moderate,—it should, like an antenuptial contract, be exempt from the operation of the Act 1621, cap. 18; and on the whole I come to the conclusion, although with much hesitation, that the defenders are entitled to absolvitor from the reductive conclusion and the conclusions following on it, except so far as regards the furniture. . . ."

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any provision for his wife which would have been preferable to the claims of creditors. But the deed has none of the characteristics of a provision, and, on the contrary, has the characteristics of a gift. It is a conveyance of the granter's whole estate, heritable and moveable, and it is not usual for a husband to strip himself of everything he possesses and transfer it to his wife as a provision for her *stante matrimonio*. It is not conditioned to take effect in the event of the wife's survivance, but gives possession to both heritage and moveables at once—that is, at the date of granting. These circumstances alone stamp the deed, in my opinion, with the character of a gift. If this view is sound, then it follows that the gift was revoked by Robertson's bankruptcy, and the pursuer is entitled to have it set aside. It was urged upon us that the deed in question might be sustained as a provision, at all events in so far as regards the life policy which it transfers, on the authority of the decision in the case of *Craig* v. *Galloway*.[1] But that case was distinctly different from the present. There the life policy was originally taken out in the wife's name, and the only thing (certainly the main thing) urged against it as a provision was that the wife could *stante matrimonio* surrender it, and take the surrender value. The Court thought that such a proceeding was not at any time within the contemplation of the parties, and was in itself so improbable that no weight was given to that consideration, and the Court being of opinion that the life policy was taken out as a provision for the wife, sustained the wife's right against the challenge of the husband's creditors. But I am satisfied that in the present case the transfer of the husband's policy was not made as a provision, but as part of the gift of his whole estate, and in that view the case of *Craig* v. *Galloway* [1] has no application.

Lord Moncreiff.—In more than one passage in his opinion the Lord Ordinary discloses his uneasiness and suspicion of the defenders' case, but notwithstanding he has assoilzied the defenders from the whole conclusions of the action.

I entirely differ from him on both branches of the case, and first as to the assignation granted by the male defender in June 1898. Having considered the whole of the evidence I can come to no other conclusion than that when by that deed the male defender professed to divest himself in favour of his wife of (what he says was) his whole property, including the lease of the house in which he lived, and all the furniture therein, he did so, not for the *bona fide* purpose of making a provision for his wife in the event of his predeceasing her, but in order to defeat the rights of his creditors in the event which he anticipated of their proceeding against his estate under the guarantee which he had granted.

The assignation does not profess to be a provision for the wife in the event of her survivance; it is an absolute gift, to take effect from its date and during the husband's life. If it is of any effect the wife might have realised the whole of the property assigned immediately. A husband if solvent can by postnuptial settlement make a rational provision for his wife in the event of her survivance, which shall not be revocable except *quoad*

[1] 22 D. 1211, rev. 4 Macq. 267.

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excessum. "But there must be no circumstances whence to presume an intention in the husband to prefer his wife to his other creditors"—Ersk. iv. 1, 33. Now, in two points this assignation fails. First, it is not a provision to take effect only in the event of the wife's survivance; and secondly, it was clearly made for the purpose of defeating an anticipated claim by the husband's creditors. The effect of it, if a demand had been made on him at the time, would have been to make him ostensibly bankrupt.

I am therefore of opinion that this assignation was either a gratuitous donation *inter virum et uxorem* made *stante matrimonio*, or, as I think, a purely collusive attempt by the male defender to put his whole estate beyond the reach of his creditors while truly retaining control of it. In either case it is revocable and reducible.

In this view it is not necessary to consider the case on the footing that the assignation can be regarded as *bona fide* intended to be a provision for the female defender. But if it could be so regarded it would be reducible in part. A husband cannot make an irrevocable provision for his wife to take effect *stante matrimonio*. I do not share the Lord Ordinary's doubt on this point, which I think is settled by the case of *Dunlop* v. *Johnston*.[1]

The only matter as to which some doubt might have existed is in regard to the policy of assurance. In the view which I take of the case this policy was assigned not as a provision to take effect in the event of the wife's survivance, but simply as one asset of the male defender's effects which was made over along with the rest of his property.

THE COURT recalled the interlocutor reclaimed against, granted decree of reduction, and ordained the defender Mrs Robertson to deliver to the pursuer the titles of the leasehold subjects and the policy of insurance, decerned for payment of £439, 10s. 8d., and *quoad ultra* assoilzied the defenders.

CAIRNS, M'INTOSH, & MORTON, W.S.—DUNCAN SMITH & M'LAREN, W.S.—Agents.

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Warrand's Trustees v. Warrand.

ALEXANDER WILLIAMSON AND OTHERS (Mrs Catherine Munro Warrand's Trustees), First Parties.—*W. E. Mackintosh.*
HUGH MUNRO WARRAND, Second Party.—*Chree.*
GEORGE ARTHUR STUART WARRAND, Third Party.—*Chree.*

Succession—Faculties and Powers—Power to appoint "under conditions and restrictions."—Mrs Warrand by trust-disposition and settlement directed her trustees to convey the residue of her estate to the children of her brother Alexander Warrand, "in such proportions, at such times, on such conditions, and under such restrictions as he may direct by any writing under his hand executed after my death"; declaring that the interests of the children should vest in them on the occurrence of the two events of the death of Alexander Warrand, their father, and their majority.

After the death of Mrs Warrand, her brother Alexander Warrand executed a deed of appointment whereby, on the narrative of the power of appointment in Mrs Warrand's trust-disposition and settlement, he appointed that "the said residue shall on my death belong to the said children (on the conditions and under the restrictions hereinafter written, so far as I may lawfully impose such conditions and restrictions) in the proportions"

[1] 3 Macph. 758, aff. 5 Macph. (H. L.) 22.

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specified; and with regard to the shares of all but two of his children, he provided, directed, and appointed "that the said shares shall belong to them in liferent only, and for their alimentary use allenarly, and shall be held by" the trustees acting under Mrs Warrand's settlement "during the lifetimes of the said children respectively, and the free income of the respective shares shall be paid to such children, and that the fee or capital of the respective shares shall belong to the lawful issue of such children, and in the event of any of such children dying without issue, the share of such child shall on his or her death be disposed of as he or she by will or other deed shall direct, and failing direction, shall belong to the next of kin of such child."

In a question (raised after the death of Alexander Warrand, and when all his children had attained majority) between Mrs Warrand's trustees and Hugh and George, two of the children of Alexander Warrand, whose shares had been restricted to a liferent under his deed of appointment, *held* (1) that the deed of appointment, in so far as it appointed that the residue should belong to the appointer's children in the proportions specified, was a valid and effectual exercise of the power of appointment; (2) that the restriction of the children's right to a liferent, and the appointment of the fee to their issue, were *ultra vires* and ineffectual; and (3) that Hugh and George Warrand were entitled to payment of the fee of the shares respectively appointed to them.

Lennock's Trustees v. *Lennock*, 8 R. 14; *Wallace's Trustees* v. *Wallace*, 18 R. 921; *Wright's Trustees* v. *Wright*, 21 R. 568, *distinguished* and *commented on*.

2D DIVISION.

MRS CATHERINE MUNRO WARRAND of Bught, Inverness-shire, died on 24th March 1891, leaving a trust-disposition and settlement and deed of directions, dated 3d October 1883 (with four codicils thereto of various dates) by which she conveyed her whole estates, heritable and moveable, real and personal, to trustees for the purposes therein specified.

By the trust-disposition and deed of directions, the testatrix, after providing for the disposal of her estates of Bught and Piltochie, and directing payment of a number of legacies, in the fifth place gave directions as to the disposal of the residue of her means and estates. The fourth and last branch of the fifth purpose was in the following terms:—

'(Fourth) I direct the said trustees and their foresaids, on the death of the said Alexander John Cruickshank Warrand [her brother], or on my own death should I survive him, to hold and apply, pay, divide, and convey the said residue and remainder of said means and estate to and for behoof of the lawful child or children of the said Alexander John Cruickshank Warrand (including the heirs succeeding to the said estates of Bught and Piltochie), and that in such proportions, at such times, on such conditions, and under such restrictions as he may direct by any writing under his hand executed after my death, and failing any such writing, then to hold the same for behoof of the children of the said Alexander John Cruickshank Warrand (including as aforesaid) equally among them, payable in the case of sons of my said brother on their respectively attaining majority, and in the case of daughters on their respectively attaining majority or being married, whichever of these events shall first happen: And I declare that the interests of my said brother's children in said residue shall vest in them respectively upon the occurrence of the two events of the death of my said brother and their majority, or in the case of daughters on their majority or marriage, it being my intention that their said interests should not vest prior to the periods of payment herein appointed, and that the share of any child of my said

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brother who may predecease the term of payment of such share, leaving lawful issue, shall be paid to such surviving issue or their legal guardians, and failing issue, the share of any such predeceasing child shall belong to the survivors of the said children of my brother and the issue of predeceasers, if any, equally among them *per stirpes*: But it is hereby declared that any of the children of my said brother, upon attaining majority, and during the lifetime of their father, shall have power to divide and apportion his or her prospective interest among his or her children and their issue, in such proportions and subject to such conditions as he or she may think proper; and I direct the said trustees to hold and apply the rents, dividends, and other annual produce and income of the share of said residue prospectively falling to each of the children of the said Alexander John Cruickshank Warrand (in the event of his decease), or such part thereof as the said trustees may deem necessary and proper for the maintenance, clothing, education, upbringing, and advantage of such child, until actual payment of his or her share, and to accumulate as part of said share such part of the income thereof as the said trustees may not apply for these purposes, if such accumulation may lawfully be made, otherwise the right to such surplus income shall immediately vest in the child or children prospectively entitled to the share of capital producing such income; and notwithstanding the period of payment of the shares of residue before expressed, I provide that it shall be lawful to and in power and option of the said trustees, if they shall see fit to advance and pay, after my death and before the arrival of the term of payment foresaid, to and for behoof of the said children of the said Alexander John Cruickshank Warrand, or any of them, with consent of my said brother during his life and at the discretion of the said trustees after his death, such part as they may see fit of their respective shares of the fee or capital of the said residue for the support of such child or children, or for establishing a son in business or fitting out or making provision for a daughter on marriage, or otherwise for behoof of such child or children."

The testatrix was survived by her brother, Alexander John Cruickshank Warrand.

On 4th April 1893 Alexander J. C. Warrand executed a deed of appointment, by which upon the narrative of the foregoing power of appointment and upon the further narrative that he then had eight surviving children, viz.:—Alexander Redmond Bewley Warrand, Emily Catherine Fannie Warrand, Louisa Laura Forbes Warrand or Caton, Constance Georgina Warrand, Hugh Munro Warrand, George Arthur Stuart Warrand, Myra Kathleen Grant Warrand, and Duncan Grant Warrand; and that he had resolved to exercise the power of appointment: "Therefore, in virtue of the powers conferred on me by the said trust-disposition and settlement and deed of directions and codicils, and of all other powers enabling me herein, I do hereby appoint that the said residue shall on my death belong to the said children (on the conditions and under the restrictions hereinafter written, so far as I may lawfully impose such conditions and restrictions) in the proportions following, that is to say, to the said Alexander Redmond Bewley Warrand, eighteen one-hundredth parts; to the said Emily Catherine Fannie Warrand, eighteen one-hundredth parts; to the said Louisa Laura Forbes Warrand or Caton, twelve one-hundredth parts; to the said Constance Georgina Warrand, twelve one-hundredth parts; to the said Hugh Munro Warrand, ten

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one-hundredth parts; to the said George Arthur Stuart Warrand, eight one-hundredth parts; to the said Myra Kathleen Grant Warrand twelve one-hundredth parts; and to the said Duncan Grant Warrand, ten one-hundredth parts; and I provide that the share hereby appointed to the said Alexander Redmond Bewley Warrand and Louisa Laura Forbes Warrand or Caton shall vest in and be payable to them on my death; and with regard to the shares of my other children, I provide, direct, and appoint that the said shares shall belong to them in liferent only, and for their alimentary use allenarly, and shall be held by the trustees acting under said trust-disposition and settlement and deed of directions and codicils during the lifetimes of the said children respectively, and the free income of the respective shares shall be paid to such children, and that the fee or capital of the respective shares shall belong to the lawful issue of such children, and in the event of any such children dying without issue, the share of such child shall on his or her death be disposed of as he or she by will or other deed shall direct, and failing direction, shall belong to the next of kin of such child, and the shares of the said children, other than the said Alexander Redmond Bewley Warrand and Louisa Laura Forbes Warrand or Caton, shall vest in liferent as aforesaid on my death, and on their respectively attaining majority in the case of sons, or in the case of daughters on their respectively attaining majority or being married: And I further provide, direct, and appoint that notwithstanding the restriction of the children above named to a liferent, it shall be in the power of the trustees acting under the said trust-disposition and settlement and deed of directions and codicils to advance and pay to any of such children, or to apply for his or her behoof from time to time, or in one sum, a part of the capital of the share of such child not exceeding one-third of the total capital of such share, and the interest of the issue of such child shall be restricted accordingly."

By another deed of appointment, dated 10th December 1894, Mr Warrand directed and appointed that the shares of residue which should belong to his sons Hugh Munro Warrand and George Arthur Stuart Warrand should be nine one-hundredth parts each, instead of ten one-hundredth parts and eight one-hundredth parts respectively, as provided in the earlier deed of appointment.

Mr Alexander J. C. Warrand died on 2d November 1899, survived by the eight children mentioned in the deed of appointment, all of whom had attained majority.

In November 1900 a special case was presented by (1) Mrs Warrand's trustees; (2) Hugh Munro Warrand; and (3) George Arthur Stuart Warrand, for determination of, *inter alia*, the following question of law:—"1. Is the provision in the deed of appointment of 4th April 1893, whereby the second and third parties are restricted to a liferent of the shares apportioned to them, with a power of disposal in the event of their dying without issue, a valid exercise of the power of appointment conferred on Alexander John Cruickshank Warrand, and ought it to receive effect? or Are the second and third parties entitled to payment of the capital of the sums appointed to them respectively?"

The facts above narrated were set forth in the case.

The first parties maintained that the restriction of the shares of the second and third parties to a liferent was effectual. The second and third parties maintained that, on a sound construction of Mrs

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Warrand's trust-disposition and settlement and deed of directions, Mr Alexander J. C. Warrand was not entitled to restrict these parties to a liferent of their shares, and to appoint the fee to their children; that the appointment of the fee to their children was invalid, and that they were entitled to payment of the capital of the sums appointed to them respectively.[1]

At advising,—

LORD TRAYNER.—The late Mrs Catherine Warrand by her trust-disposition and settlement directed her trustees, in an event which has happened, to pay and divide the residue and remainder of her estate to the children of her brother Alexander, "in such proportions, at such times, on such conditions, and under such restrictions as he (Alexander) may direct by any writing under his hand." Alexander, by deeds executed by him of date 4th April 1893 and 10th December 1894, on the narrative of the foresaid power conferred on him by his sister, appointed with regard to the second and third parties to this case (with whose interests only we are here concerned) that their shares of said residue should be 9/100th parts to each; but he also provided that said shares should belong to them in liferent only and for their alimentary use allenarly, and that the fee or capital of their respective shares should belong to their lawful issue, and failing such issue, should be disposed of as they (the second and third parties) should direct, and failing such direction should belong to their next of kin. We are asked to determine whether such an appointment by Alexander was a valid exercise of the power conferred on him. There is authority for the proposition that an appointment within the power is valid, and may be sustained, although burdened with conditions *ultra vires* of the appointer. In such a case the appointment is sustained, and the conditions annexed to it are disregarded. Whatever, therefore, may be thought of the conditions and restrictions imposed here on the shares appointed to the second and third parties, I think there can be no doubt that there was a valid appointment made in favour of each of them of a 9/100th part of the residue.

But, as I have pointed out, Alexander Warrand by his deed of appointment directed that the shares appointed to the second and third parties should belong to them in liferent only, and the fee to their issue, or, failing issue, as the second and third parties should direct, or to their next of kin. Was it competent to the appointer to make these restrictions and conditions? I think not. In the first place, I think it clear that the direction to give the fee of the shares in question to the children of the second and third parties was *ultra vires* of the appointer, because he was thereby conferring part of the estate to be divided on persons who were not objects of the power. In the second place, to confer a mere liferent of the shares

[1] *Cited by the first parties.*—Lennock's Trustees v. Lennock, Oct. 16, 1880, 8 R. 14; Wallace's Trustees v. Wallace, June 12, 1891, 18 R. 921; Wright's Trustees v. Wright, Feb. 20, 1894, 21 R. 568; Crompe v. Barrow, 1799, 4 Vesey jr. 681; Carver v. Bowles, 1831, 2 Russ. and Myl. 301. *By the second and third parties.*—Baikie's Trustees v. Oxley, Feb. 25, 1862, 24 D. 589, 34 Scot. Jur. 338; M'Donald v. M'Donald's Trustees, March 10, 1874, 1 R. 794, rev. June 17, 1875, 2 R. (H. L.) 125; Mackie v. Mackie's Trustees, July 4, 1885, 12 R. 1230; Gillon's Trustees v. Gillon, Feb. 8, 1890, 17 R. 435; Churchill v. Churchill, 1867, L. R., 59 Eq. 44.

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appointed was not within the power of the appointer. What he was authorised by the power to do was to apportion the residue of his sister's means and estate—that is, the fee of such residue—the residue itself—among his children. To give them a mere liferent of a portion of that estate was not giving them that to which by the truster's settlement they were entitled, and which by the same settlement the appointer was directed to give them. There is no authority, so far as I know, for the proposition that under a direction and power to appoint to a share of an estate the appointer may validly appoint to a mere liferent of a share. On the contrary, I take the law on that matter to be well stated by the Lord Justice-Clerk in the case of *Lennock's Trustees*,[1] when he says,—"When a sum of money is left to certain persons, and a power is conferred on another to divide or apportion the amount among them, it has been settled that it is beyond the power to restrict the share of one of the beneficiaries or legatees to a mere right of liferent, and an attempt so to exercise the power will be of no avail." But it has been maintained by the first parties that it was competent to Alexander Warrand to restrict the right of the second and third parties to a liferent if he gave them also a power of disposal of the fee. For this proposition there is some appearance of authority in the cases to which we were referred, namely, the cases of *Lennock's Trustees*,[1] *Wallace*,[2] and *Wright's Trustees*.[3] But when these cases are carefully considered I think it appears that they do not support the proposition, to the full extent at all events for which the first parties contend. In these cases the right conferred on the beneficiary was regarded as in some measure a right of fee the enjoyment or use of which was restricted. I do not myself see how a right of fee can be conferred, and at the same time a restriction placed on its use and enjoyment. It was decided in *Miller's* case[4] that this could not be done. But assuming for the moment that it can—that there can be a fee restricted to a liferent enjoyment of it by the fiar (as by declaring that he shall not be entitled to alienate it gratuitously during his lifetime, although that would not exclude the diligence of creditors against the fee) —the case we are here dealing with could not be brought within such a category. The right which the appointer declared to be the right of the second and third parties was not a restricted fee, but an alimentary liferent allenarly. No doubt there is added a power of disposal, but it is not absolute, but conditional—conditional on the second and third parties having no issue; so that even if it were within the power of an appointer directed to divide the money or estate among certain persons, to appoint to a certain share in liferent with an absolute power of disposal of the fee (a view which I am not to be regarded as holding), that would not avail the first parties in the present case.

I am, therefore, of opinion that, while the appointment in the present case is valid in so far as it appoints a 9/100th share of the truster's residue to each of the second and third parties, it is invalid and ineffectual in so far as regards the conditions annexed to the appointment.

LORD YOUNG.—I concur.

[1] 8 R. 14, at p. 15. [2] 18 R. 921. [3] 21 R. 568.
[4] Miller's Trustees v. Miller, Dec. 19, 1890, 18 R. 301.

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LORD MONCREIFF.—It is clear from the terms of the power of appointment that the primary objects of the power among whom the residue was to be divided were such of the immediate children of Alexander Warrand as survived what is called in the deed the "term of payment"—that is, such as survived their father and attained majority, or, being females, married. Alexander Warrand was given power to divide the fund among his children "in such proportions, at such times, on such conditions, and under such restrictions" as he might direct by any writing under his hand. The issue of the children are to take in the event of their respective parent's predeceasing the "term of payment," which is expressly said to be the time of vesting. To this limited extent they also are objects of the power, but not in competition with their parents.

The first parties, who are the testamentary trustees of Mrs Catherine Warrand, do not maintain that the appointment made by Alexander Warrand is in all respects valid; but they do maintain that he validly executed the power of appointment conferred upon him in so far as he restricted the shares of the second and third parties to a liferent. While I think that the first parties were well entitled to present the question for the determination of the Court, and while their argument at first sight receives support from the cases to which we were referred by Mr Mackintosh, I do not think that their contention is sound. The appointment made by Alexander Warrand, while good as a division and apportionment of the capital, is *ultra vires* and invalid in so far as it restricts the rights of the second and third parties to a liferent.

Turning to the deed of appointment the appointment by Alexander Warrand commences thus:—"In virtue of the powers conferred on me by the said trust-disposition and settlement and deed of directions and codicils, and of all other powers enabling me herein, I do hereby appoint that the residue shall on my death belong to the said children (on the conditions and under the restrictions hereinafter written, so far as I may lawfully impose such conditions and restrictions) in the proportions following—that is to say." He then proceeds to divide the fund into one hundred parts, and these he apportions in certain proportions among his eight children. The second party is given 10/100th parts, and the third party 8/100th parts, subsequently altered to 9/100th parts to each. So far that is a valid and unobjectionable exercise of the power of appointment. The deed then proceeds to declare that the shares appointed to two of the children, viz., Alexander and Louisa, shall vest at and be payable to them on their father's death. This also is unobjectionable, because Louisa (Mrs Caton) had married, and Alexander, the eldest son, presumably had attained majority.

But then the appointer proceeds to cut down and restrict the interests which he had already given to the remaining children (three of whom, be it observed, were sons) to an alimentary liferent. The deed leaves no doubt of the limited nature of the interest which he intends his children to have. It is not even a restricted fee; it is a liferent. The direction is, that "the free income of the respective shares shall be paid to such children, and that the fee or capital of the respective shares shall belong to the lawful issue of such children." And again, the said shares "shall vest in liferent as aforesaid," &c.; and again in a clause by which he empowers the trustees to

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make advances of capital to the said children he says,—"I further provide, direct, and appoint that notwithstanding the restriction of the children above named to a liferent, it shall be in the power of the trustees . . . to advance and pay to any of such children, or to apply for his or her behoof from time to time, or in one sum, a part of the capital of the share of such child, not exceeding one-third of the total capital of such share, and the interest of the issue of such child shall be restricted accordingly."

Pausing there, that is undoubtedly a bad exercise of the power of appointment, or rather a bad restriction of the apportionment which the appointer has already made, in this respect, that it restricts the interest of the immediate children to a liferent, and bestows the fee of their shares upon their children, who in competition with them were not objects of the power.

But it is argued, that granting that the gift of the fee to grandchildren was *ultra vires*, the result is, not that the whole limitation falls, but that the destination to grandchildren being struck out there remains a restriction to a liferent coupled with a power of disposing of the shares by will, and that this is sufficient.

The decisions have gone far in the direction of sustaining a deed of appointment in so far as it can possibly be held to be within the power after striking out these parts of the deed which are invalid, although in doing so some violence is done to the intentions of the appointer. There is no stronger example of this than the case of *M'Donald* v. *M'Donald's Trustees*,[1] which must now be held to regulate the law of Scotland.

But this is only done where it is possible to separate the good from the bad, and if the objectionable portions are so mixed up with the remainder of the appointment as not to admit of separation, the whole deed, or at least such part of it as is inextricable, falls.

In the present case there is no difficulty in separating the appointment of the fund from the limitations which follow. In that respect the case resembles and is more than covered by the case of *M'Donald*.[1] In that case the appointers began by declaring that it was their will that a sum of £25,000 secured over certain entailed estates should "be settled on and belong to our eldest son and other members of our family in succession, being heirs in possession of the entailed estate—the sum of £25,000 being the share . . . which we . . . have allotted and apportioned, and do hereby allot and apportion, as the share of our eldest son, or failing him of the heir of entail succeeding to the said entailed estate," and that the way, and the only way, in which the appointers intended and directed that the eldest son should obtain the benefit of this apportionment was that their marriage-contract trustees should after their death discharge the said heritable bond for £25,000 over the entailed estates, the result of which would have been that Colonel M'Donald, the eldest son, would only have had an interest during his life in the sum apportioned, and that the benefit of the apportionment might ultimately accrue to persons who were not objects of the power. It was contended for the younger children, and with success, in this Court, that the conditions being invalid (and both the majority and the minority of the Court agreed that they were) the whole apportionment failed, and that

[1] 1 R. 794, rev. 2 R. (H. L.) 125.

there must be an equal division. So formidable did this objection appear to Colonel M'Donald that in the appeal case his first alternative contention was that the whole appointment was good. Alternatively he pleaded that the appointment of the £25,000 was good, and that the conditions attached to the gift being invalid should be disregarded. The House of Lords sustained the latter contention, and held that the appellant was entitled to the £25,000 absolutely, although undoubtedly this was not according to the intention of the appointer.

In the present case the appointer, after making what if it stood alone would be a good absolute appointment to the second and third parties, has attempted to restrict their interests under the erroneous belief that he had power to give the fee of their shares to their children. The whole of the restrictions hinge on this. He has restricted the second and third parties to a liferent, and although he has superadded provisions which might raise the interest given to somewhat more than a liferent, these provisions are conditional and might never come into operation. I do not admit that an unqualified power to test would cure the defect, but not even that is given. He gives them a power to test, but only in the event of their dying without having had issue. Again, the trustees are given power to make advances of capital, but these advances are limited to one-third of the respective shares, and this restriction is made in the interests of the grandchildren to whom the fee is destined. In my opinion the whole of these restrictions are due to and dependent on the invalid gift of fee to the grandchildren, and stand or fall according to the validity of that gift. Even if they could stand alone the interest given does not amount in any view to one of fee.

It is necessary to say a word on the cases which were pressed on us in argument. Assuming them to be well decided, none of them when examined seems to me to touch the case. The principal Scottish authority relied on was *Lennock's Trustees*.[1] The judgment in that case was framed, or intended to be framed, upon the judgment in the old English case of *Carver* v. *Bowles*.[2] The latter case is chiefly known and cited as an authority for the proposition that an appointment otherwise good does not necessarily fail because the appointer has adjected invalid conditions; but it is true that another point was decided which must be noticed. The direction in the appointment was to pay the interest to the daughter during her life for her separate use and without power of anticipation or alienation; and then followed the limitations in favour of issue, followed by a conditional power of disposal on the failure of issue, which were held to be in excess of the power. The Master of the Rolls held that the words of appointment were sufficient to vest the shares *absolutely in the daughter;* but that it was competent for the donee of the power to limit the interest which he appointed to his daughters to their separate use and to restrain them from anticipation or alienation. Accordingly in the judgment (p. 309) it was declared that the daughters' shares "are limited to their respective separate use for life, . . . and are to be held and enjoyed by them without power to make any assignment or appointment by way of alienation." Subject to this they had an absolute right of disposal. The decision may or may not be sound,

[1] 8 R. 14. [2] 2 Russ. and My., 301.

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but two things are apparent, that it is not an authority to the effect that a liferent coupled with a qualified power to test would have been good; and secondly, it was not necessary to remodel the deed of appointment further than to draw a pen through the objectionable clauses.

Coming now to *Lennock's Trustees*,[1] there are peculiarities about that case which somewhat detract from its value. The terms of the deed were substantially the same as those in the case of *Carver* v. *Bowles*,[2] it being directed that the trustees should pay the interest and annual proceeds to the appointer's daughters during their respective lives "for their and each of their own separate and absolute use and benefit, notwithstanding coverture, and so that my said daughters respectively shall not have power to dispose thereof by way of anticipation."

Then follows a power to the daughters to divide the fee among their children; and in case there should be no children who attained a vested interest in the funds, "in trust for such person or persons in such shares, and in such way and manner as my said daughters respectively shall in manner aforesaid appoint." It is to be observed that both parties to the special case maintained that the restrictions on the daughters' interests were wholly invalid; but the Lord Justice-Clerk held that the case was ruled by *Carver* v. *Bowles*.[2] He did not, however, regard the interest given to the daughters as one of liferent. He expressly says that an attempt to restrict the right to a liferent would have been bad; but he says,—"It may be quite true, as it was in that case (*Carver* v. *Bowles*[2]), that some of these restrictions reduce the actual enjoyment to little more than a life interest, but they do not appear to me to exceed the limits which were contemplated by the testator." Lord Gifford again, as I gather from the conclusion of his opinion, did not even decide that the grandchildren had not a right of fee. He contented himself with holding that there was a good appointment of the fund in liferent to the daughters, leaving the question as to their power to dispose of the fee to arise subsequently.

The interlocutor, again, goes beyond the declaration in the case of *Carver* v. *Bowles*,[2] which contained no reference to disposal by will; because after declaring that the shares of the daughters are limited to their separate use for life, it proceeds,—"are to be held by them subject to the power of appointment conferred by the said settlement." Now, the power of appointment in the settlement was limited, if there were issue, to appointing among the issue who were not objects of the power. Perhaps the interlocutor means simply that the daughters should have power to test. If so, there is nothing to suggest that the power was conditional on there being no issue. I think that this was the Lord Justice-Clerk's intention, but not Lord Gifford's, who was not prepared to decide as to the interests of the children.

The decision in *Wallace's Trustees*[3] simply followed the other decisions, the language of the deed of appointment being practically the same, with this exception, that there was no destination to the issue of the daughters. The daughters had an absolute right of disposal by will of the capital of their shares—not, as here, a limited and conditional power.

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[1] 8 R. 14. [2] 2 Russ. and My. 301. [3] 18 R. 921.

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In the last case, *Wright's Trustees*,[1] the power of appointment was contained in Mr John Wright's antenuptial marriage-contract. Under it the survivor of the spouses had power to appoint among the child or children of the intended marriage in such proportions, at such times, and under such conditions as he or she might direct. Mr John Wright survived his wife, and died leaving a settlement by which he directed a third part of the trust funds to be held for behoof of his daughter Florence in liferent, and the parties after named in fee. The parties after named were her lawful children if she had any, and failing children such parties and in such manner as she should direct by any writing under her hand, and failing such writing to her nearest of kin equally. I observe in passing that under that deed, differing from the one which we have to construe, the appointment did not commence with an absolute appointment of a certain sum to Florence. The only appointment made to her is in liferent, and this of itself is sufficient to distinguish it from the present case. It is also, I think, sufficient to distinguish it from the cases of *Carver* v. *Bowles*[2] and *Lennock's Trustees*,[3] because in both these cases, although there was a prohibition of anticipation, there was what was held to be otherwise an absolute appointment.

But then Lord Adam deals with the peculiarity of the case, that the power to test which is superadded to the liferent is not an absolute power to test, in which respect the deed resembles that in the present case. He holds, and rightly, that the abortive appointment to children who were not objects of the power could not of itself render invalid a gift to an object of the power. But then he had to meet the difficulty that the power to test was not an absolute right, but was conditional upon Miss Wright dying without issue. He held, however, that the power to test, though qualified, was sufficient, coupled with the liferent, to constitute a good exercise of the power in favour of Florence. If it were good law that a liferent, plus a qualified power of testing, is equivalent to a right of fee, I should agree that the effect of an abortive attempt to interject persons who were not objects of the power would not affect the right to test conferred. But I know of no authority to the effect that a liferent with a power to test so qualified is equivalent to a right of fee.

In regard to the case of *Crompe* v. *Barrow*,[4] to which Lord Adam refers, I fail to see its application to the case of *Wright*.[1] In *Crompe* v. *Barrow*[4] the contention on behalf of Charles Barrow was that the fee of the moiety, of which he had the liferent, having been given to his issue, persons not objects of the power, in the first instance, and in the event of his dying without issue to his sister Frances, the whole of the appointment fell, and the fund fell to be disposed of as unappointed. It is true that the judgment of the Master of the Rolls implies that Frances would only take in the event of Charles dying without leaving issue, and that if he left issue, although they could not take, the fund would go as unappointed. But Frances seems to have been content with this qualified right, and the real dispute was whether the gift to her was not wholly bad in consequence of the invalid appointment to the children of Charles. The Master of the

[1] 21 R. 658. [2] 2 Russ. and My. 301. [3] 8 R. 14. [4] 4 Ves. junior, 681.

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Rolls held that it was not, and sustained the claim of Frances to that extent. The question does not seem to me to be the same. There the question was whether a gift in remainder of a full though conditional right of fee to an object of the power wholly failed because an ineffectual attempt had been made to give the fee to persons who were not objects of the power. In *Wright's*[1] case, as here, the question was whether an object of the power who was entitled to a fee was bound to accept something less than a right of fee. If *Crompe* v. *Barrow*[2] applied at all to the present case, the second and third parties would have no power to test on their shares if they had issue. That is exactly what they complain of.

None of these cases, assuming them to be well decided, seems to rule this case, or necessarily to conflict with the view which I take of it. In none of them was there such a distinct and separable appointment as here. Again, *Carver* v. *Bowles*,[3] on which the decisions in *Lennock's Trustees*[4] and *Wallace's Trustees*[5] were intended to be based, merely decided that it was within the power to restrain the object of the power (a female) from anticipation, leaving her otherwise absolute owner, and free to dispose of her share by will or deed to take effect after her death. In *Wright's Trustees*[1] the only appointment was in liferent, which is sufficient to distinguish the case, but I do not agree in the judgment, which goes far beyond the other decisions. This case really depends on the well-settled law that, "if the first appointment gives the absolute interest to the appointee, and the subsequent superadded modification of it is void, the original appointment stands exactly as if the attempted modification were struck out of the will"—*per* Master of the Rolls (Lord Romilly) in *Churchill* v. *Churchill*.[6]

I therefore would answer the second alternative of the first question in the affirmative.

LORD JUSTICE-CLERK.—I concur in the opinion of Lord Trayner.

THE COURT answered the first alternative of the first question in the negative, and the second alternative in the affirmative.

SKENE, EDWARDS, & GARSON, W.S.—W. K. AIKMAN, W.S.—Agents.

No. 60. Jan. 24, 1901. M'Call's Trustees v. Murray.

THOMAS M'CALL AND OTHERS (M'Call's Trustees), First Parties.—*Jameson, Q.C.—Graham Stewart.*

GEORGE MURRAY AND OTHERS, Second Parties.—*Jameson, Q.C.—Graham Stewart.*

MARGARET MACKEY OR COOTE AND OTHERS, Third Parties.—*Campbell, Q.C.—Cullen.*

THOMAS M'CALL GRACIE AND OTHERS, Fourth Parties.—*Cook.*

Succession — Vesting — Clause of Survivorship — Trust — Discretion of Trustees.—Trustees under a settlement were directed to divide the residue of the truster's estate on the death of a liferentrix, "so soon thereafter as deemed proper," with the further provision that if any of the residuary legatees should predecease "the said term of payment and division among them," the share of such predeceaser should be held as lapsed.

A residuary legatee survived the liferentrix, but died before the trustees had made payment and division.

[1] 21 R. 658. [2] 4 Ves. junior, 681. [3] 2 Russ. and My. 301.
[4] 8 R. 14. [5] 18 R. 921. [6] L. R., 5 Eq. 44, at p. 48

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Held that the share of residue destined to the residuary legatee had vested on the death of the liferentrix.

Succession—Heritable or Moveable—Conversion.—Trustees under a settlement were directed on the death of a liferentrix to "divide" the residue of the truster's estate into as many "shares" as the truster had sisters, and "having thus divided the said residue and shares," to "pay" the "shares" in certain proportions to his sisters, whom failing, to their issue, declaring that if any of his sisters should have predeceased the "period of payment and division," leaving issue or their descendants, such issue or descendants should take equally among them, if more than one *per stirpes*, the share which would have fallen to the deceasing parent, but that if any sister predeceased the said term without issue her "share" should be held to have lapsed. The trustees were further directed, if they thought proper, "in order that the provisions herein conceived in favour of females may be rendered more secure," to invest the shares falling to females on the security or in the purchase of heritable or other property, exclusive of the *jus mariti*, courtesy, or other legal rights of any husbands they might marry.

Part of the residue was heritable at the date of death both of the truster and of the liferentrix.

Held that the truster intended his estate to be realised and converted into cash on the death of the liferentrix, and that the share of a residuary legatee who had died intestate after her share had vested in her belonged to her heirs *in mobilibus*.

2D DIVISION.

THOMAS M'CALL, architect in Glasgow, died in 1869, leaving a trust-disposition and settlement, dated 27th September 1861, whereby he conveyed his whole means and estate to the trustees therein named in trust for, *inter alia*, the following purposes:—(4) Payment of annuities to his five sisters; (5) payment of the liferent of the residue of his estate to his daughter Mary M'Call, and upon her death, in the event of her leaving lawful issue, and upon such issue respectively attaining the age of twenty-one years complete, for division and apportionment of the said residue itself among such issue; and (6) "In the event of the death of the said Mary M'Call without leaving lawful issue or in the event of her death leaving issue and of such issue all predeceasing the foresaid term of payment and division amongst them, then, so soon thereafter as deemed proper my trustees, after providing for fulfilment of the purposes of the trust above mentioned, shall divide the residue and remainder of my estate and effects including as a foresaid into equal shares according to the number of my said sisters who may be in life at the period of such division and such of them as may have died leaving lawful issue that is a share for each sister then in life and one for each sister who may have died leaving lawful issue, and my said trustees having thus divided the said residue and shares as aforesaid shall pay over two thirds of one share to the said Mrs Alice or Elshie M'Call or Kirkwood, whom failing to her issue as aftermentioned, and the remaining shares and part of a share equally to and among the said Mrs Jean M'Call or Gracie, Isabella M'Call or Whyte, Agnes M'Call and Jessie M'Call, whom failing to their issue as aftermentioned, my said sisters and their issue in the events foresaid being hereby constituted my residuary legatees; Declaring always that should any of my said sisters Jean M'Call or Gracie, Isabella M'Call or White, Agnes M'Call, Jessie M'Call or Alice or Elshie M'Call or Kirkwood have predeceased the said term of payment and division amongst them, leaving lawful issue or their descendants, such issue or their descendants shall take equally among them if more than one *per stirpes* the share which

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would have fallen to the deceasing parent had she survived the said term the issue of predeceasing children in every case coming in their parent's room and place but, in case any of my said sisters shall predecease the said term without leaving lawful issue or their descendants at the foresaid period of division, then the share provided to such sister and her issue shall be held as lapsed and divided accordingly." The testator provided that the whole provisions in favour of females should be "exclusive of the *jus mariti* and right of administration of any husbands," "and in order that the provisions herein conceived in favour of females may be rendered more secure I authorise and empower my said trustees, if they shall think proper so to do, notwithstanding the foresaid destination and provisions, in place of paying over their provisions to the said females, to lay out the same on the security or in the purchase of such heritable or other property as they may think fit, either in name of the said females exclusive of the *jus mariti* courtesy or other legal right on the part of their husbands or of themselves the said Trustees or others as trustees for behoof of such females in liferent for their liferent use allenarly and of their children whom failing of my said trustees for the ends uses and purposes before mentioned in fee in which last case the fee before conceived in favor of such females is hereby restricted and limited to a liferent right accordingly but with power nevertheless in that event to them respectively in the event of any one or more of them dying without issue to test by will or other *mortis causa* deed upon the fee of their respective shares."

The trustees were further given full powers of sale.

Thomas M'Call was survived by the liferentrix Mary M'Call, and by his five sisters. Of the sisters all save one, Jessie M'Call, predeceased the liferentrix Mary M'Call.

Mary M'Call died on 23d October 1899. Part of the residue was heritage and part was moveable, both at the death of the testator and at the death of the liferentrix.

Jessie M'Call died unmarried and intestate on 3d January 1900, by which time no steps had been taken to wind up or divide the estate.

Of Thomas M'Call's sisters who predeceased the liferentrix three—viz., Mrs Kirkwood, Mrs White, and Mrs Gracie—left issue and descendants of issue. The others died unmarried.

Questions having arisen as to (1) whether the share of the estate of Thomas M'Call, provided to the said Jessie M'Call, vested in her at the death of the liferentrix, and (2) whether the terms of the testator's settlement imported conversion of the estate from heritable to moveable, the present special case was brought.

The parties thereto were (1) Thomas M'Call and others, the testamentary trustees of the late Thomas M'Call; (2) George Murray and others, the issue and descendants of issue (excluding the heir in heritage) of Mrs Kirkwood; (3) Margaret Mackey or Coote and others, the issue and descendants of issue of Mrs Gracie and Mrs White (exclusive of the heirs in heritage), and Thomas White and another, the executors of Jessie M'Call; and (4) Thomas M'Call Gracie and others, the heirs at law in heritage and heirs *in mobilibus* of both Jessie M'Call and Thomas M'Call.

The second parties maintained that the share of the estate of the said Thomas M'Call provided to the said Jessie M'Call vested in her, and that the same was part of her moveable succession, and fell to them, along with the third and fourth parties, as her heirs *in mobilibus ab intestato*, or alternatively that it formed the intestate

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moveable succession of the deceased Thomas M'Call, and fell to the same parties as his heirs *in mobilibus ab intestato.*

The third parties maintained that the said share did not vest in Jessie M'Call, but belonged to them and the second and fourth parties as residuary legatees of the said Thomas M'Call, and fell to be divided among these parties in terms of his settlement; alternatively, that the said share was moveable, and fell into intestacy, and belonged to them and the second and fourth parties *per stirpes* as the representatives of his heirs *in mobilibus.*

The fourth parties maintained that the part of the said share which consisted of heritage was heritable, and fell to them either as heirs in heritage of Jessie M'Call or alternatively of Thomas M'Call.

The questions for the opinion of the Court were:—"(1) Did the share of the residue of the estate of the said Thomas M'Call in favour of Jessie M'Call vest in her? 2. In the event of query 1 being answered in the affirmative, does such share of residue fall to be paid to the representatives of Jessie or Janet M'Call *ab intestato?* 3. In the event of query 2 being answered in the affirmative, does such share of said residue fall to be paid over (1) to the heirs *in mobilibus* of the said Jessie M'Call, or (2) so far as represented by the share of the heritable property to her heirs in heritage, and the remainder of her said share to her executors? 4. In the event of query 1 being answered in the negative (1) does such share of said residue belong to the second, third, and fourth parties as residuary legatees of the said Thomas M'Call, or (2) does such share fall into intestacy, and (*a*) belong to the second, third, and fourth parties *per stirpes* as his heirs *in mobilibus*, or (*b*) so far as represented by the share of heritable property belong to his heirs in heritage, and the remainder of said share to his heirs *in mobilibus?*"

Argued for the second parties;—(1) Vesting took place in Jessie M'Call at the death of the liferentrix; the discretion to the trustees as to the term of payment did not prevent vesting at the date when payment became possible.[1] (2) What vested in Jessie M'Call was a right to claim a share of residue, and there was here conversion.[2] The number and complicated nature of the *pro indiviso* shares which would have to be made unless there was conversion, shewed that the testator intended conversion to take place.

Argued for the third parties;—There was no vesting in Jessie M'Call.[3] Assuming no vesting, the share passed under the residuary clause of Thomas M'Call's settlement.

Argued for the fourth parties;—The second parties were right in their contention as to vesting in Jessie M'Call, but there was no conversion. The second parties had not established that the testator intended the house property to be changed to moveable before distribution. It was not necessary for the purposes of the trust, and unless it was necessary there was no conversion.[4] If trustees could

[1] Scott v. Scott's Executrix, Jan. 27, 1877, 4 R. 384; Wood v. Neill's Trustees, Nov. 6, 1896, 24 R. 105.

[2] Baird v. Watson, Dec. 8, 1880, 8 R. 233; Brown's Trustees v. Brown, Dec. 4, 1890, 18 R. 185; Galloway's Trustees v. Galloway, Oct. 27, 1897, 25 R. 28; Advocate-General v. Blackburn, Nov. 27, 1847, 10 D. 166; Playfair's Trustees v. Playfair, June 1, 1894, 21 R. 836.

[3] Howat's Trustees v. Howat, Dec. 17, 1869, 8 Macph. 337, 42 Scot. Jur. 116.

[4] Hogg v. Hamilton, June 7, 1877, 4 R. 845.

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lawfully convey to beneficiaries the estate as committed to them, the beneficiaries were bound to accept it in that shape, and there was no conversion.[1] In the case of *Anderson*,[1] there was just the same difficulty as to *pro indiviso* shares which there was here. Any difficulty as to the clause in the settlement as to the provisions in favour of females being exclusive of their husbands' legal rights was met by the case of *Sheppard*,[2] where there was a similar clause. If there was no vesting in Jessie M'Call there was intestacy, and if so, no conversion, even where there was a direction to sell, because such a direction could only take effect where there was a bequest in favour of somebody. There being intestacy, these parties took the heritage as heirs in heritage of Thomas M'Call.

LORD JUSTICE-CLERK.—The first question is, whether the residue of the estate of Thomas M'Call vested in Jessie M'Call. Thomas appointed the liferent of the residue to go to his daughter Mary M'Call, and on her death without issue then alive it was to be divided into equal shares according to the number of his sisters, the issue of any predeceasing sister being entitled to a share with surviving sisters. When the liferent lapsed Jessie M'Call was the only annuitant surviving, and she died in 1900. Three of her sisters died leaving issue.

The clause of the deed upon which the question of vesting depends is the sixth clause, by which the trustees are directed in the event which occurred "then so soon thereafter as deemed proper my trustees . . . shall divide the residue, . . . and having thus divided that residue shall pay" in a certain manner directed. I am of opinion that Jessie M'Call having lived to the time to which this direction applied, there was vesting in her. There is no direction to hold up the estate, the only discretion given being to enable the trustees to have reasonable time to carry out the testator's directions in detail, but the rights and interests of beneficiaries coming into operation upon the event occurring which caused the right to emerge.

The second question is, whether the whole share which vested in Jessie is to be held to have been moveable, or was partly heritable and partly moveable, the rights of parties to this case depending upon the answer to be given to that question. It is not unattended with difficulty, there being nothing direct in the trust-deed to aid in interpreting it. But I think that when the deed is examined to ascertain the intention of the granter, the fair result is that he desired his estate to be divided as a moveable estate. I do not proceed upon the power given to the trustees to sell, for that might be a power which it was wise to give, although the testator had no direct intention that his estate should be dealt with as moveable in its entirety when the time for division came. Nor do I attach any weight to the use of the word "pay" used in regard to the shares, for if the deed was otherwise clear the use of such an expression would not be sufficient to compel a reading which would imply that the whole was moveable. But

[1] Anderson's Executrix v. Anderson's Trustees, Jan. 18, 1895, 22 R. 254; Sheppard's Trustees v. Sheppard, July 2, 1885, 12 R. 1193; Seton's Trustees v. Seton, July 2, 1886, 13 R. 1047; Lord Rutherfurd Clark in Playfair's Trustees v. Playfair, *supra*.

[2] 12 R. 1193.

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when it is found that the testator's instructions seem to relate to a division into shares, and again into fractions of shares,—and further, that when the testator desires to provide protection for provisions to females he specially gives the trustees power, if they see fit, to lay out the amount of their shares "on the security or in the purchase of such heritable or other property as they may see fit, either in name of the said females, exclusive of the *jus mariti*, courtesy, or other legal right on the part of their husbands,"—it seems to me that that indicates that the estate the trustees had to deal with was a moveable estate, part of which they might apply for special reasons in the purchase of heritage. It is to be noted that in the general conditions only the *jus mariti* and right of administration of husbands are excluded, and that where the testator deals with heritage he inserts the appropriate word "courtesy." It seems thus to be a fair inference from the deed that the succession was moveable.

My opinion is that the first and second questions should be answered in the affirmative, and the first alternative of the third question in the affirmative. The fourth question it is unnecessary to answer.

LORD YOUNG.—I am also of opinion that the share of the estate of Thomas M'Call provided to Jessie M'Call vested in her. I am further of opinion, from expressions used in the deed, that it was the intention of the testator that she should take her whole share in money, and not part of it in land, and that the estate must therefore be dealt with as moveable, and go to her heirs *in mobilibus*.

LORD TRAYNER.—I entertain no doubt that the rights which the late Jessie M'Call took under the settlement of her brother Thomas M'Call vested in her on the death of Mary M'Call, who liferented the whole trust-estate. The only doubt which has been suggested as to the period of vesting arises from the terms of the direction to the trustees to divide the residue of the truster's estate on the death of the liferentrix without issue, or "so soon thereafter" as the trustees deemed proper, with the further provision that if any of the residuary legatees should predecease "the said term of payment and division among them," the share of such predeceaser should descend to her issue, and failing issue should be treated as a lapsed legacy. In view of these provisions it was maintained that there was no vesting in the residuary legatees until actual payment or division had been made. I cannot assent to that view. It appears to me that the period of division and payment to and among the residuary legatees contemplated by the truster was the death of the liferentrix, and although it is added "or so soon thereafter" as the trustees should deem proper, these words appear to me only to provide for a reasonable time being allowed the trustees to realise and distribute the estate. In a word, that the latitude given to the trustees as to the time of division had only reference to the fair administration of the trust and realisation of the estate according to what they deemed best, but did not postpone vesting, or enable the trustees by their actings to delay or alter the period of vesting.

The question whether the share of residue which fell to and vested in Jessie M'Call was all moveable or was partly heritage is attended with some difficulty. Part of the residue was undoubtedly heritable at the date

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of the death both of the truster and of the liferentrix. The trustees had a power of sale, but did not exercise it. There was therefore no conversion through the action of the trustees. But there are three considerations which lead me to the conclusion that the share of Jessie M'Call must be treated as all moveable succession. First, the direction of the truster to his trustees is to divide the residue, and to pay it in certain proportions to the residuary legatees. This in itself is not much, because I recognise that the words "pay," "convey," "transfer," &c., have been regarded in previous cases as practically synonymous. Still it is a direction to pay, which applies more directly to a division of realised estate than to estate which is to be transferred to a legatee *in forma specifica*. Second, the fractional division of the residue among the legatees would have been more difficult to accomplish in the way of *pro indiviso* conveyance of heritage than in the payment of money, and I see nothing to suggest that the truster intended to put any such difficulty on the shoulders of his trustees. Third, the truster directed his trustees, if they think proper, "in order that the provisions herein conceived in favour of females may be rendered more secure," to invest the shares falling to females in the purchase of heritable property or in heritable securities, so as to exclude the legal rights of any husbands they might marry. Now, I think that direction fairly presupposes that the heritage left by the truster had been or was to be realised before the division of the residue, as otherwise the truster would have directed his trustees to convey the existing heritage to the legatees, so as to exclude their husbands' legal rights, and to invest the balance in such a way as to produce the same effect. This last consideration seems to me to be enough to turn the scale on a balancing of considerations in favour of the view that there was conversion—conversion by reason of the intention of the truster—who intended, as I conclude, from his whole deed, that on the death of the liferentrix his estate should be realised, and in that form paid over to the residuary legatees in the proportions mentioned by him.

Lord Moncreiff.—On the question of vesting I do not entertain any doubt. The "term of payment and division" in the case of the liferentrix Mary M'Call dying without leaving lawful issue was the date of her death. No doubt the deed contains the provision that the trustees are to divide "so soon thereafter as deemed proper," but that is after the term of payment and division in the sense of the deed has arrived, and the direction is only inserted in order that the trustees may take such reasonable time as they may think fit for ingathering and realising the estate.

The question of conversion is perhaps more difficult. The argument *ab inconvenienti* does not carry us very far, because those who are entitled to take may chance to be many or few at the date of division. But in the present case there are sufficient indications in the deed that what the truster anticipated and intended in disposing of his mixed estate was that it should all be converted into cash and then divided. The provisions which have already been referred to with regard to the provisions in favour of females sufficiently indicate this.

I therefore agree that the first and second questions, and the first alternative of the third question, should be answered in the affirmative.

THE COURT answered the first and second questions and the first alternative of the third question in the affirmative, and *quoad ultra* found it unnecessary to answer. No. 60. Jan. 24, 1901. M'Call's Trustees v. Murray.

T. F. WEIR & ROBERTSON, S.S.C.—HENRY ROBERTSON, S.S.C.—W. & J. COOK, W.S.—Agents.

GEORGE NEILL, Pursuer (Respondent).—*Watt, K.C.—A. M. Anderson.* SIMON HENDERSON, Defender (Reclaimer).—*Craigie—David Anderson.* No. 61. Jan. 25, 1901. Neill v. Henderson.

Reparation—Slander—Privilege—Judicial Slander—Arbitration—Witness—Malice.—In an action of damages for slander the pursuer averred that during the course of arbitration proceedings to which the defender was a party, and in which the pursuer was called by the arbiter to give information, after a statement by the pursuer to the arbiter, the defender stated to the arbiter of and concerning the pursuer "that man cannot speak one word of truth, and all that he has stated just now is lies from beginning to end," and that on being asked to withdraw the statement he repeated it.

Held (*aff.* judgment of Lord Kincairney, *diss.* Lord Young) that the pursuer was entitled to an issue, but (*rev.* judgment of Lord Kincairney, *dub.* Lord Moncreiff) that the occasion was privileged and malice must be put in issue.

THIS was an action of damages for slander at the instance of George Neill, commission agent, 1 Morrison Place, Edinburgh, against Simon Henderson, baker, Fountainbridge, Edinburgh, concluding for £500 of damages. 2D DIVISION. Lord Kincairney.

The pursuer averred:—(Cond. 2) "About twenty years ago the defender and Dr John Bowie, 41 Lauriston Place, Edinburgh, and John Nisbet, High Street, Edinburgh, purchased the estate of Parsons Green for feuing purposes, and entered into an agreement for the construction of certain roads dividing their respective portions of said estate. Sometime ago disputes arose between the defender and Dr Bowie as to the payment of the cost of constructing said roads. The defender and Dr Bowie agreed to refer the matters in dispute between them in connection with said roads to the arbitration of Mr William Ormiston, Lord Dean of Guild of Edinburgh. Mr Ormiston accepted the reference, and appointed a meeting of parties and their agents to be held on the ground on the 6th April 1900, at 2.30 p.m., to hear parties and take evidence on the matters in dispute. As the pursuer had constructed the major portion of the roads on said estate, he was asked by Dr Bowie to attend the proposed meeting, so as to point out to the arbiter the roads which he had made on the orders of and at the expense of Dr Bowie." (Cond. 3) "On said 6th April 1900 the pursuer accordingly went to said meeting at Hobart Street, Parsons Green. After the agents of the parties had made statements to the arbiter, the pursuer was called upon to state to the arbiter which of the roads in question were made by the different proprietors, Dr Bowie and the defender. After the pursuer had made this statement, the defender, in the presence and hearing of the said William Ormiston, Alexander Guild, of Messrs Reid & Guild, W.S., agent for Dr Bowie, and the said Dr Bowie, said, 'Mr Ormiston, that man cannot speak one word of truth, and all he has stated just now is lies from beginning to end,' or used words of like meaning and import. The said statement was of and concerning the pursuer, was false and calumnious, and was made maliciously and without probable or any cause. The pursuer immediately called upon the defender to with-

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draw the said statement, but he refused to do so. On the contrary, the defender reiterated the said slanderous statement in the same or similar language, and subsequently, during said meeting, he addressed other offensive terms towards the pursuer. Subsequently the pursuer wrote the defender by registered letter, calling upon him to apologise for said slanderous statement, but to this letter the defender has made no answer."

The pursuer pleaded;—(1) The defender having slandered the pursuer, is liable to make reparation therefor.

The defender pleaded;—(1) The pursuer's averments are neither relevant nor sufficient to support the conclusions of the summons. (3) In any event, any statement made by the defender regarding the pursuer being privileged, and the defender having made the same without malice, and with probable cause, decree of absolvitor should be pronounced.

On 13th November 1900, the Lord Ordinary (Kincairney) approved of the following issue:—"Whether, on or about the 6th day of April 1900, and at or near Hobart Street, Parsons Green, Edinburgh, the defender, in the presence and hearing of William Ormiston, Lord Dean of Guild of Edinburgh; Alexander Guild, of Messrs Reid & Guild, W.S., Edinburgh; and Dr John Bowie, 41 Lauriston Place, Edinburgh, or one or other of them, did falsely and calumniously say of and concerning the pursuer: 'Mr Ormiston, that man cannot speak one word of truth, and all he has stated just now is lies from beginning to end'; or did use words of like import and effect of and concerning the pursuer, to his loss, injury, and damage?" *

The defender reclaimed, and argued;—(1) There was no issueable matter on record. The statement complained of was referable only to the proceedings on the occasion in question, and was not meant to be, and could not be interpreted as, a charge of general mendacity. It was an extravagant remark, made practically *in rixa*, and therefore

* "OPINION.—I am of opinion that the issue lodged by the pursuer should be approved. The words complained of amount to a general charge of mendacity, and are, in my opinion, slanderous. The case of *Milne* v. *Walker*, 24th November 1893, 21 R. 155, appears to be in point. There have been cases in which language of that sort has been held not to support an award of damages, where it appeared from the proof that the words were spoken in the heat of a quarrel, and were not intended to impute, nor understood as imputing, actual delinquency, but were merely of the nature of coarse vituperation, and were so understood by the person attacked, as in *Watson* v. *Duncan*, 4th February 1890, 17 R. 414, and *Christie* v. *Robertson*, 12th July 1899, 1 F. 1155. These were not judgments on issues, but on the evidence; and, if in this case it shall appear in the evidence that nothing slanderous was intended or understood, the defender may be entitled to a verdict.

"It was argued for the defender that the case was one of privilege, the words complained of being spoken in the course of proceedings in an arbitration. The pursuer maintained that proceedings before an arbiter were not to be regarded, in questions of this sort, as judicial proceedings. I am clearly of opinion that they are (see *Macmillan* v. *Free Church*, 3 July 1862, 24 D. 1282, at p. 1285; *Hay* v. *Cameron*, 18th June 1898, S. L. T. 67), and that words spoken in the course of proceedings before an arbiter are entitled to a certain measure of privilege. But I do not consider that such privilege covers a charge of general mendacity; and I am therefore of opinion that it is not necessary to take an issue of malice. I may add that I think malice is relevantly averred."

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there was no relevant case.[1] The case was quite different from the case of *Milne* v. *Walker*,[2] relied on by the Lord Ordinary, which was a case of a deliberate charge of lying made by letter to, and published in, the papers. (2) The occasion was an arbitration, which was a judicial proceeding, and a statement by a party, being referable to the matter arbitrated on, was entirely privileged, just as a statement of counsel or of a witness.[3] In any event, malice must go into the issue, and malice was not relevantly averred.[4]

Argued for the pursuer;—(1) The statement was defamatory. (2) The pursuer was not a party to the arbitration proceedings, and therefore there could be no privilege. Even if privilege attached to the statement in so far as it referred to the matter in arbitration the scope of the statement was much wider. If the case was privileged, and malice was necessary to the issue, it was relevantly averred,[5] but it was not necessary to the issue, and the pursuer was entitled to meet a defence of privilege by proof of malice at the trial, although he had taken an issue without malice.[6]

LORD JUSTICE-CLERK.—In adjusting the issue in this case the only question is, whether the word "maliciously" should be inserted in the issue. In my opinion it should be inserted. The slander is said to have been uttered in speaking to an arbiter during the course of a practically judicial proceeding. It has been the practice, where issues have been allowed in cases where the alleged slander was spoken in the course of such cases, to put the malice specifically in the issue, as a matter to be proved. I would therefore insert the word "maliciously" before approving of the issue.

LORD YOUNG.—I do not think it is desirable to express any opinion in this case, as I understand that all your Lordships except myself are of opinion that it should go to trial. It must therefore go, and it will serve no useful purpose for me to state why I differ from that view.

LORD TRAYNER.—I think the language used by the defender and here complained of was libellous, and that the pursuer is entitled to an issue. But as the language in question was used in the course of a judicial or *quasi*-judicial proceeding, and was not plainly irrelevant or impertinent to the matter being discussed, I think the defender was privileged, at least to the extent of requiring that malice should be put in issue, and this I think should now be done.

LORD MONCREIFF.—The only question is whether the word "maliciously" should be inserted in the issue. My own opinion is that it should not,

[1] Macdonald v. Rupprecht, Jan. 19, 1894, 21 R. 389.
[2] Nov. 24, 1893, 21 R. 155.
[3] Munster v. Lamb, 1883, L. R., 11 Q. B. D. 588; Dawkins v. Lord Rokeby, 1875, L. R., 7 H. L. 744.
[4] M'Intosh v. Flowerdew, Feb. 19, 1851, 13 D. 726, 23 Scot. Jur. 320; Mackellar v. Duke of Sutherland, Jan. 14, 1859, 21 D. 222, 31 Scot. Jur. 139; Scott v. Turnbull, July 18, 1884, 11 R. 1131; Gordon v. British and Foreign Metaline Co., Nov. 16, 1886, 14 R. 75; Selbie v. Saint, Nov. 8, 1890, 18 R. 88; Hay v. Cameron, June 7, 1898, 6 S. L. T., No. 67.
[5] Douglas v. Main, June 13, 1893, 20 R. 793; M'Ternan v. Bennett, Dec. 21, 1898, 1 F. 333.
[6] M'Bride v. Williams & Dalzell, Jan. 28, 1869, 7 Macph. 427, 41 Scot. Jur. 241.

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because I think that, on the pursuer's statement, which is what we have to deal with, no privilege is disclosed; or rather, that any privilege that attached to the occasion or to the party was lost owing to the intemperance of the words which the defender is said to have used. But I do not mean to press my own views on that matter, for two reasons. In the first place, it is the general practice to insert the word "maliciously" in cases of judicial slander, and I do not desire lightly to depart from what seems to be a well established practice. But, secondly, it matters very little whether the word "maliciously" is introduced or not into the issue. Even if it is introduced, in my opinion the pursuer will have fully discharged the burden thus laid upon him if he establishes at the trial to the satisfaction of the jury the facts which he sets forth in the third article of the condescendence, —that is, that the defender used the words imputed to him, that there were no circumstances to put upon them a different meaning from that which they naturally bear, and that on being called upon to withdraw them the defender reiterated the charge. I say that if these averments are proved, there will be evidence upon which it will be competent for the jury to find that the defender used the word maliciously in the sense of the issue.

THE COURT approved of the issue as amended by the addition of the words "and maliciously" after the word "calumniously."

GRAY & KINNISON, S.S.C.—COUTTS & PALFREY, S.S.C.—Agents.

No. 62. Jan. 25, 1901. Somerville v. Macdonald's Trustee.

GEORGE SOMERVILLE (Petitioner), Respondent.—*Lord-Adv. Murray—Cook.*

MRS ISABELLA MACDONALD OR ARMOUR (Macdonald's Trustee), Appellant.—*Campbell, K.C.—T. B. Morison.*

Burgh—Dean of Guild—Appeal—Competency—Order to take down ruinous buildings—Edinburgh Municipal and Police Act, 1879 (42 *and* 43 *Vict. cap. cxxxii.*), *sec.* 166.—The Edinburgh Municipal and Police Act, 1879 (as amended by the Edinburgh Improvement, &c. (Amendment) Act, 1893, sec. 34), enacts by section 166 that if any building "be deemed by the burgh engineer to be in an insecure or ruinous state," he shall cause notice to be given to the owner to take down or secure or repair such building "as the case shall require," and failing the owner doing so, "the Dean of Guild Court shall, on the complaint of the Procurator-fiscal of Court, if they find it necessary after hearing parties, order the owner" of the building "to take down, rebuild, repair, or otherwise secure the same to their satisfaction within a time to be fixed by the Court."

In a complaint under this section the Dean of Guild Court, proceeding on their own skill and knowledge, after due inspection of the buildings in question, pronounced an interlocutor finding that the buildings were in a ruinous state and ordering the owner to take them down.

In an appeal the owner asked for further inquiry as to the condition of the buildings, either by a remit or by proof.

Held that no case had been made out for disturbing the judgment of the Dean of Guild Court, even if review was competent on the question of fact.

Question, whether such review was competent.

1ST DIVISION. Dean of Guild Court, Edinburgh.

MRS ISABELLA MACDONALD OR ARMOUR, as trustee of the late Tertius Macdonald, surgeon, Edinburgh, was proprietor of a shop on the ground floor of the tenement No. 89 High Street, Edinburgh. On 27th April 1900 Mr John Cooper, burgh engineer, sent a statutory notice in regard to this tenement to Mrs Armour's law-agent in the fol-

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lowing terms:—"Sir,—I beg to intimate to you that the slating, roofing, ceilings, joisting, floors, partitions, walls, of your property at 89 High Street are in a ruinous or insecure state, and in terms of 'The Edinburgh Municipal and Police Act, 1879,' section 166, and 'The Edinburgh Municipal and Police Acts, 1879 to 1896,' hereby require you as part owner forthwith to take down, secure, or repair the same. I beg further to intimate, that should you fail to have the work begun within three days from this date, further proceedings will be taken, and all expenses incurred will be levied from you in terms of the statutes." *

Mrs Armour not having complied with this notice, a petition was presented to the Dean of Guild Court on 22d May 1900 by George Somerville, Procurator-fiscal of that Court, in which Mrs Armour and the owners of the upper flats of the tenement were called as respondents.

The respondent Mrs Armour lodged answers to the petition, and stated that she had "been advised by skilled and competent advisers that her property is satisfactorily built and in good condition, and is perfectly secure. She is willing to take all reasonable steps to repair any defects that the Court may hold proved to exist in her property."

After certain procedure in the petition, the Dean of Guild, on 18th October 1900, after having visited the premises and heard the Procurator-fiscal and parties' procurators, found "in the meantime that all the flats of the tenement above the ground or shop flat are ruinous and insecure, and must be taken down"; and also "that the joists between the ground flat and the first flat, and the stone arching on the ground flat, are insecure"; and therefore in the meantime he ordained the respondents, other than Mrs Armour, to take down forthwith the flats belonging to them respectively.

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* Section 166 of the Edinburgh Municipal and Police Act, 1879 (42 and 43 Vict. cap. cxxxii.), is amended by section 34 (3) of the Edinburgh Improvement, &c. (Amendment) Act, 1893 (56 and 57 Vict. cap. cliv.), to read as follows:—

If any house, building, wall, or other erection of whatever form or material, or anything affixed thereon, be deemed by the burgh engineer to be in a ruinous or insecure state, the burgh engineer shall immediately cause the occupiers (if any) to remove from the occupancy of such houses or buildings until the same are put into a safe condition; and shall, if he judge it necessary, cause the same wholly or partially to be taken down . . . and shall cause a notice to be given to the owner of such house or building, wall, or other erection . . . requiring such owner forthwith to take down, secure, or repair such house or building, wall, or other erection as the case shall require; and if such owner do not begin to repair, take down, or secure such house, building, wall, or other erection within the space of three days after such notice has been so given . . . and complete such repairs or taking down or securing, as speedily as the nature of the case will admit, the Dean of Guild Court shall, on the complaint of the Procurator-fiscal of such Court, "*if they find it necessary after hearing parties*," † order the owner of such house or building, wall, or other erection, to take down, rebuild, repair, or otherwise secure the same to their satisfaction within a time to be fixed by the Court; and in case the same be not taken down, repaired, rebuilt, or otherwise secured within the time so fixed, the Court shall cause all, or so much of such house or building, wall, or other erection as shall be in a ruinous or insecure condition, or dangerous to be taken down, repaired, rebuilt, or otherwise secured, in such manner as shall be requisite, and then follow provisions as to the cost of the operations.

† The words in italics were introduced by the amending Act.

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because I think that, on the pursuer's statement, which is what we have to deal with, no privilege is disclosed; or rather, that any privilege that attached to the occasion or to the party was lost owing to the intemperance of the words which the defender is said to have used. But I do not mean to press my own views on that matter, for two reasons. In the first place, it is the general practice to insert the word "maliciously" in cases of judicial slander, and I do not desire lightly to depart from what seems to be a well established practice. But, secondly, it matters very little whether the word "maliciously" is introduced or not into the issue. Even if it is introduced, in my opinion the pursuer will have fully discharged the burden thus laid upon him if he establishes at the trial to the satisfaction of the jury the facts which he sets forth in the third article of the condescendence, —that is, that the defender used the words imputed to him, that there were no circumstances to put upon them a different meaning from that which they naturally bear, and that on being called upon to withdraw them the defender reiterated the charge. I say that if these averments are proved, there will be evidence upon which it will be competent for the jury to find that the defender used the word maliciously in the sense of the issue.

THE COURT approved of the issue as amended by the addition of the words "and maliciously" after the word "calumniously."

GRAY & KINNISON, S.S.C.—COUTTS & PALFREY, S.S.C.—Agents.

No. 62. Jan. 25, 1901. Somerville v. Macdonald's Trustee.

GEORGE SOMERVILLE (Petitioner), Respondent.—*Lord-Adv. Murray—Cook.*

MRS ISABELLA MACDONALD OR ARMOUR (Macdonald's Trustee), Appellant.—*Campbell, K.C.—T. B. Morison.*

Burgh—Dean of Guild—Appeal—Competency—Order to take down ruinous buildings—Edinburgh Municipal and Police Act, 1879 (42 *and* 43 *Vict. cap. cxxxii.*), *sec.* 166.—The Edinburgh Municipal and Police Act, 1879 (as amended by the Edinburgh Improvement, &c. (Amendment) Act, 1893, sec. 34), enacts by section 166 that if any building "be deemed by the burgh engineer to be in an insecure or ruinous state," he shall cause notice to be given to the owner to take down or secure or repair such building "as the case shall require," and failing the owner doing so, "the Dean of Guild Court shall, on the complaint of the Procurator-fiscal of Court, if they find it necessary after hearing parties, order the owner" of the building "to take down, rebuild, repair, or otherwise secure the same to their satisfaction within a time to be fixed by the Court."

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Held that no case had been made out for disturbing the judgment of the Dean of Guild Court, even if review was competent on the question of fact.

Question, whether such review was competent.

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owing terms:—"Sir,—I beg to intimate to you that the slating, roofing, ceilings, joisting, floors, partitions, walls, of your property at 89 High Street are in a ruinous or insecure state, and in terms of 'The Edinburgh Municipal and Police Act, 1879,' section 166, and 'The Edinburgh Municipal and Police Acts, 1879 to 1896,' hereby require you as part owner forthwith to take down, secure, or repair the same. I beg further to intimate, that should you fail to have the work begun within three days from this date, further proceedings will be taken, and all expenses incurred will be levied from you in terms of the statutes." *

Mrs Armour not having complied with this notice, a petition was presented to the Dean of Guild Court on 22d May 1900 by George Somerville, Procurator-fiscal of that Court, in which Mrs Armour and the owners of the upper flats of the tenement were called as respondents.

The respondent Mrs Armour lodged answers to the petition, and stated that she had "been advised by skilled and competent advisers that her property is satisfactorily built and in good condition, and is perfectly secure. She is willing to take all reasonable steps to repair any defects that the Court may hold proved to exist in her property."

After certain procedure in the petition, the Dean of Guild, on 18th October 1900, after having visited the premises and heard the Procurator-fiscal and parties' procurators, found "in the meantime that all the flats of the tenement above the ground or shop flat are ruinous and insecure, and must be taken down"; and also "that the joists between the ground flat and the first flat, and the stone arching on the ground flat, are insecure"; and therefore in the meantime he ordained the respondents, other than Mrs Armour, to take down forthwith the flats belonging to them respectively.

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If any house, building, wall, or other erection of whatever form or material, or anything affixed thereon, be deemed by the burgh engineer to be in a ruinous or insecure state, the burgh engineer shall immediately cause the occupiers (if any) to remove from the occupancy of such houses or buildings until the same are put into a safe condition; and shall, if he judge it necessary, cause the same wholly or partially to be taken down . . . and shall cause a notice to be given to the owner of such house or building, wall, or other erection . . . requiring such owner forthwith to take down, secure, or repair such house or building, wall, or other erection as the case shall require; and if such owner do not begin to repair, take down, or secure such house, building, wall, or other erection within the space of three days after such notice has been so given . . . and complete such repairs or building down or securing, as speedily as the nature of the case will admit, the Dean of Guild Court shall, on the complaint of the Procurator-fiscal of the Court, "*if they find it necessary after hearing parties*," † order the [illegible] of such house or building, wall, or other erection, to take down, repair, or otherwise secure the same to their satisfaction within a [illegible] be fixed by the Court; and in case the same be not taken down, [illegible], rebuilt, or otherwise secured within the time so fixed, the Court [illegible] use all, or so much of such house or building, wall, or other erection [illegible] be in a ruinous or insecure condition, or dangerous to be taken [illegible] repaired, rebuilt, or otherwise secured, in such manner as shall be [illegible]e, and then follow provisions as to the cost of the operations.

† The words in italics were introduced by the amending Act.

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The upper flats were taken down as thus directed, and thereafter the Dean of Guild Court again visited the premises on 14th December 1900 in the presence of the agents of the parties interested.

On 20th December the Dean of Guild Court pronounced the following interlocutor:—"Having of new visited the *locus* and inspected the premises so far as now existing, and having heard the procurator-fiscal, counsel for the respondent the trustee of Tertius Macdonald: . . . Repels the motion made by counsel for the trustee of Tertius Macdonald that the Court should allow a proof of the condition of the property owned by the said trustee: Finds . . . that the work ordered by the interlocutor of 18th October last has now been executed: Finds, on further inspection, now that the upper flats have been taken down, that the premises owned by the respondent the trustee of Tertius Macdonald, . . . are not only insecure but are ruinous, and must be taken down: Therefore ordains the respondent the trustee of Tertius Macdonald to take down forthwith her said premises," &c.*

Mrs Armour (Macdonald's trustee) appealed to the First Division of the Court of Session.

Argued for the appellant;—The words "as the case shall require" in section 166 shewed that the burgh engineer was required to specify in the notices served by him what was to be done. The notice in this case was defective in this respect, and further, it was a notice to the appellant as part owner of the whole tenement, whereas she was only owner of the ground floor. The notice was thus not sufficient to support the proceedings which followed upon it.[1] But, further, as the case was instituted in May, and the interlocutor appealed against was pronounced on 20th December 1900, it was evident that there was no reasonable apprehension of any danger to the public, or any reason for immediate action. It would thus have been the proper and fair course to have granted the appellant's motion for a proof in regard to the state of the property. This was especially the case in view of the position taken up by the appellant on the advice of her own experts, that the subjects owned by her were in a perfectly secure state. The judgment of the Dean of Guild contained no information to shew why other and less drastic measures than demolition would be insufficient,

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* "NOTE.—In consequence of the report of the burgh engineer, dated 11th December 1900, it became necessary for the Court to again visit the premises, and they did so on 14th December curt., in the presence of agents for the parties interested. The Court found that the work of pulling down the upper flats had been executed, and the Court were in a better position to judge of the condition of the premises on the ground floor than they were in before the upper flats were taken down. The result of the Court's inspection was that they were unanimously satisfied that the premises of the respondent, the trustee of Tertius Macdonald, are not only insecure but also ruinous, and that they are in such a condition that they must be taken down. The Court heard counsel for the respondent the trustee of Tertius Macdonald and the procurator for Mrs Carr on 18th December current. The counsel for the respondent the trustee of Tertius Macdonald then asked to be allowed to lead proof as to the condition of his premises. The Court repelled this motion, because they consider the matter which was to be the subject of proof is one which they are completely competent to judge of without proof, in respect that the members of the Court are men of skill on this particular matter."

[1] Campbell v. Magistrates of Edinburgh, Nov. 24, 1891, 19 R. 159.

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information which was very desirable in view of the divergence between the opinion of the expert members of the Dean of Guild Court and the appellant's expert advisers. In exercising its jurisdiction under the section in question, the Dean of Guild Court was merely exercising its ordinary jurisdiction, and it was competent for this Court to review the judgment on any ground.[1] In the circumstances of this case the appellant was entitled to further inquiry as regards the condition of this building, which might either be by a remit to an independent architect or by a proof.[2]

Argued for the respondent;—The respondent accepted the view that in these special enactments, by which new duties were imposed on the Dean of Guild, that Court was treated as a pre-existing Court, from which at common law there was a right of appeal. But the Court of Appeal would examine into the nature of the duties thrown on the Dean of Guild by the particular provision in question. This had been lost sight of in the appellant's argument in dealing with the authorities, particularly with regard to the case of *Boswell*.[2] In that case the point was, whether the proprietor of an upper flat, who had no express title to the back area, had any right to object to buildings erected by the owner of the ground flat in the back area. The Dean of Guild held that the proprietor of the upper flat had a right to object on the theory that he had a prospective right of support from the building in the area. This view was negatived by the Second Division, who held that the proposed buildings did not interfere with the common interest. The case of *Boswell*[2] was thus not a case where a view of the Dean of Guild upon a question of fact was reversed upon a remit. The real question involved was a question of law, and there was no necessity for a remit at all. There was thus no precedent for the course the appellant asked the Court to adopt. The question was, what was the duty imposed on the Dean of Guild by section 166 of the Act of 1879, as amended by section 34 of the Act of 1893, and had he fulfilled that duty? The words "deemed by the burgh engineer" shewed that initially at all events the burgh engineer was the judge of the matter of fact, but he was not final. The Dean of Guild Court had to satisfy itself that he was right, and if so satisfied, to proceed forthwith. The question was not, was an appeal from the decision of the Dean of Guild Court on this matter competent, but what were competent grounds of appeal. It was not a competent ground of appeal that the Dean of Guild Court was wrong in approving of the view taken by the burgh engineer, because what the statute required was that there should be approval in fact, not by this Court but by the Dean of Guild Court.

At advising,—

LORD PRESIDENT.—(After stating the proceedings)—The present appeal was thereafter brought, and the appellant moved either for a proof of her averments that her premises are not ruinous or insecure, or for a remit to a man of practical skill to be named by this Court, to report as to the condition of these premises. The respondent objects to either of these courses being followed, upon the ground that they are, according to his contention, precluded by sec. 166 of the Edinburgh Municipal and Police Act, 1879, as

[1] Somerville v. Directors of the Edinburgh Assembly Rooms, July 7, 1899, 1 F. 1091, at 1094.

[2] Boswell v. Magistrates of Edinburgh, July 19, 1881, 3 R. 986.

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amended by sec. 34, subsec. 3, of the Edinburgh Improvement, &c., Act, 1893.

The words, "if they find it necessary after hearing parties," were introduced into sec. 166 by the amending Act, and prior to their introduction, it might have been contended with much force that the question whether a building was in a ruinous or insecure state so as to warrant proceedings being taken under it depended solely upon whether the building was or was not "deemed" by the burgh engineer (which I take to mean considered by him in the exercise of an honest judgment after proper examination), to be in a ruinous or insecure state. His judgment on this question was not declared to be subject to the review of any Court, and, assuming it to have been honestly arrived at, it might possibly have been held that it was final, and that the duty of the Dean of Guild Court, after the burgh engineer had reported his opinion as to the condition of the building, was rather executorial than judicial. But the introduction of the words, "if they find it necessary after hearing parties," gives them the right (if they had it not before) to exercise a judgment as to the condition of the buildings, and they did so in this case after due examination.

The respondent did not dispute that an appeal to this Court is competent, but he submitted that the only power which the Court has under such an appeal is to ascertain whether the burgh engineer has (in the sense already explained) "deemed" the building to be in a ruinous or insecure state, or whether the Dean of Guild Court has arrived at that conclusion in the performance of its duties under sec. 166, and that, as in this case there is no allegation that the burgh engineer and the Dean of Guild Court did not apply their minds to the subject, or did not honestly arrive at the conclusion that the building is ruinous, this Court has no power to review their judgments on this matter, either upon a proof as to the condition of the buildings, or upon a report by a man of skill, whose judgment would be substituted for that of the burgh engineer and the Dean of Guild Court. There is much force in this contention, but it does not appear to me to be necessary for the decision of the present case to express an opinion upon it, so absolutely put. Not only does the appellant not allege that the burgh engineer did not in the sense above explained "deem" the building to be ruinous or insecure, or that the Dean of Guild Court did not, after due examination, arrive at the same conclusion, but there are no other allegations which should, in my view, lead us to order further inquiry, if we have power to do so. Such judgments as we have before us should not be lightly disturbed, especially where they relate to a statutory provision made for the purpose of protecting the lieges from imminent danger.

The appellant states in her pleadings that for some months prior to the date of the notice the burgh engineer was negotiating, through her agents, for the purchase of her property—a statement which might suggest that the appellant meant to allege that the action taken by the burgh engineer was not in the proper execution of his duty, but for the purpose of enabling the city authorities to acquire the property at less than its true value. The appellant's counsel, however, upon the question being put to them, stated that they did not desire to make any allegation, or ask for any proof, to this effect.

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For these reasons I am of opinion that the appeal should be dismissed, and that the interlocutors appealed against should be affirmed.

LORD ADAM.—I concur.

LORD M'LAREN.—I concur in your Lordship's opinion. I think the jurisdiction of this Court under the Acts in question was not disputed. It was conceded by the Lord Advocate that to some effect the Court has jurisdiction to review the Dean of Guild's interlocutors, and I should desire to reserve my opinion as to the extent of that jurisdiction, and the manner in which in each case it may be expiscated. I agree that in the present case all the proceedings were regular and fair. According to the constitution of the Dean of Guild Court the Court is entitled to proceed upon its own knowledge after due inspection of the buildings, and there is nothing to suggest that the inspection was not properly and fairly made. I see no ground for disturbing the finding of the Dean of Guild Court.

LORD KINNEAR.—I agree. The appellant's counsel pointed out that the competency of this appeal had not been challenged in the Single Bills, and argued that therefore it must be held that the jurisdiction of this Court was not called in question. I confess I think that in saying so he entirely misunderstood the point taken against him by the respondent, and the position in which the case stands. Nobody disputes the competency of the appeal, nor the jurisdiction of this Court, to consider the grounds upon which it is taken. But it is a totally different matter to say that this Court has jurisdiction to determine, upon an inquiry ordered by the Court itself, special questions of fact and discretion which the statute commits, first to the burgh engineer and then to the Dean of Guild Court, and to substitute our decision for their decision upon these questions. Your Lordship has thought it unnecessary to decide the general question raised by the argument of the respondent's counsel on the point I have just stated, and I quite agree that the case may be disposed of in the circumstances in which it is brought before us without deciding any more general question than your Lordships are disposed to decide—namely, that there is no sufficient ground for our interference in this case. I agree with what was said by your Lordship in the chair, that if the question had arisen under the first of the two Acts founded on, so long as it stood unamended it might have been doubtful whether the opinion of the burgh engineer was not conclusive, because the statute says that when he deems that a building or a wall is ruinous and insecure he shall immediately order the removal of the persons occupying such building, and then there are certainly strong grounds for saying that certain statutory consequences are to follow as a matter of course. But the Lord Advocate conceded, and I think rightly, that it was not very material to determine whether that would have been so or not, because, as the statute is now amended, a power to reconsider the engineer's determination on its merits is given to the Dean of Guild Court. The Dean of Guild Court, when it is set in motion, after hearing parties, may, according to the construction of the statute which the Lord Advocate conceded to be the right one, upon its own judgment, and upon such materials as they think necessary, determine whether the burgh engineer's

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opinion is to be carried into operation or not. Now, the question is whether we, in like manner, are to consider on its merits the opinion of the Dean of Guild Court. I am not disposed, having regard to the view taken by your Lordship, to consider in what circumstances it might be maintained that we ought to review upon its merits that question of skill and discretion which the Dean of Guild Court has to decide. I have no doubt whatever that if a case could be made to shew that the Dean of Guild Court has not properly applied its mind to the question, if it has not proceeded fairly in the exercise of its jurisdiction so as to do justice to the parties before it, or if it has come to a conclusion without having informed itself of the facts according to the ordinary and proper methods of procedure, the Court should interfere, and we should recall the Dean of Guild's judgment, and remit to him to proceed and do justice, or take some other course which it may be proper to consider when the case arises. But in this case there is really no ground for suggesting that the Dean of Guild Court committed any error of procedure or any injustice. The appellant complained that the notice which was served upon her by the burgh engineer was too general, because she is proprietor only of the lower flat of a certain tenement, and his notice referred generally to the property without specifying the particular part of it, and in what respect it was ruinous. Now, I think as it stood at first the notice is certainly open to that criticism, but then in the course of the proceedings the complaint was made perfectly specific. The appellant denied that her house was ruinous, and the question of fact was dealt with very properly. The Dean of Guild Court, in the first place, ordered an inspection of the premises, and made that inspection themselves. Upon that, as your Lordship has pointed out, they found, in the first place, with reference to the upper flats, which did not belong to the appellant, that they were ruinous and must be taken down, and then they said as to the ground flat, "we shall postpone coming to any conclusion about that until the upper storeys are down; we shall look at it in the position in which it will be after these operations are completed, and then make up our minds as to what shall be done." But when the upper flats had been taken down the Dean of Guild Court—that is, the Dean of Guild and the other practical members of his Court—inspected the premises in the presence of the parties, and came to the conclusion that this lower flat was also ruinous and dangerous, and must be removed. Now, the question is, whether we are to set aside, in the first place, the opinion of the burgh engineer, made after due inspection, that this building is ruinous and dangerous, and must be removed; and secondly, the opinion of the Dean of Guild Court, which is composed, as we all know, of practical men experienced in this particular matter, that the burgh engineer is right, and that the building is dangerous; and to substitute for them our own opinion, which we are to arrive at either by setting up the opinion of one man of skill of our own selection against the opinion of the men of skill appointed by Parliament, who are public officers responsible for the performance of their duty, or our own opinion founded upon a proof to be taken in this Court. I confess I think neither the one course nor the other would—to say the least of it—be at all expedient. The whole proceedings directed by this clause in the statute are intended to be summary. The burgh engineer is to proceed immedi-

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ately, and that arises from the very nature of the case, namely, that the building is ruinous, and that the safety of the lieges is endangered by its condition. Now, if that question is not to be determined until after proof is taken in a Court of law and the Court have had sufficient opportunity for coming to a conclusion upon the conflicting testimony of experts, it is obviously very probable that in many cases the question would be solved by a high wind before the Court had time to consider it. Then, I think, it is equally out of the question to set up the opinion of one man whom the Court may select as conclusive against the men of skill selected by Parliament. Without suggesting that these considerations should lead to a different conclusion from that of your Lordships, I think they at least afford sufficient ground for refusing to disturb the determination of the Dean of Guild Court, when nothing can be said against the procedure and nothing against the determination itself, except that the appellant thinks it wrong. I observe that the reason which the Dean of Guild gives for the ultimate course of procedure which he took is a perfectly good one, because he says that after the second inspection which the Court ordered, because they thought they would then be in a better position to judge of the condition of the premises than on the first inspection, it was moved for the appellant that she should be allowed to lead proof as to the condition of her premises. The Dean of Guild says,—"The Court repelled this motion, because they consider the matter which was to be the subject of proof is one which they are able to judge of without proof, in respect that the members of the Court are men of skill on this particular matter." I think the Dean of Guild Court was perfectly justified in arriving at that conclusion, and that we should not be justified in disturbing its judgment upon any grounds which have been argued to us.

THE COURT dismissed the appeal, and affirmed the interlocutor appealed against.

GRAHAM, JOHNSTON, & FLEMING, W.S.—NISBET & MATHISON, S.S.C.—Agents.

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M'Gilvray v. Main.

MRS ISABELLA M'GILVRAY, Pursuer (Appellant).—*Hunter.*
ALEXANDER MAIN AND ANOTHER, Defenders (Respondents).—*Shaw, K.C.—Lees.*
WILLIAM BERNFIELD AND ANOTHER, Defenders (Respondents).—*Trotter.*

Reparation—Wrongous Apprehension—Police-constable—Issue.—In an action for damages for wrongous apprehension against two police-constables the pursuer averred:—That the defenders came to her house and apprehended her on a charge of making a disturbance in a shop; that she denied the charge, and signified her willingness to accompany the defenders to the police-office, "but before she could put on her hat and jacket, or any other thing properly, the said" defenders "suddenly seized hold of her, and in presence of her neighbours and a large number of people, dragged her out of her said house down the stairs into the street, and thence to" the police-office; that throughout she offered no resistance, and said to the defenders that she would go quietly with them if they would release their hold of her; but that they paid no heed to her requests.

Held that the action was relevant.

Issue—Whether the defenders "wrongfully and with unnecessary force

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and violence" apprehended the pursuer in her house, and conveyed her to the police-office?—*approved.*

IN December 1889 Mrs Isabella M'Gilvray, wife of John M'Gilvray, 30 Kelvin Street, Glasgow, with consent of her husband, raised an action in the Sheriff Court at Glasgow, against William Bernfield and Fanny Cohen, both residing at 102 North Woodside Road, Glasgow, and also against Alexander Main and William Nisbet, constables in the city of Glasgow Police, and Samuel Glass, an inspector in that force, praying for decree against the defenders jointly and severally or severally for the sum of £500, as damages for slanderous charges, assault, and wrongous and oppressive apprehension.

The questions now reported relate solely to the case as directed against the defenders Main and Nisbet. The following were the pursuer's averments in so far as material to the case as against these defenders:—

(Cond. 2) On 2d October 1899, at noon, the pursuer called at the shop 102 North Woodside Road, occupied by the defenders Bernfield and Cohen, for the purpose of making inquiry regarding a chest of drawers, and after she had transacted her business with the defender Cohen, who was in the shop, she left and went home. (Cond. 3) "About three hours afterwards on said date, and while the pursuer was in her house at 30 Kelvin Street aforesaid, which is one stair up from the ground level, and on the door thereof the pursuer's husband's name appears on a brass plate, the defenders Main and Nisbet called on her along with the defender Cohen, and stated in the hearing of Mrs Young, 30 Kelvin Street, Glasgow, and pursuer's daughter Catherine, and her neighbours, that Cohen had charged pursuer with cursing and swearing and making a disturbance in the said shop at 102 North Woodside Road aforesaid on that day, and that pursuer must come with them at once to the police-office at Camperdown Street, Glasgow. Pursuer immediately denied the charge, and signified her willingness to accompany them to the police-office, but before she could put on her hat and jacket, or any other thing properly, the said constables suddenly seized hold of her, and in presence of her neighbours and a large number of people dragged her out of her said house down the stairs into the street, and thence to the Camperdown Police-Office. Pursuer throughout offered no resistance, and said to the constables that she would go quietly with them if they would release their hold of her, but they paid no heed to her requests." (Cond. 4) She was detained in a cell in the police-office for about five hours, after which she was released on bail of 10s. 6d., on the understanding that she would answer to the charge on the following day. (Cond. 5) On the following morning she appeared to answer the charge, but no one appeared against her, and she was allowed to go. (Cond. 7) "The whole of the said proceedings were wrongous, irregular, and oppressive, and the charge made by Bernfield and Cohen, and repeated by the two constables, was false and most slanderous. The pursuer was apprehended without a warrant of any kind, and was subject to the indignity of being dragged from her house through the public streets of Glasgow, and of being detained in the public cell without a warrant of any kind having been first obtained from the proper authorities. The defenders, in apprehending and detaining the pursuer in the manner above mentioned without legal warrant, and in treating her in the manner before described, acted maliciously, oppressively, and illegally, and without any just

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or probable cause. In executing the arrest they used great harshness and acted with quite unnecessary force and violence. The charge preferred against her was utterly groundless, and was also made maliciously and oppressively."

The pursuer pleaded, *inter alia*;—(3) The pursuer having been assaulted by the defenders Main and Nisbet, the latter are liable in damages to her. (4) The pursuer having been illegally, wrongously, and oppressively seized and marched in custody of the defenders Main and Nisbet, and afterwards detained by the defender Glass in the police-office, these defenders are liable to pursuer in reparation, and decree should be granted, with interest and expenses as craved.

The defenders pleaded, *inter alia*, that the action was irrelevant.

On 13th February 1900, the Sheriff-substitute (Strachan) pronounced this interlocutor:—"Before answer, allows parties a proof of their averments, other than the defender Samuel Glass. . . . Finds that no relevant case has been stated against the said Samuel Glass: Therefore assoilzies him from the conclusions of the action."

The defenders Main and Nisbet appealed to the Sheriff (Berry), who on 26th June 1900 adhered.

The pursuer then appealed for jury trial.

She proposed two issues, the first being directed against the defenders Bernfield and Cohen, with damages laid at £250. The second was in the following terms:—"(2) Whether, on or about 2d October 1899, the defenders Alexander Main and William Nisbet, maliciously and without probable cause, apprehended the said pursuer in her house at 30 Kelvin Street, Glasgow, and conveyed her to the police-office at Camperdown Street, Glasgow, to the loss, injury, and damage of the pursuer? Damages laid at £250."

Hunter having moved that the issues proposed be approved, *Lees*, for the defenders Main and Nisbet, objected to the second issue.

It was pointed out from the bench that, assuming a relevant case to be stated against Main and Nisbet, the second issue proposed was not the appropriate issue to raise that case—that the pursuer's case against these defenders appeared to be, not that they had acted illegally in arresting her without a warrant, but that they had made the arrest with unnecessary force and violence.

Hunter stated that the issue had been framed in accordance with that approved in the case of *Young*,[1] but intimated that he was willing that the issue should be amended by substituting for the words "maliciously and without probable cause" the words "wrongfully and with unnecessary force and violence."

The issue was amended accordingly.

Lees then argued;—The action as against Main and Nisbet was irrelevant. An action against a police-constable for damages on account of the use of unnecessary force and violence in making an arrest would be allowed to go to trial only if supported by very clear, specific, and substantive averments.[2] Here there was nothing more than the language of mere exaggeration.

Hunter was heard in reply.

LORD JUSTICE-CLERK.—I see no ground for not allowing the second issue as now amended. The pursuer makes a distinct averment on record of a

[1] Young v. Magistrates of Glasgow, May 16, 1891, 18 R. 825.
[2] Malcolm v. Duncan, March 17, 1897, 24 R. 747.

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wrongful act in which unnecessary violence was used towards her by the police-constables. The wrongfulness of the act consists in what they did. It is said on behalf of the defenders that the language must be assumed to be exaggerated. I do not think we are entitled to assume that. In the meantime we must take the statement that a law-abiding citizen was not allowed to put on decent apparel, but was seized and dragged through the streets. If that were done, she being willing to go peaceably, it is impossible to consider it as otherwise than wrongful. It was said it would be very hard on the police if charges of this kind were made against them when there was no ground for them. I can only say that it is hard on any citizen to have a charge made against him which cannot be justified. Charges are often made by the police themselves which in the ultimate inquiry cannot be justified. I can see no reason for protecting the police more than any other citizen from inquiry where distinct averments of excess are made. The fact is that very few cases of such a kind come before the Court, just for this reason, that in nine cases out of ten the police act within their rights and with fairness, and if they use violence it has been necessary in the carrying out of the law.

In the present case, with the clear averment before us on record, we have no option, in my opinion, but to send this case to be expiscated by evidence.

LORD TRAYNER.—I am of the same opinion. The second issue as amended is, whether the police in the execution of their duty behaved wrongfully and with unnecessary force and violence. I quite agree that we should not do anything which would hamper the police in the performance of their duty, but care must also be taken that the police in the performance of their duty do nothing that is wrongful or tyrannical. In the present case what is averred is that the policemen called at the pursuer's house, charged her with a criminal offence, and desired her to go with them to the police-office; that before she could dress herself to go out with decency, they seized hold of her and dragged her with unnecessary violence to the police-office. If that statement is true, then the policemen exceeded their duty.

There appears to be some doubt as to whether the word "wrongfully" should be inserted in the issue. I am of opinion that it should be inserted. The meaning to be attached to the word is shewn by the words with which it is connected, namely, "with unnecessary force and violence." The question is not as to whether the pursuer was apprehended wrongfully because the police had no warrant. If it had been intended to try that question, it would have had to be stated plainly in the issue whether the police acted "wrongfully and without a warrant." But that is not the question sent for trial. That question is whether the police in the execution of their duty acted "wrongfully," because they acted "with unnecessary force and violence."

LORD MONCREIFF.—I am of the same opinion. It appears plainly from the pursuer's averments that the police-constables in making the arrest acted on information supplied to them. I therefore think that they were justified in apprehending the pursuer. The question comes really to this—Were the police-constables justified in their mode of carrying out the arrest? I

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agree that we should not interfere unnecessarily in cases like the present, but if the facts stated on record are assumed to be true, it is impossible to hold that the pursuer's case is irrelevant. It may turn out that the pursuer's averments are not true, and that the police-constables did not act as stated, or that the pursuer resisted, and they were compelled to arrest her violently, but the true facts can only be ascertained at the trial.

The only other point is as to the insertion of the word "wrongfully" in the issue. I have some doubt as to whether this word should be inserted, because it might suggest to the jury that if the pursuer proved that the defenders acted without a warrant they acted "wrongfully," and were not entitled to make the arrest. But it must be understood by the parties and explained to the jury that the word "wrongfully" is not used in that sense, but refers merely to the mode in which the police-constables carried out the arrest.

LORD YOUNG was absent.

THE COURT approved of the issue as amended as the issue for the trial of the cause.

HENRY ROBERTSON, S.S.C.—JAMES BRYSON, Solicitor—CAMPBELL & SMITH, S.S.C.—Agents.

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F. R. MÜLLER & Co., Pursuers (Respondents).—*Shaw, K.C.—Cook.*
WEBER & SCHAER, Defenders (Reclaimers).—*Guthrie, K.C.—Cullen.*

Contract—Proof—Writ or Oath—Written Contract of Sale—Prior Oral Agreement—Innominate Contract.—In an action raised by A against B for damages for failure to deliver certain parcels of indiarubber goods, A produced and founded on sale-notes under B's hand, bearing that he had sold the goods in question to A. In defence B averred that prior to the transactions condescended on the parties had entered into a verbal agreement to the effect that while the contracts for the supply of rubber by the defender to the pursuer were to be *pro forma* with the pursuer as buyer, the pursuer was only to receive a commission on the sale of the goods by him to a particular consumer who was named, and further, that the pursuer was to confine his dealings in the article in question to the defender alone. B further averred that A had not implemented this agreement, and moved to be allowed a proof *pro ut de jure* of his averments. The Lord Ordinary (Kincairney) held that the alleged agreement could only be proved by the writ or oath of the pursuer, on the ground that it was an agreement of an innominate and unusual character.

The defender having reclaimed, the Court *adhered* to the Lord Ordinary's judgment on the ground that it was incompetent to supersede a contract of sale instructed by writing by parole proof of an antecedent oral contract of an entirely different character.

1ST DIVISION. Lord Kincairney.

THIS was an action at the instance of F. R. Müller & Company, merchants, Glasgow, against Weber & Schaer, merchants in Hamburg, concluding for £7500 as damages for breach of contract in respect of the defenders' failure to deliver certain parcels of rubber or gum, known in the trade as balata.

The pursuers averred that by contracts dated in May, June, and July 1899, the pursuers purchased from the defender four several parcels

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of balata amounting in all to 140 tons, for delivery commencing in July and ending in April 1900.*

The pursuers further averred (Cond. 4) that at the request of the defenders an agreement was come to by letters postponing the time for the delivery of the balata; that the defenders had delivered 14½ tons but refused to deliver the balance; that the pursuers had accordingly been compelled to purchase balata elsewhere to enable them to meet their engagements; that the price had risen, and that they had suffered loss in consequence to the extent of the sum sued for.

The defenders admitted that they refused to deliver the balance of the balata.

They stated, *inter alia*, that the principal consumers of balata in the United Kingdom were R. & J. Dick of Glasgow, and that they received their supplies from the defenders through the pursuers. "The business in indiarubber between the pursuers and defenders was done in the ordinary way of merchants' business, the pursuers sending orders at certain prices, and the defenders accepting if satisfied with the prices. Prior to September 1898 the business in block balata was done in similar form, but on the basis that the pursuers on their part were really doing the business on commission for the defenders, that is to say, their profit was in the form of a commission on the sales made to them for R. & J. Dick."

Further, that in consequence of incidents displeasing to the defenders, Messrs Weber and Mr Lussman, the defenders' broker in balata, had a meeting in Hamburg with Mr F. R. Müller of the pursuers' firm, with a view to adjusting the footing on which business was to be done. (Stat. 6) "Before Mr Müller left Hamburg he had a meeting with the Messrs Weber and Mr Lussman, when an agreement was come to as the basis of all future transactions in block balata between the pursuers and the defenders, to the following effects, viz., that while the contracts should *pro forma* continue to be with the pursuers as buyers—(1) The pursuers should be bound to accept a commission of one-half per cent from the defenders and to take no further commission or profit from Messrs Dick; (2) The pursuers should be bound to sell all balata supplied by the defenders to Messrs Dick at the defenders' invoice prices, and to put before Messrs Dick all the defenders' offers or proposals of business at the prices and on the terms quoted by them; (3) That if the pursuers desired at any time to speculate in balata on their own account they should only be entitled to do so after advising the defenders beforehand of the transactions, and on condition that any such balata bought by them was not for Messrs Dick, but for the pursuers' own account, or eventually for account of one or other of the smaller consumers in the United Kingdom; (4) That in the absence of express stipulation all block balata sold by the defenders to the pursuers should be for Messrs Dick so as to

* The contracts were, *mutatis mutandis*, in the following form:—

"Hamburg, d. 15th May 1899.

"*Von* WEBER & SCHAER.

"*Für* Herr Messrs F. R. MÜLLER & Co., Glasgow.

"DEAR SIRS,—

"We have this day sold to you:

"60 tons Venezuela Block Balata, July/December delivery, at 1/4 per lb. engl. f.o.b. here, less ½ % for you, payable per cheque on London within 14 days after date of B/L.

"We remain, dear Sirs, yours very truly, WEBER & SCHAER."

enable the defenders to keep in touch with that firm's requirements; (5) That the pursuers should not buy any block balata in Hamburg except through the defenders, and that they should not buy in any other market; (6) That the pursuers should transmit to the defenders accurate information as to requirements and arrangements of Messrs Dick in regard to the purchase of balata. The above mentioned agreement was made as the basis of all future business in balata between the parties, and all contracts made thereafter, and in particular the contracts now sued on by the pursuers were entered into subject to said agreement and were conditional upon the pursuers duly performing their part thereof. In the contracts carried out after this agreement was come to the pursuers, while appearing as buyers on the invoices, were paid the stipulated commission of one-half per cent above mentioned."

That the pursuers had violated the terms of this agreement, and that consequently the defenders, as already stated, had refused to deliver the balance of the balata.

The pursuers pleaded;—(4) The defenders' averments of agency contract alleged to qualify the contracts libelled in condescendence 3 can only be proved by writ or oath. (5) The alleged contract libelled in statement 6 of the defenders' statement of facts being innominate and unusual, can only be proved by writ or oath.

The defenders pleaded;—(2) *Lis alibi pendens.* (4) In respect of the pursuers' breach of contract as condescended on, the defenders were justified in refusing to make delivery under the contracts sued on.

On 4th December 1900 the Lord Ordinary (Kincairney) pronounced the following interlocutor:—"Repels the second plea in law for the defenders: Sustains the fifth plea in law for the pursuers: Allows the defenders a proof by writ of the pursuers of defenders' averments in statement 6 of their statement of facts; and *quoad ultra*, and under reservation of all other pleas, allows the pursuers a proof of their averments on record, and to the defenders a conjunct probation." *

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* "OPINION.—In this action the pursuers, merchants in Glasgow, purchased from the defenders, merchants in Hamburg, 140 tons of balata, which is a species of gum; and they produce four memoranda signed by the defenders and addressed to the pursuers, each stating that the defenders had sold to the pursuers the quantities of balata therein mentioned, the four contracts making up the total amount of 140 tons. The pursuers aver that the defenders have delivered only 14½ tons, and have refused to deliver the remaining 125½ tons; and this is an action of damages for the defenders' failure to deliver in terms of their contracts. The pursuers allege that the price of balata has risen since the date of their contracts, and they conclude for £7500 as the amount of damage which they have suffered. That, of course, they require to prove.

"The defenders do not dispute the contracts, and they admit the nonfulfilment of them. They, however, take the plea of *lis alibi pendens;* and, on the merits, they plead that they were justified in refusing to make delivery because of the pursuers' breach of a contract which they, the defenders, allege.

"[After dealing with the plea of *lis alibi pendens.*] The other defence of breach of contract is founded on an averment of a verbal agreement, said to have been entered into in Hamburg at a date not definitely stated, but shortly after September 1898, the parties to which are said to have been the defenders and a member of the pursuers' firm, and which the defenders

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The defenders reclaimed, and argued;—(1) This was not an attempt to vary a concluded and unambiguous written contract by parole proof of a prior verbal agreement. The alleged contract of sale was not complete. It was unilateral only. There was no antecedent request or order for the goods bearing to be sold—no writing at all under the hand of the pursuers. The contract, moreover, was not wholly contained in the sale-notes founded on. On the pursuers' own averments (cond. 4) the terms of these were modified by certain letters which were not before the Court. The alleged contract was not unambiguous. The price was stated to be so much "for you" or "to you." That was a very unusual clause, and suggested a special relationship pointing to just such an agreement as the defenders alleged. In the circumstances a proof at large should be allowed.[1] The cases founded on by the pursuers were cases of contracts absolutely complete and perfectly unambiguous. (2) The Lord Ordinary's judgment was based on the ground that the alleged agreement was of an innominate and anomalous character. But the rule restricting proof in the

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say 'was made as the basis of all future business in balata between the parties and all contracts made thereafter, and in particular the contracts now sued on were entered into subject to said agreement,' which is a very singular averment. This alleged verbal agreement is quoted in statement 6, and a most intricate and confused and singularly expressed agreement it is. This is the agreement which the pursuers are said to have broken, and, until it and the breach of it are proved, there seems no defence except as to amount. The pursuers argued that the averment was irrelevant in any view, but that is a point which may be cleared after proof, if the agreement and breach are proved by competent evidence.

"In regard to this agreement, the pursuers have pleaded that it can only be proved by writ or oath, firstly (plea 4), because it purports to qualify the written contract expressed in the memoranda, and secondly, because it is innominate and unusual. I incline to think that both pleas are good, although, looking to the terms in which the memoranda are expressed and the circumstance that, so far as they form contracts, or rather parts of contracts, they are unilateral, I have some doubt as to the first of these pleas, and prefer to proceed on the second. There is a rule in our law to the effect that contracts which are both innominate and unusual can only be proved by writ or oath. It is a rule which may not be of easy application in all circumstances, but it has been enforced and judicially affirmed too often to be questioned; in particular in *Edmonstone* v. *Edmonstone*, 7th June 1861, 23 D. 995, 33 Scot. Jur. 514; *Taylor* v. *Forbes*, 13th January 1853, 24 D. 19, note; *Wharton* v. *Goodlet*, 16th July 1864, 6 Macph. 1067; *Forbes* v. *Caird*, 1877, 4 R. 114; and *Garden* v. *The Earl of Aberdeen*, 24th June 1893, 20 R. 896. If ever there was an averment of a verbal agreement to which this rule might be fitly applied, it is the agreement averred by the defenders, for it is so detailed and so confused that the idea that it could possibly be proved by parole seems almost out of the question. It was urged by the defenders that the rule had never been applied to a mercantile contract, and should not be extended. But I see no reason, and the opinions of the Judges suggest none, for making any distinction as to this point between a mercantile contract and any other. The unreasonableness of leaving a complex contract to depend on mere memory is as great in the case of a mercantile contract as of any other, and the reasons for the rule, good or bad, apply equally. I feel, therefore, bound to sustain the pursuers' fifth plea, which will make it unnecessary to dispose of plea four; and I think the proper course will be to allow a proof, reserving the other pleas of parties."

[1] Buchanan & Co. v. Macdonald, Dec. 10, 1895, 23 R. 264.

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case of innominate agreements was highly technical. It was very rarely applied, and only when the contract alleged bordered upon the incredible, which was very far from being the case here. The tendency of the Court was to reject the rule,[1] especially in the case of mercantile transactions.[2]

Argued for the respondents;—(1) What the defenders proposed to do was to displace what was on the face of it a written contract of sale by a verbal agreement, proved only by parole evidence, of agency. That was directly against the well-established rule that the terms of a written contract could not be contradicted or varied by parole evidence.[3] (2) The Lord Ordinary was right in holding, on the authority of the cases cited by his Lordship, that the contract alleged by the defenders was innominate and unusual, and proveable therefore only by the writ or oath of the pursuers.

LORD PRESIDENT.—I am of opinion that the result at which the Lord Ordinary has arrived is correct, although I prefer to rest my judgment on somewhat different grounds.

The first question is, what is the nature of the contracts, if any, which purport to have been made by the four "sold-notes"—to describe the writings by the most general name. The four notes emanate from the defenders, they are their writings, and they were in effect accepted by the pursuers.

Taking as a sample the note of 15th May 1899 we find that it runs thus:—"We have this day sold to you—60 tons Venezuela Block Balata, July/December delivery, at 1/4 per lb. engl. f.o.b. here, less ½ per cent for you, payable per cheque on London within 14 days after date of B/L."

That appears to me to be as distinct a record of a contract of purchase and sale (unless it is at once rejected by the person to whom it is sent), as could well be imagined. If the relation of the parties had been such that one of them was entitled to reject, and did timeously reject, the offer, a different question would have arisen. These notes, however, were not rejected, but were retained, and this retention of them seems to me to infer the acceptance of an unambiguous offer of sale in which all the essential terms of such a contract are to be found. The only point, as I understood the argument, that was made on the construction of the notes was that there was one ambiguous expression, viz., "less ½ per cent for you." This, it was argued, suggests agency, and so raises an ambiguity which requires to be cleared by proof. The expression, however, appears to me to be a natural and ordinary way of describing a discount. The "to you" which occurs in one of the notes seems to be a variation which is immaterial. The contract then is in writing, and it is, when retained, an unequivocal record of a transaction of purchase and sale.

The defenders, however, deny that there is any contract of sale, or any

[1] Moscrip v. O'Hara, Spence, & Co., Oct. 23, 1880, 8 R. 36.
[2] Reid v. Reid Brothers, June 8, 1887, 14 R. 789.
[3] Sutherland v. Montrose Shipbuilding Co., Feb. 3, 1860, 22 D. 665, 32 Scot. Jur. 262; Lee v. Alexander, Aug. 3, 1883, 10 R. (H. L.) 91; Burrell v. Russell & Co., March 26, 1900, 2 F. (H. L.) 80; National Bank of Australasia v. Turnbull & Co., March 5, 1891, 18 R. 629; Chitty on Contracts (6th ed.), 133-4 and 140.

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relation of buyer and seller, alleging that the agreement was truly one of agency. The pursuers reply that to allow the proof asked would be to sanction an attempt to convert what on the face of a written instrument is one contract, into an essentially different contract, which should not be permitted unless upon the production of evidence of a similar character to that by which the original contract is established, *i.e.*, proof *scripto*. Accordingly, without having recourse to the plea that the contract which the defenders seek to establish is innominate and unusual, it appears to me to be a sufficient ground of judgment that the defenders' proposal is to displace the effect of documents constituting or recording contracts of sale, and to substitute for these another and a wholly different contract. And when we inquire how it is proposed that this should be done, we find that it is not by another writing or writings, but by parole proof of a statement [defenders' stat. 6] to this effect, that Mr Müller had a meeting in Hamburg with Mr Weber, "when an agreement was come to . . . to the following effects, viz., that while the contracts should *pro forma* continue to be with the pursuers as buyers (1)," and then follow six detailed heads embracing many matters of a somewhat complex and unusual kind. It is to be observed that not only is it not alleged that there was any writing embodying the contract proposed to be set up, but it is not said that the words set out in the six heads were in fact used on the occasion of the meeting. They purport to be merely a summary or result of what in the view of one of the parties passed between them at the meeting. But it is well known that the effect of a conversation is a thing about which parties may very well differ, and to allow a proof of so general an allegation would be to take off the effect of an unequivocal written contract by an allegation of the effect or result of verbal communings. Further, the proposal is not to modify the written contract by anything which happened subsequently, it is to prove that the written contracts were governed by an antecedent master contract which was to regulate all the future dealings of the parties, although no such contract is ever mentioned in the writings instructing their transactions. If the agreement of the parties was such as the defenders allege, it ought to have been reduced to writing, so that the subsequent written contracts could have been read along with it. Further, the tenor of the governing contract which the defenders seek to prove is inconsistent with the writings. The peculiarity is, that while one of the defenders' allegations is that the contracts for the future should *pro forma* continue to be with the pursuers as buyers, the proposal now made is to prove that the contracts are not sales at all. It is hardly necessary to point out the improbability of such an agreement as is alleged, and the danger there would be in setting aside later written contracts, when the presumption is that a subsequent writing is the last and governing expression of the agreement. The agreement alleged is not only very improbable, it is also very one-sided, binding the pursuers to give up all other trade connections and deal only with the pursuers, while the defenders are not placed under any corresponding restriction. It would, in my view, be contrary to the settled rules of evidence to permit a clear and unequivocal writing to be displaced by a parole agreement such as that alleged by the defenders.

LORD ADAM concurred.

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LORD M'LAREN.—I quite agree, and have very little to add. The case is that the purchasers of goods under a sale-note bring an action of damages against the sellers for failure to deliver the goods.

The case for the defenders is that this sale-note is only *pro forma* a sale, and is subject to an antecedent agreement, whereby five or six conditions have to be observed in all transactions between the parties. The effect of these is to reduce the contract of sale to one of agency. *Prima facie* this appears to be a kind of agreement which could only be proved by written evidence, because it is an agreement which the parties who might desire to enter into it would be careful to reduce to writing. It is not difficult to find a good legal justification in support of the result at which the Lord Ordinary has arrived, *i.e.*, that the defenders' averments can only be proved by writ or oath. I think the key to the question is to be found in the consideration that the effect of the alleged agreement is not to add to or vary the contract, but to put an end to the contract of sale, and to substitute a new and different contract for it. Now, there is a doctrine in our law that when by a written contract property has passed, any agreement to restrict the right of property which has passed must be proved by writ or oath. I referred to certain cases in which, by an extension of the principle of the Trust Act, 1696, rather than by the direct application of that Act, it was held that you could not transform a written agreement of sale into some other contract otherwise than by the writ or judicial admission of the *ex facie* owner. In *Hamilton* v. *Western Bank*,[1] where goods were transferred to a bank *ex facie* absolutely, this principle was applied. A proof was allowed to the bank of its averment of pledge, but the Lord President announced that the proof had completely failed; and his Lordship's judgment is rested on the ground that the title could only be qualified in terms of the bank's judicial admission, which was, that the bank had taken over the goods in security of present and future advances.

In what I say I recognise that there may be cases of sale where the essentials of the contract are in writing, in which, nevertheless, certain conditions of the contract may be proved by parole. As an illustration, the case may be figured where the time and place of delivery are not expressly stated in the agreement. In such a case the law implies the usual conditions in the particular trade, and allows parole evidence to prove what these are. And I do not think that our judgment at all infringes on the principle that in the case of sale, which is a proper consensual contract, evidence of all conditions in the contract is competent, and such evidence may be partly oral and partly in writing. Nor do I wish to suggest a doubt as to the principle on which the Lord Ordinary has rested his judgment, because I have no doubt that there may be cases of contracts so unusual that they can only be proved by writ or oath. As an illustration, take the case of a contract of service for an unusual period—say for a term of years. But I prefer to rest my judgment on the ground I have stated, that this is an attempt to substitute one contract for another by

[1] Dec. 13, 1856, 19 D. 152, 29 Scot. Jur. 77.

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evidence less satisfactory than that by which the apparent contract is proved.

LORD KINNEAR concurred.

THE COURT adhered.

MENZIES, BLACK, & MENZIES, W.S.—AULD & MACDONALD, W.S.—Agents.

No. 65. Jan. 29, 1901. Bayne & Thomson v. Stubbs, Limited.

BAYNE & THOMSON, Pursuers (Respondents).—*Jameson, K.C.—Graham Stewart.*

STUBBS, LIMITED, Defenders (Reclaimers).—*D.-F. Asher, K.C.—T. B. Morison.*

Reparation — Slander — Privilege — Malice—Trade Slander—Company for providing subscribers with confidential information as to financial status of traders.—In an action of damages for slander, the pursuers averred that shortly after they had placed an order with a manufacturer the defenders wrote to the manufacturer of and concerning them that "they do a fairly extensive trade, but the account, from various causes, is not regarded with much confidence in these markets, although in certain quarters they appear to be in receipt of moderate credit. The capital at command, however, is limited, and the payments of late have been slow and unsatisfactory, but their settlements for years have always been dilatory. At the same time, several of their shops are not thought to be paying, and it is feared that credit transactions meanwhile represent more than an average risk"; and that the defenders had failed to make adequate inquiry, which would have shewn that these statements were false.

It was admitted that the defenders were a company formed for the purpose, *inter alia*, of preventing their subscribers from making bad debts, by furnishing them with information as to the financial status of persons with whom they proposed to trade; that the manufacturer was a subscriber of the company; that the letter complained of was written in response to a request by the manufacturer for information as to the amount of credit which it would be safe for him to give the pursuers; and that the information was given on the condition that it was confidential, for the use of the subscriber only, and not to be divulged by him to any third party.

Held (1) (*dub.* Lord Trayner) that the case was relevant, and (2) that the defenders were privileged in writing as they did, and that malice must be put in the issue.

2D DIVISION. Lord Kincairney.

THIS was an action of damages for slander at the instance of Messrs Bayne & Thomson, grocers and confectioners, Renfrew Street, Glasgow, against Messrs Stubbs, Limited, Edinburgh.

The pursuers averred;—(Cond. 2) "About the middle of February 1900 the pursuers gave an order to Messrs Gatti Brothers, chocolate manufacturers, Acton Street, Haggerston, London, per their Glasgow agent, Mr James Thompson Dowling, for a half ton of chocolates at £74 per ton nett. One half of the order was to have been delivered immediately after the order was given, and the balance when required." (Cond. 3) "Immediately after the said order was given the defenders, in or about February or March 1900, wrote to Messrs Gatti, stating that the pursuers' account 'from various causes is not regarded with much confidence in these markets, although in certain quarters they appear to be in receipt of moderate credit. The capital at command, however, is limited, and the payments of late have been slow and unsatisfactory, but their settlements for years have always been dilatory. At the same time, several of their shops are not thought

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to be paying, and it is feared that credit transactions meanwhile represent more than an average risk.'"* (Cond. 4) "The said statements made by the defenders are of and concerning the pursuers, and are false. By the said statements the defenders represented that the pursuers were in financial difficulties, and were persons whose financial position was so bad as to render it unsafe for merchants and traders to have business relations with them. They were made by the defenders of and concerning the pursuers falsely, calumniously, and maliciously. If the defenders had made adequate inquiry they would have ascertained that the financial status of the pursuers was excellent. They, however, failed to make such inquiry. As a result of said statements being made, Messrs Gatti failed to deliver the first portion of the chocolate when required, and only made delivery thereof upon receiving an assurance from their said representative that the said statements regarding the pursuers were entirely untrue.'

The defenders, in reply, stated that the letter contained no libel, and averred (Ans. 3 and 4) "that the defenders are a company of merchants and others engaged in trade, formed for the purpose, *inter alia*, of promoting *bona fide* trading, and preventing their subscribers from making bad debts. The said Messrs Gatti, who are subscribers of the defenders, made inquiry regarding the pursuers' position in the spring of the present year, and the defenders, in the exercise of their lawful rights in the interests of their said subscribers, answered said inquiry, but the defenders' answer was marked 'private and confidential'; and is a confidential document, and is regarded as such by Messrs Gatti."

The defenders pleaded, *inter alia*;—(1) The pursuers' averments are irrelevant, and insufficient in law to support the conclusions of the summons. (2) The answer which the defenders made to Messrs Gatti's inquiry being confidential, and, *separatim*, being a privileged communication, the defenders ought to be assoilzied.

By interlocutor dated 13th November 1900, the Lord Ordinary (Kincairney) repelled the defenders' first and second pleas, and approved of the following issue:—"(1) Whether on or about February or March 1900 the defenders wrote to Messrs Gatti stating that the pursuers' account [here followed the statement libelled in cond. 3], and whether the said statements are of and concerning the pursuers, and are false and calumnious, to the loss, injury, and damage of the pursuers?"†

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* The full text of the letter from which the statement libelled was taken was not produced till the hearing in the Inner-House, as after mentioned, and consisted of the above quotation, preceded by the words, "This is an old established firm of grocers and tea-merchants having several retail branch shops throughout the city, and an office and stores at the address given. They do a fairly extensive trade, but the account," and followed by the words, "Registered Information:—Small-debt decree, 1887; Small-debt decree, 1899."

† "OPINION.—This is a case of considerable importance and difficulty; but, after careful consideration, I have come to the conclusion that the first and second pleas for the defenders should be repelled, and that an issue for the pursuers should be adjusted.

"The pursuers are tradesmen. The defenders say that they (the defenders) 'are a company of merchants and others engaged in trade, formed for the purpose, *inter alia*, of promoting *bona fide* trading, and preventing their subscribers from making bad debts.' This may be quite true, but cannot be assumed at this stage, as the pursuers gave no admission on the subject.

"The pursuers set forth that the defenders wrote to Messrs Gatti the

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The defenders reclaimed.

At the hearing the pursuers gave an admission of the defenders' statements in ans. 3 and 4, quoted above, and the full text of the inquiry by Messrs Gatti, which was on a form furnished by the defenders to their subscribers, and of the defenders' reply containing the alleged slander,* was for the first time produced.

The inquiry was as follows:—

"*Please Report* (*upon the terms and conditions at foot hereof*) *respecting*

"(*Name in Full*) Bayne & Thomson.

"*Profession, Trade, or Occupation,* Confectioners.

"*Street,* 23 Renfrew Street.

"*Town,* Glasgow.

"*Nature of Information Required,* How long established, and if safe for £30 to £40.

"CONDITIONS—It is agreed that all information is furnished in confidence, for the personal use of the subscriber, and is under no

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letter or memorandum set forth on record, but they do not aver or admit that that letter was an answer to inquiries by Messrs Gatti. The form of the pleadings forbids the assumption that it was. The pursuers have presented issues without any innuendo. They pressed for approval of these issues as they stood; but stated that they were willing to put in issue the innuendo which they have averred, if that was necessary. I may deal with this question of the innuendo at once, by saying that I do not think it admissible. So far as the innuendo expresses no more than the letter quoted, it would be superfluous. So far as it expresses something which the letter, according to its sound construction, does not express, I do not think it admissible. The innuendo sets forth that the letter represented that the pursuers were in financial difficulties. I think that is going further than the letter goes, and is putting on it a meaning which, on its sound construction, it does not bear. Therefore, while, as I have said, I think the pursuers are entitled to an issue, I think it must be on the letter without the innuendo.

"The defenders have maintained that the letter is not libellous, and that the action is irrelevant. They founded on the case of *MacLaren* v. *Robertson,* January 4, 1859, 21 D. 183, which they represented as conclusive in their favour. That case, however, does not relate to a trade slander. The pursuer was not a merchant or tradesman, but an innkeeper. The judgment proceeded on an extremely rigid criticism of the averments, and I think the Court regarded the alleged slander as imputing to the pursuer no more than poverty. They held that the words did not warrant the innuendo that he was represented to be insolvent. The case certainly decides that it is not defamatory to say of a man that he is poor, but I think it cannot be regarded as deciding any more general proposition, at least in regard to defamation of trade.

"There have been, however, later decisions which appear even more in point. The case of *Andrews* v. *Drummond,* March 5, 1887, 14 R. 568, was an appeal from the Sheriff Court. It was an action directed against parties who issued a publication which related to the financial position of the persons whose names they published. The pursuers' name was published in one of the lists, and certain statements were made in reference to them. The Lord President, in whose judgment the other Judges concurred, in dealing with these statements, observed that the meaning of them was 'that, as regards the whole persons named in the list, there is

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* *Supra,* p. 409, note *.

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circumstances to be divulged to a third party, and the subscriber shall be held accountable for any loss or damage arising from the breach or non-observance of this agreement; also that subscriptions are only received, status inquiry books and search cards or forms furnished, and all information given, upon the understanding that the agency is not to be held responsible for damage or loss arising from insufficient or inaccurate information, whether by reason of mistake or negligence of the agency, its servants, agents, or correspondents, or otherwise.

"The dispensing of credit with safety being a matter demanding the utmost discretion, the subscriber undertakes to obtain information from other available sources, and not to give credit in sole reliance upon any information furnished by the agency."

Argued for the defenders;—(1) The Lord Ordinary had held that the letter complained of could not bear the innuendo which was averred, and the pursuers maintained that no innuendo was necessary, but in the absence of any innuendo there was no relevant case, for the letter, in the ordinary meaning of its terms, contained no libel, either personal or trade.[1] It was no libel to say that a man's credit was not of the highest; and this letter, unless it could be innuendoed, merely amounted to a statement that the pursuers had credit, but not the best. The case of *Andrews*,[2] relied on by the pursuers, and

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risk in dealing with them. If that be the true meaning, it certainly contains something that in law amounts to slander as against any party whose name is in that list, because it manifestly means that he is a party who cannot be dealt with by shopkeepers without the shopkeepers incurring a risk, which means that he is not in good credit.' That appears to me to lay down distinctly that it is slanderous to say of a tradesman untruly that he is in bad credit.

"In *Wright and Greig* v. *Outram*, July 17, 1889, 16 R. 1004, which was also a case of trade slander, an issue was adjusted whether a paragraph in the *Glasgow Herald* represented that the pursuers were in financial difficulties and were being financed by means of accommodation bills. That representation, however, goes further than the statement in this case, which does not represent or mean to assert that the pursuers were in financial difficulties. It is no doubt carefully and temperately expressed, but I think it is certainly disparaging to the pursuers' credit, and represents it as under average. The opinion given, however moderately expressed, is such as, if published, might be destructive of the pursuers' credit and ruinous to their trade.

"It was further argued for the defenders that the expression of their opinion was privileged, and that the pursuers could not succeed without proof of malice, which was not, and indeed according to the defenders could not be, relevantly averred. But I think it impossible to deal safely with that question at present, because I know nothing judicially about the defenders or their connection with this case, except that they made, or are said to have made, the statements referred to, with what object, and whether in answer to inquiries or ultroneously, I do not at present know. There was no proof of malice in the case of *Andrews* v. *Drummond*, and malice was not put in the issue in the case of *Wright and Greig* v. *Outram*. But I do not desire to decide at present that when the facts are fully disclosed there may not be room for the plea of privilege and for the argument that the statement complained of was the legitimate answer to legitimate questions. . . ."

[1] MacLaren v. Robertson, Jan. 4, 1859, 21 D. 183, 31 Scot. Jur. 111.

[2] Andrews v. Drummond & Graham, March 5, 1887, 14 R. 568.

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founded on by the Lord Ordinary, was distinguishable. It was not a case of imparting confidential information, but of ultroneous publication, no doubt, to subscribers, but to subscribers whether they had asked for the special information or not. (2) The occasion was privileged, and if an issue were allowed, malice must be put in it. Stubbs were the agents of Messrs Gatti, and were under a legal obligation to do what they were paid for, viz., to ascertain and communicate to Messrs Gatti what they had learned as to the status of the pursuers.[1]

Argued for pursuers;—(1) The case was relevant and undistinguishable from *Andrews*.[2] The case of *MacLaren*[3] was distinguishable as not being a case of trade libel, and as establishing merely that it was no libel to call a man "poor." It was unnecessary to innuendo this letter; it spoke for itself. (2) No such company as the defenders' had ever been held to be protected by privilege. They could not be said to be a company fulfilling any moral or social duty, as was the case in *Waller*.[4] This was a company ultroneously putting itself forward as willing to give information for profit to itself. In order to create privilege, it was necessary that the person making the statement, the person to whom it was made, and the person of whom it was made, should be interrelated. There must be a right or duty to make the statement, and a right to hear it. No doubt a relationship existed between the defenders and Messrs Gatti which entitled the latter to ask for the information, but no relationship (such as, *e.g.*, existed between master and servant) existed between defenders and pursuers which created either a right or a duty in the former to impart the information to Messrs Gatti, and in the absence of such a relationship there could be no privilege. If a private detective were to give untrue information, he would not be privileged whether he did it ultroneously or for gain or on employment, and the defenders were in no better position. It was always difficult to prove malice against a corporation, and if the defenders were to get the benefit of privilege, it would be practically licensing them to deal with the characters and reputations of others as they chose.

Lord Trayner.—This case as presented to us stands in a somewhat different position from that in which it stood when the Lord Ordinary pronounced the interlocutor under review. It is now admitted by the pursuers that the defenders' company exists, *inter alia*, for the purpose of obtaining information on behalf of its members in regard to the commercial standing and credit of persons or firms proposing to enter into contracts with such members; and that the letter complained of was written and sent by the defenders in answer to an application made to them by Messrs Gatti (members of the defenders' company) for information regarding the position and credit of the pursuers. Copies of the application and the answer are now before us, and from them it appears that the contents of the defenders' letter do not go beyond the information which they were asked to furnish.

[1] Waller v. Loch, 1881, L. R., 7 Q. B. D. 619; Robshaw v. Smith, Feb. 20, 1878, 38 L. T. 423; Newton v. Fleming, March 10, 1846, 8 D. 677, 18 Scot. Jur. 346; Shaw v. Morgan, July 11, 1888, 15 R. 865; Nevill v. Fine Arts and General Insurance Co., L. R. [1895], 2 Q. B. 156.

[2] 14 R. 568. [3] 21 D. 183. [4] L. R., 7 Q. B. D. 619.

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The defenders' letter bears that it is private and confidential, and that its contents are to be divulged to no one by the Messrs Gatti.

In these circumstances I doubt whether the pursuers have set forth a relevant case. The defenders' letter may fairly be regarded as a confidential communication made by a servant to a master, or by an agent to his principal; and communications of that kind are to be regarded very differently from ultroneous statements made by one person to another between whom no confidential relation exists regarding a third. Looking to the defenders' letter itself, and considering the circumstances under which it was written, I have difficulty in coming to the conclusion that it is a libel on the defenders. Its language is very moderate and guarded, and says nothing (or certainly says very little) more than one commercial man may say in confidence to another about a third whose commercial standing is a matter in which they are personally and immediately concerned. But perhaps it may be enough to entitle the pursuers to an issue that they aver not only that the statements in the defenders' letter are false, but that by adequate inquiry they would have known or ascertained this, an inquiry which (as alleged) they failed to make. I understand that your Lordships are both of opinion that the pursuers have stated a relevant case, and having stated my doubt on the matter, I am not prepared to dissent from your judgment.

Taking the case as relevant, I am of opinion that the defenders were privileged in writing as they did. They had, in my opinion, both a right and a duty to make the communication complained of, and consequently malice must be put in the issue. The form of the issue as adjusted does not seem to me to be satisfactory, but the parties have agreed, I understand, to take the issue in the form which I suggested in the course of the discussion.

LORD MONCREIFF.—I am of opinion that the pursuers are entitled to an issue remodelled in the way Lord Trayner has suggested. Two questions arise here, first, as to the relevancy of the pursuers' statements, and, second, whether a case of privilege is disclosed. On the first question I do not entertain the doubt that Lord Trayner indicated. I think that a case of slander or libel is disclosed in this letter, although the letter is framed in very guarded and cautious language, the benefit of which no doubt the defenders will get at the trial. But notwithstanding the care with which the letter was written, what it conveys is this:—"You will, from inquiries we have made, certainly find, if you comply with the order you have received from this firm, that you will have to wait some time for your money, and you will certainly run some risk, and the risk you will run will not be an average risk. In confirmation of what we have said, we call your attention to two small-debt decrees against them, one so recently as 1899." I cannot doubt that a letter in these terms would have a most discouraging effect on any intending customer, and would injure the pursuers' trade.

On the second question I have no doubt after the explanations we have received from the parties. As the record stands at present it does not clearly appear that the communication complained of was made in answer to any letter written by Gatti Brothers; but it is now candidly and fairly

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admitted that, as one would have gathered from the terms of the letter itself, the letter was written in reply to inquiries privately made by Gatti Brothers as to the sufficiency and solvency of the pursuers. Now, that being so, I think that is *prima facie* a case of privilege, and therefore malice must go into the issue. I should like to guard myself by saying that I confine my opinion entirely to the circumstances of the present case. This was a private inquiry in the strictest sense, made by Gatti Brothers to Stubbs & Company asking Stubbs & Company to give them certain information about the pursuers, who had placed an order with them, and that information is given expressly on the footing that it is strictly confidential, and not to be divulged. That being so, I think the case is exactly the same as if Gatti Brothers had sent their own special agent to make inquiries on their behalf and the special agent had made a report to them with regard to the financial condition of the pursuers. I cannot doubt that a report so made, and communicated to nobody else but the employers, would have been privileged, and I think in their dealings with Stubbs & Company in this matter Stubbs & Company were really in the position of Gatti Brothers' agents. But it would be a different case if the publication had been made ultroneously by Stubbs & Company to the public, or even—but upon this matter perhaps it would be better I should reserve my opinion—if it had been made for private circulation among their own subscribers. But viewing this case as one of private and confidential inquiry made by Gatti Brothers to Stubbs & Company, and a communication made in reply by Stubbs & Company on the footing that it was not to be divulged, but to be confidential, I think *prima facie* that it is privileged.

LORD JUSTICE-CLERK.—I concur.

LORD YOUNG was absent.

THE COURT recalled the interlocutor reclaimed against, repelled the defenders' first plea in law, and appointed the issue as amended to be the issue for the trial of the cause.

The issue as amended was as follows:—"Whether in or about February or March 1900 the defenders wrote and sent to Messrs Gatti a report in the terms set forth in the schedule hereto, and whether the said report, or part thereof, is of and concerning the pursuers, and is false, calumnious, and malicious, to the loss, injury, and damage of the pursuers?"

The schedule set forth the full text of the defenders' answer to Messrs Gatti's inquiry.

CLARK & MACDONALD, S.S.C.—GEORGE F. WELSH, Solicitor—Agents.

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JAMES SMITH AND OTHERS (Trustees of College Street United Free Church, Edinburgh), AND OTHERS, First, Second, Third, and Fourth Parties.—*Sol.-Gen. Dickson—Macphail.*

THE PARISH COUNCIL OF THE CITY PARISH OF EDINBURGH, Fifth Parties.—*Campbell, K.C.—Clyde.*

Police—Poor and School Rates—Exemption—Premises exclusively appropriated to public religious worship—Church and Mission Halls—Rating Exemptions (Scotland) Act, 1874 (37 *and* 38 *Vict. c.* 20), *sec.* 1.—The

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Rating Exemptions (Scotland) Act, 1874, sec. 1, enacts,—"No assessment or rate under any general or local Act of Parliament for any county, burgh, parochial or other local purpose shall be assessed or levied upon or in respect of any church, chapel, meeting-house, or premises in Scotland exclusively appropriated to public religious worship, . . . Provided also that such exemption shall continue although such church, chapel, meeting-house, or other premises, or any room belonging thereto, or any part thereof, may be used for Sunday or infant schools, or for the charitable education of the poor."

Held that church and mission halls sometimes used for temperance meetings and for congregational social meetings, could not be regarded as exclusively appropriated to public religious worship, and did not fall within the exemption.

1ST DIVISION.

THIS was a special case presented by (1) the Trustees for the College Street United Free Church, Edinburgh, first parties; (2) the Trustees for the Minister and Kirk-session of St Bernard's Parish, Edinburgh, second parties; (3) the Trustees of Mayfield United Free Church, Edinburgh, third parties; (4) the Trustees for the Edinburgh Sabbath Free Breakfast Mission, fourth parties; and (5) the Parish Council of the City Parish of Edinburgh, fifth parties.

For the year from Whitsunday 1899 to Whitsunday 1900 the fifth parties (the Parish Council of the City Parish of Edinburgh) issued notices of assessment for poor and school rates on the halls belonging to the parties of the first, second, third, and fourth parts.

These latter parties claimed that the halls fell within the exemption enacted by section 1 of the Rating Exemptions (Scotland) Act, 1874.*

The following facts were stated in the case:—"(3) The hall of the College Street United Free Church, Edinburgh, which is the subject of the assessments levied by the fifth parties on the first parties as aforesaid, adjoins said church, and is connected with it by a passage. It can be entered either from the church door along that passage or from a stair leading to the hall direct, and to the first floor of an adjoining property. The said hall is and has been used for mission school and evening services, Band of Hope and Temperance meetings, and also for social meetings and literary and musical entertainments given by societies in aid of or in connection with the congregational schemes and purposes. The said hall is never let for hire, but occasionally a charge of 6d. or 1s. is made on admission to the social meetings, or collections are taken at literary or musical meetings, not for profit, but solely for the purpose of defraying the extra expense incurred in connection therewith. The various meetings held in the said hall are, as a rule, opened with praise and prayer, and closed with a benediction.

"4. The parties of the second part, representing the kirk-session of St Bernard's Parish Church, West Claremont Street, Edinburgh, have a hall or halls at 24, 26, and 28 Dean Street, Edinburgh. The said hall or halls do not adjoin the said church. They are used for Sunday schools, sewing classes, and Boys' Brigade meetings. The halls are also used, in connection with the church and parish work, for sales of work, work parties, and soirees to Sunday school children, for admission to which no charge is made; also for Penny Readings, for admission to which a nominal charge is made towards defraying expenses. The premises are never let for hire."

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The hall belonging to the third parties was as regards situation relative to the Mayfield United Free Church, and the uses it was put to, in a very similar position to the hall of the College Street United Free Church.

"6. The parties of the fourth part, representing the Edinburgh Sabbath Free Breakfast Mission, have premises in Old Fishmarket Close, Edinburgh, consisting of large and smaller halls, also three classrooms used for Sunday school, ladies' retiring room, kitchen, two attic rooms, and caretaker's house. The sole object of the mission is to gather in the poorest people in the city (who will not attend the ordinary places of worship) to religious services. The religious services carried on in the premises consist of services on Sundays and Wednesdays. There are also held during the week mothers' meetings, a service for poor girls, which is combined with a sewing class, and Gospel Temperance and Band of Hope meetings. There is also a penny savings bank, which is managed by some of the workers in the mission. At the Gospel Temperance meetings a substantial tea is provided, and a charge of one penny has been made for admission. This is a nominal charge which does not nearly cover the outlay. The mission is maintained by the voluntary contributions of the public. None of the workers in the mission receive payment for their services. The premises are never let for hire."

The parties of the first, second, third, and fourth parts contended that the halls belonging to them respectively were not liable to assessment for poor and school rates, but were exempt in virtue of the provision of section 1 of the Statute 37 and 38 Vict. c. 20, under the circumstances above set forth. The fifth parties, on the other hand, maintained that the halls were not exempt, in respect that they were not exclusively appropriated to public religious worship, and that they were used for purposes other than public religious worship, Sunday or infant schools, or the charitable education of the poor.

The parties submitted for the opinion and judgment of the Court the following questions of law:—"(1) Is the hall connected with the College Street United Free Church exempt from assessment for said rates? (2) Are the halls connected with Saint Bernard's Parish Church exempt from assessment for said rates? (3) Is the hall belonging to Mayfield United Free Church exempt from assessment for said rates? (4) Are the premises belonging to the Edinburgh Sabbath Free Breakfast Mission exempt from assessment for said rates?"

The first, second, third, and fourth parties argued;—Reading the enactment of section 1 and the proviso together, and having regard to the wide definition that the Legislature had given to Sunday school, ragged school, &c. (3 and 4 Will. IV. c. 38, and 32 and 33 Vict. c. 40), the halls in question were entitled to the benefit of the exemption claimed. It was quite plain that the words "exclusively appropriated" must not be read literally, for the proviso is inconsistent with such a construction, and further, if so read, then the subsidiary apartments of a church—the vestry, &c.—not being appropriated to religious public worship, would prevent even the church getting the benefit of the exemption, which was absurd. It was evidently sufficient if the primary use of a building, as was the case here, was public worship.

The fifth parties argued;—The buildings in question did not satisfy the requirements of the section. They were quite separate from, and not merely apartments of, the churches. The Free Breakfast hall was

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not, indeed, connected with any church, and the condition of the case was that they were all separately assessable subjects. It was impossible to say of any one of them that it was appropriated to public religious worship. It was not enough to say that it was connected with a building that was so appropriated. It was not necessary to consider the proviso at all, but even if it were, it was very clear that it did not apply to the halls in question. The reference to Acts other than the one whose terms had to be construed was altogether irrelevant.

LORD PRESIDENT.—It appears to me that under section 1 of the Act 37 and 38 Vict. cap. 20, two points might arise—first, whether the buildings in question fall within the leading enactment; and, second, if they fall within that enactment, what is the effect of the proviso at the end of the section. If they fall within the leading enactment, we would require to consider whether the uses to which they are put answer any of the descriptions contained in the proviso, but it appears to me that we do not require to consider the proviso, because I think that on the statement in the case none of the buildings to which it relates come within the leading enactment. That enactment declares that "No assessment or rate under any general or local Act of Parliament for any county, burgh, parochial, or other local purpose shall be assessed or levied upon or in respect of any church, chapel, meeting-house, or premises in Scotland exclusively appropriated to public religious worship, or upon or in respect of any ground exclusively appropriated as burial ground." I should be quite disposed to accept the argument which was submitted as to the meaning of the word "appropriated." I do not think it requires that public religious worship shall be practised in every part of the building—for instance in the session-house or vestry—but it appears to me that the main building must be exclusively dedicated to public religious worship.

Now, upon the facts stated, it is plain that none of the buildings in question are exclusively appropriated to public religious worship, nor do they seem to me to form parts of any buildings which are so exclusively appropriated. I think it would be a very dangerous argument for the persons interested in the churches if they persuaded us that the buildings in question formed parts of the churches, as they would then run a great risk of rendering the whole structures, including the churches, assessable, seeing that if the buildings were identified with the churches, it could not be predicated of the combined buildings that they were exclusively appropriated to public religious worship.

Upon the view now stated it is probably unnecessary to go through the different buildings in detail, but I may briefly refer to some of them. The first is the hall of the College Street United Free Church. Structurally, it can be entered either from the church door or from a stair leading to it (the hall) direct. I say nothing about its structural connection with the church, as, if that connection amounted to identification, this might (as already pointed out) render the whole combined structure assessable. As to the uses of the hall, it is stated that it is, and has been, used for mission, school, and evening services, Band of Hope and temperance meetings, and also for social meetings, literary and musical entertainments given by

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societies, in aid of or in connection with congregational schemes and purposes. Collections are taken at literary or musical meetings, not for profit, but solely for the purpose of defraying expenses. This description of the purposes for which the hall is used indicates plainly the purposes for which it was built; and if it was built for the purposes mentioned, that is just another way of saying that it was appropriated to these purposes, and religious worship occupies a very subordinate place among them. Accordingly, it would be impossible, in my judgment, to predicate upon the statement that the hall was a building exclusively, or to any material extent, appropriated to public religious worship. It is true that the purposes mentioned are excellent, and I have no doubt that such halls are built in pursuance of the larger views as to the duties of the Christian Church which now prevail, and of the advantages resulting from bringing the members of a congregation together otherwise than merely once or twice a week for religious worship. Doubtless the halls are aids to the religious life and work of the church, but they are certainly not exclusively appropriated to public religious worship, and, if that be so, they do not come within the leading enactment. The case of the St Bernard's Halls is perhaps a more testing one, because the halls do not even adjoin the church. I think we were told that they are about a quarter of a mile distant from the church, and in a different street. These halls are not in any sense structurally a part of or adjuncts to the church, and if they are not so, the question whether they could get the benefit of its appropriation to religious worship would not arise. There, again, I think it would be a most dangerous argument to say that they were parts of the church. The case of the hall belonging to the Mayfield United Free Church is very similar to that of the hall of the College Street United Free Church. The Edinburgh Sabbath Free Breakfast Mission is no doubt a most excellent institution, but it is not associated with any church, and not only is it not exclusively appropriated to public religious worship, but it is not appropriated to public religious worship at all. There are religious services in the premises twice a week, on Sundays and Wednesdays, and mothers' meetings, a service for poor girls, combined with a sewing class, as also Gospel Temperance and Band of Hope meetings, together with a penny bank. To say that a place in which such incidental religious services are held twice a week, along with so many secular uses, was exclusively appropriated to public religious worship, would be a contradiction in terms.

For these reasons, it seems to me that all the four questions should be answered in the negative.

Lord Adam.—The Act 37 and 38 Victoria, c. 20, says: "No assessment or rate under any general or local Act of Parliament for any county, burgh, parochial, or other local purpose, shall be assessed or levied upon or in respect of any church, chapel, meeting-house, or premises in Scotland exclusively appropriated to public religious worship." Now, it appears to me that the premises we have to deal with here are not premises specifically mentioned, so to speak, in the Act. It is not a question of any church, chapel, or meeting-house at all, but certain premises connected with the several churches or chapels or meeting-houses of which the four parties to

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the case are owners. They, in three of the cases, being owners of certain premises undoubtedly exclusively appropriated, we must assume, to public worship, come here and ask us whether certain premises—some physically connected, but in one case at least not even physically connected with these churches—are proper subjects of assessment or not. I think that is the real case, and it is the footing upon which this case must be tried. Well then, not being, I think, on the face of it, either churches, chapels, or meeting-houses proper, the question is whether they are premises in Scotland exclusively appropriated to public worship. Is that their character or not? If that cannot be made out, they are not entitled to exemption. The statement of the case is that they are in connection with proper buildings—proper churches, or proper chapels,—in which public worship is conducted. That was not the purpose of these auxiliary premises, whatever it was. We must see what the use of these various halls is, and see whether or not they are exclusively appropriated to public religious worship. If that is the question, I think the solution is very easy. There is no statement in the case to the effect that the premises are exclusively appropriated to public religious worship, and it would appear to me that that is conclusive against the claim for exemption. I fail to see how mission schools, or temperance meetings, or social meetings, or anything of that kind, fall within the designation of public worship. It appears to me that that is the solution of the whole case, and one can quite understand why the case is brought in the form in which it is, because, if these buildings were all to be treated as part of the church, it appears to me that it would be rather dangerous for the exemption of the main building. This is simply a question of whether certain halls connected with these churches are to be exempt or not. I agree with your Lordship in thinking that they do not come under the exemption.

LORD M'LAREN.—It was noticed in the course of the argument, and I think it is reasonably clear, that the question of the construction of this enactment might have been raised in a different form,—that is to say, whether what are called mission halls, or school halls, for giving instruction as an adjunct to the services of a church, would be within the exemption, or whether, being partly used for secular purposes, they might have the effect of subjecting the place of worship itself to taxation. But Mr Campbell explained that the Parish Council do not wish to raise that question, and that in the administration of their statutory powers they prefer to exempt the churches to which those halls were attached, and to assess the halls as separate subjects. It is then a condition of the case that the halls are separate subjects, because the second article sets out that the Parish Council issued notices of assessment for poor and school rates on the halls belonging to the parties of the first, second, third, and fourth part, and the question is whether they are separately assessable.

Now, in order to bring each and all of these halls within the exemption contended for, it must be shewn that they are, primarily, places appropriated to public religious worship. In looking over the case, I do not find, in regard to any one of them, an admission in terms that these halls are appropriated to religious worship, or such a circumstantial statement as might

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enable us to infer that they were appropriated to public worship. On the contrary, I think it is clear that they are not buildings of that character, although they are useful adjuncts to the work of a church or it may be material for applying the energies of a Christian congregation to a good object. Following your Lordships' opinions, this seems to me to be conclusive of the question, and it is not necessary to consider whether, if the halls were primarily places of public worship, those educational uses and mission uses to which the case refers would have the effect of taking the buildings out of the exemption.

LORD KINNEAR.—I am of the same opinion. I do not understand that it is suggested that there is any ground upon which the churches or places of worship belonging to any of the parties represented in this case are liable to assessment. The exemption of such churches is admitted. But then, the case that is presented to us is that there are certain separate tenements belonging to the trustees or managers of certain churches, and in one case of trustees for a mission which does not seem to be specially connected with any particular church, which are free from assessment, not as churches but as separate buildings. Now, the exemption founded upon is an exemption of churches. The enactment is that no assessment shall be levied upon or in respect of any churches in Scotland; but then the word "church" is intended to be used in the widest and most general sense in which it can be used in describing buildings as distinguished from a religious association. Therefore, the section goes on to add after the word "church" the words "chapel, meeting-house, or premises in Scotland exclusively appropriated to public religious worship." Now, I think that last phrase is a very general description of what is meant by a church, which, in the sense to which I have referred, is a building. There are, no doubt, religious bodies who deny the name of church to an unconsecrated building. There are others who might take exception to certain buildings for public worship; but speaking generally and in ordinary language, what is commonly meant by a "church," speaking of the church as a building, is simply, in the words of the statute, premises exclusively appropriated to public religious worship. Now, the exemption being in favour of such premises only, it appears to me to be perfectly clear on the description which is given to us of such halls for which the exemption is now claimed that they are not such premises. They are not in any sense churches or exclusively appropriated to public religious worship. They are halls which have been erected or hired by certain congregations for charitable and educational purposes which they desire to prosecute, presumably as part of their proper work as Christian congregations, but which they do not think it fit or convenient to carry on within the church itself. It is for that last reason that they find it necessary to have separate buildings for carrying out these useful and charitable purposes. The only question therefore, on the construction of the statute, is whether those separate buildings are churches or not, and I quite agree with your Lordship that they are not exclusively appropriated to public religious worship, or appropriated to public religious worship at all. They are, therefore, in my judgment, not churches, and not within the exemption; and I agree that when that has

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been once determined, it is quite unnecessary to consider what is the effect of the proviso attached to the exemption which is intended only to save churches or premises exclusively appropriated to public religious worship from being liable to assessment, merely because of parts of them being used for Sunday or infant schools. I therefore agree with your Lordship in the way it is proposed to answer the questions of law.

THE COURT answered all the questions in the negative.

MENZIES, BLACK, & MENZIES, W.S.—R. ADDISON SMITH, S.S.C.—Agents.

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JAMES HERIOT BALFOUR-MELVILLE, Petitioner (Reclaimer).—*Jameson, K.C.—Guy.*
JAMES MYLNE (Balfour-Melville's Factor) AND OTHERS, Respondents.—*Guthrie, K.C.—Cullen.*
MRS MARY LOUISA BALFOUR-MELVILLE AND OTHERS, Respondents.—*Craigie—Younger—William Wallace.*

Entail—Provisions to younger children—Deductions from free rental—Burdens imposed under legislation subsequent to entail.—A deed of entail, dated in 1808, which reserved power to the heir in possession to grant provisions for his widow and younger children out of the free rental of the estate, but no power to burden the fee under any circumstances, provided that provisions for younger children might be granted to an amount not exceeding four years' free rental of the estate, under deduction of "feu-duties and all other legal and annual burdens, excepting liferents to widows or widowers, and any debts contracted for improvements and buildings under the Act 10 Geo. III. cap. 51."

In a petition for the restriction of younger children's provisions, and for disentail, *held* that the deductions from the free rental fell to be determined on the construction of the deed of entail, and that the interest on bonds and dispositions in security, and the annual amount of certain rent charges and bonds of annualrent, by which the estate was burdened under powers conferred by statutes subsequent to the date of the entail, did not fall to be deducted.

1ST DIVISION. Lord Pearson.

JAMES HERIOT BALFOUR-MELVILLE, W.S., heir of entail in possession of the entailed estate of Strathkinness, in the county of Fife, presented a petition for restriction of younger children's provisions and widow's annuity, and for disentail.

The deed of entail of Strathkinness was dated 22d April, and recorded in the Register of Tailzies 7th July, 1808. It contained the usual prohibition against the contraction of debt whereby the fee of the estate might be affected, but reserved powers to the succeeding heirs of entail to grant liferent annuities to widows or widowers, and provisions to younger children, out of the free rental. With regard to the liferent to widows and widowers, the deed provided that they should be restricted if at any time, together with the annual interest on the provisions for younger children, they exceeded one-half of the free rental of the estate. With regard to younger children's provisions, the deed of entail contained the following clauses:—"Moreover, reserving always to the said heirs of entail who shall succeed to the said lands, teinds, and others, full power and liberty to provide their lawful children (other than the heir succeeding to the said lands, teinds, and others) in such portions and provisions as they shall think fit, not exceeding, in case there shall be one child other than the heir succeeding to the said lands, teinds,

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and others, two years' free rent of the same; in case there shall be two children other than such heir, three years' free rent of the same; and in case there shall be three or more children other than such heir, four years' free rent of the same; after deducting always feu-duties and all other legal and annual burdens, excepting liferents to widows or widowers, and any debts contracted for improvements and buildings under the Act of Parliament, Tenth George the Third, chapter fifty-one. . . . And further declaring, that any bond or other security to be granted by the said heirs of entail for children's provisions shall bear a special clause, and they are hereby declared to be so qualified that no apprising, adjudication, or other real diligence shall be led or deduced thereupon against the fee or property of the said lands, teinds, and others, or any part thereof, for payment of such children's provisions, interest thereon, or penalties corresponding thereto, nor shall it be in the power of the said heirs of entail to sell any part of the said lands for payment thereof, but the current rents of the said lands, teinds, and others, so far only as free and unaffected at the time, shall be subjected and liable to legal execution for payment of the said children's provisions, and shall be appropriated by the next heir of entail succeeding thereto accordingly, who shall be, and is hereby, prohibited and debarred from applying or appropriating the said free rents to any other purpose until such provisions shall be satisfied and paid, reserving only to him or herself such a proportion of the said free rents in the meantime as shall be necessary for his or her subsistence, not exceeding one-half of the said free rents for the time, while the said provisions or any part thereof remain unpaid."

The children's provisions which it was sought to restrict were contained in a bond of provision dated 9th January 1895, whereby the late James Balfour-Melville, the petitioner's father, at that time heir of entail in possession of the estate of Strathkinness, bound himself and the heirs of entail succeeding to provide a sum of £10,000 for his younger children, six in number, in certain proportions thereby specified.

At the date of the petitioner's accession to the entailed estate it was burdened with, *inter alia*, three bonds and dispositions in security for £12,204, £200, and £700, granted in 1885, 1885, and 1888 by John M. Balfour-Melville, a former heir of entail in possession, under authority to charge the estate with debt obtained by application to the Court under the Rutherfurd Act (11 and 12 Vict. cap. 36). The estate was also burdened with certain rent-charges and bonds of annualrent, amounting to £813, 2s. 9d. per annum, the former consisting of absolute orders issued by the Scottish Drainage and Improvement Company under statutory authority, and the latter of bonds granted under powers obtained by application to the Court.

In the petition it was proposed to deduct from the rental, in estimating the amount available for the younger children's provisions, the sum of £427, 12s. 10d., being interest on the bonds and dispositions in security mentioned above, and the sum of £813, 2s. 9d., the annual amount of the rent-charges and bonds of annualrent. On this footing the amount available, being four years' free rental of the estate, was £3672, 3s. 4d., while, if the above deductions were not allowed, it was £8635, 5s. 8d.

Answers were lodged for James Mylne, W.S., judicial factor on the estate of the late James Balfour-Melville, and for two of the younger

children, objecting to the deductions from the rental proposed by the petitioner.*

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On 26th October 1899 the Lord Ordinary (Pearson) remitted to Mr W. D. Lowe, W.S., to inquire, and report. Mr Lowe thereafter lodged a report, in which he narrated the foregoing facts, and reserved for the Lord Ordinary's consideration the question whether the interest on the bonds and the rent-charges, &c., as stated above, should be deducted from the rental.†

On 13th December 1900 the Lord Ordinary pronounced an interlocutor, whereby he found, *inter alia*, that no part of the said sums of £427, 12s. 10d. and £813, 2s. 9d. fell to be deducted from the rental in ascertaining the amount of the provisions for the younger children.‡

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* Answers were also lodged for Mrs Mary Louisa Dundas or Balfour-Melville, wife of the petitioner, and for the Hon. Mrs Duncan, widow of a former heir of entail, but to the questions raised by these respondents it is not necessary to refer for the purposes of the present report.

† With regard to the rent-charges Mr Lowe reported,—" . . . The question thus raised affects also the claim made by the petitioner for deduction of rent-charges, amounting to £813, 2s. 9d., and regarding this deduction the reporter begs to inform your Lordship that the same question was raised with reference to this same estate in an application dated 5th July 1884, presented by the late proprietor (Mr John M. Balfour-Melville), for authority to charge the estate with the children's provisions granted by the previous proprietor (Mr John Whyte-Melville). In that petition the only deductions claimed from the rental (apart from 'public' burdens) were certain rent-charges amounting to £493. The reporter is informed that no formal answers were lodged to the petition, but it appears from the report of the man of business (the late Mr John Galletly) that representations were made to him on behalf of the younger children, to the effect, *inter alia*, that the rent-charges were not a good deduction. An excerpt from Mr Galletly's report is lodged in process.

"Mr Galletly reported that the rent-charges then sought to be deducted did not represent improvements made under the Montgomery Act (although the improvements themselves were, in his opinion, of the nature of improvements which would have been allowed under that Act), and that as they were not charged under it upon the estate, they were not excluded as deductions by the deed of entail, and he indicated his opinion that the correct course to follow would be to allow the deduction of interest upon the value of the rent-charges, as at the date of the previous proprietor's death.

"The report was disposed of on 13th March 1885 by Lord Kinnear, who, after hearing counsel for the then petitioner, decided 'that the rent-charges do not fall to be deducted.' A copy of the interlocutor, which was acquiesced in by the then petitioner, and by the three next heirs (of whom the present petitioner was one), is produced.

"The rent-charges now sought to be deducted are for expenditure on Montgomery improvements of the same nature as those which were the subject of Lord Kinnear's judgment in 1885, and indeed are partly composed of the same charges. . . ."

‡ "OPINION.—In this petition for disentail it is necessary to ascertain the amount to be charged on the estate in respect of certain family provisions.

"The petition was remitted in ordinary course to Mr Lowe, W.S., and in an interim report he now asks for direction on two matters.

"The first question raised is, what deductions are to be made in ascertaining the free rental upon which certain provisions to the younger children of the preceding heir are to be calculated.

"These provisions were not granted under the powers of the Entail Acts, but under powers contained in the deed of entail executed in 1808. By

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The petitioner reclaimed, and argued;—The deductions claimed should be allowed. The clause allowing deductions from the free rental in the deed of entail should be read in the light of the decisions under the Aberdeen Act. Under that Act the interest on such burdens was a "legal and annual burden" on the estate.[1] It was no objection to this view that the interest on children's provisions might ultimately eat up the whole rental.[2] The case of *Paterson*,[3] on which the Lord Ordinary mainly relied, was distinguishable. The phrase used there was "legal annual burdens," which *prima facie* meant burdens arising *ex lege*; here it was "legal and annual burdens," which meant burdens arising *ex lege* and other legal burdens affecting the estate.

Argued for the respondents;—Neither deduction should be allowed. The case of *Paterson*[3] was a direct authority to that effect on the construction of a clause practically identical with the present. The principle there laid down was that the entailer could not have had in contemplation burdens which could not have arisen under the provisions of his deed, and were only possible under supervenient legisla-

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that deed it is provided that the rental for ascertaining the amount of younger children's provisions is to be 'the free rent, after deducting always feu-duties and all other legal and annual burdens excepting liferents to widows or widowers, and any debts contracted for improvements and buildings under the Act 10 George III. cap. 51.' The rental for calculating widows' annuities is to be the free yearly rent 'after deducting feu-duties and all legal public burdens.'

"Now, the sums in dispute, which the petitioner maintains to be proper deductions from the rental in ascertaining the children's provisions, are (1) a sum of £427, 12s. 10d. of interest on debts charged upon the estate, and (2) a sum of £813, 2s. 9d., being the amount payable under certain rent-charges.

"I proceed to deal with these in order, premising that, whatever light may be thrown upon the matter in dispute by subsequent legislation as interpreted by decisions, the questions here are primarily questions of construction of the deed of entail of 1808.

"The debts whose interest is sought to be deducted are three in number. The first is a bond and disposition in security for £12,204, 9s. 3d. which was charged on the estate by the late John M. Balfour-Melville under the authority of the Court in 1885, being the sum required for paying off the younger children's provisions granted by Mr John Whyte-Melville, his predecessor. The other two debts are bonds and dispositions in security for £700 and £200 respectively.

"The petitioner contends that the yearly interest of these debts falls within the expression 'feu-duties and all other legal and annual burdens' which are to be deducted in ascertaining the free rent, and that these words ought to receive a wide construction, because of the exceptions which immediately follow, namely:—'Excepting liferents to widows or widowers.' It is urged that this shews that, but for these words excepting them, such liferents would have been included within the expression 'All other legal and annual burdens,' and that the expression is, therefore, not used in its ordinary restricted sense.

"I think that the case of *Paterson*, 1849, 11 D. 1420, is a guide in construing clauses of this nature. I do not say that the decision on one clause will rule the construction of a different clause. But the clauses are near

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[1] Lord Saltoun, Petitioner, Jan. 18, 1887, 24 S. L. R. 352; Marquis of Queensberry, Petitioner, Aug. 12, 1873, reported as a note to Lord Saltoun; Grierson, Petitioner, June 16, 1887, 24 S. L. R. 549.

[2] Brodie v. Brodies, Dec. 6, 1867, 6 Macph. 92, 40 Scot. Jur. 56.

[3] Paterson v. Paterson, July 17, 1849, 11 D. 1420, 21 Scot. Jur. 549.

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tion. Applying that principle to the present case, it was clear that the deductions claimed arose from burdens which could not have affected the estate under the deed of entail, because that deed contained no power to burden the estate for debt. Cases under the Aberdeen Act had no bearing on a case which must turn on the construction of the particular clause in the deed of entail.

At advising,—

LORD PRESIDENT.—The only question submitted for our decision is whether two sums of £427, 12s. 10d. and £813, 2s. 9d. fall to be deducted from the rental of the estate of Strathkinness in ascertaining the amount of the children's provisions.

The sum of £427, 12s. 10d. is made up of three sums—(1) £396, 12s. 10d., being interest on £12,204, 9s. 3d., contained in a bond and disposition in security granted by John M. Balfour-Melville, a previous heir of entail, in favour of the Scottish Union and National Insurance Company;

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enough to make that decision illustrative of the present question. It was there held that upon a clause for ascertaining the free rent, 'after deducting feu-duties and other legal annual burdens,' annuities granted by the entailer, and the interest of entailers' debts which were charged on the fee, were not deductable in calculating a younger child's provision. I would specially refer to the opinions of Lord Mackenzie and Lord Fullerton as to the principles on which such a clause should be construed. These seem to me entirely to favour the respondents' view.

"The rent-charges sought to be deducted consist partly of absolute orders issued by the Scottish Drainage and Improvement Company under the Improvement Acts and partly of bonds of annualrent. Of the latter, one (amounting to £307, 1s. 8d.) is stated to have been laid on under section 21 of the Rutherfurd Act in respect of Montgomery improvements.

"It is contended that this question as to deducting rent-charges has already been decided adversely to the petitioner in a previous petition, namely, the petition which was presented in 1884 to charge the sum of £12,204, 9s. 3d. of younger children's provisions already mentioned; and that it was so decided in reference to several of the very rent-charges now in question, which were current at the date of that petition. This appears to be so, for by interlocutor of 13th March 1885 in that petition, Lord Kinnear, on a report from Mr John Galletly, S.S.C., found that the rent-charges mentioned in the report did not fall to be deducted from the gross rental in ascertaining the free rent available for children's provisions. The younger children had not lodged answers to the petition, but their agents had brought this with other matters before the reporter, and it is fully dealt with in the report.

"If the question be still open, I may say that I arrive at the same conclusion, though the question is not free from difficulty. On the clause itself the petitioner argued that the words of exception only extend to the liferents of widows or widowers, and do not cover the 'debts contracted for improvements,' which accordingly are to be deducted. There is something to be said for this view, particularly having regard to the fact that such improvements are presumed to enhance the rental, and that if the charge is not deducted the younger children obtain a double advantage. But on the whole, I think the true reading of the clause is that the words of exception cover all that follows.

"Then, on the general question of deducting rent-charges, the petitioner appeals to the cases of *Lord Saltoun* (1887, 24 S. L. R. 352) and *Lord Queensberry* (reported in a note to Lord Saltoun's case). But the former case turned on the construction of the Aberdeen Act, which contains a much

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(2) £6, 10s., being interest on £200 contained in a bond and disposition in security granted by the said John M. Balfour-Melville in favour of James Robert Lloyd; and (3) £24, 10s., being interest on £700 contained in a bond and disposition in security granted by the said John M. Balfour-Melville in favour of Miss Elizabeth Henrietta Charlotte Jackson.

The £12,204, 9s. 3d. was the amount required to pay younger children's provisions granted by the heir of entail in possession of the estate prior to John M. Balfour-Melville, and it was charged upon the estate by him under authority obtained from the Court in 1885. The other sums of £700 and £200 were charged upon the estate by John M. Balfour-Melville in 1885 and 1888 respectively under the authority of the Court, granted in an application under the Rutherfurd Act.

The question whether the interest payable under these three bonds should be allowed as a deduction from the rental in ascertaining children's provisions does not depend upon any of the Entail Acts, but upon the terms of the entail under which the estate is held. That entail was executed in 1808,

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more ample deduction clause, while the latter case involved the construction of a clause in the deed of entail which was in different terms from the present one, and which was construed as including every burden which diminished the yearly rent to the heir of entail in possession. That may be highly equitable, but I do not see my way to reach that conclusion on the construction of this entail.

"It was argued with some force that this construction ought to be adopted, seeing that by the entail the heir in possession is secured in one-half of the free rental in all events, and figures were submitted to shew that if my view receives effect the petitioner will be left with no free rent at all, or at most with greatly less than half. I was impressed by this argument, and would gladly adopt it, so as to make the burdens which really diminish the free rental fall rateably on those interested, but I do not find sufficient ground for it in the deed of entail. The heir's interest in the rents is alluded to twice in the deed. The first mention of it is contained in the clause giving power to grant liferent annuities, which declares that in case the annuities allowed, and the yearly interest that may be payable on provisions to younger children, should together exceed the half of the yearly rent, 'each of the three higher annuities above mentioned shall suffer a deduction proportional to their several amounts, so as that one-half of the free yearly rents of the said lands, teinds, and others shall always remain to the heir of entail in possession for the time.' The clause as to interest on children's provisions is to the effect that they 'are to bear interest only after the granter's death.' It will be observed that it is not the children's provisions, nor even the interest thereof, but the annuities which are to abate in order to secure the heir in his rights. The second allusion to the heir's interest in the rental occurs in the clause as to the payment of children's provisions, and is to the effect that the current rents, so far as free and unaffected at the time, shall be appropriated by the next heir accordingly, 'who shall be and is hereby debarred from applying or appropriating the said free rents to any other purpose until such provisions shall be satisfied and paid, reserving only to him or herself such a proportion of the said free rents in the meantime as shall be necessary for his or her subsistence, not exceeding one-half of the said free rents for the time.' This does not lead to the conclusion that the heir was to be assured in the enjoyment of one-half of the free rents in a question as to younger children's provisions.

"On the question of how annual burdens should be treated which could not have been imposed by the powers of the entail, but have been authorised

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when the Montgomery Act was the only statute which allowed the rents of entailed estates to be burdened with debt. The deductions allowed by the entail for the purposes of the present question are "feu-duties and all other legal and annual burdens, excepting liferents to widows or widowers, and any debts contracted for improvements and buildings under the Act 10 Geo. III. c. 51."

The clause of the entail relating to children's provisions declares that any bond or other security to be granted by the heirs of entail therefor shall be so qualified that no apprising, adjudication, or other real diligence shall be led or deduced upon the fee or property of the estate for payment of such provisions, but that the current rents, so far only as free and unaffected at the time, shall be liable to legal execution for payment of the provisions, and shall be appropriated by the next heir of entail succeeding thereto accordingly, who is thereby prohibited and debarred from applying the free rents to any other purpose until the provisions shall be satisfied and paid, reserving only to himself such proportion of the free rents in the meantime as may be necessary for his subsistence, not exceeding one-half of these free rents.

It is clear that if the question had arisen prior to the passing of the more recent Entail Acts, interest on capital debt charged upon the fee of the estate for the purpose of raising children's provisions, could not have been deducted in calculating the free rental upon which later provisions for children were to be fixed, unless such interest fell within the words "feu-duties and other legal and annual burdens" in the clause already mentioned, and it appears to me that it could not reasonably be held to do so. I should have thought this too clear for argument had it not been for the words "excepting liferents to widows or widowers," upon which it is maintained by the petitioner that the prior words must be held to have a larger comprehension than they would *prima facie* express, otherwise liferents to widows or widowers would not form exceptions from them. It is, on the other hand, contended that the express exception of "liferents to widows or widowers" in the clause rather suggests that the entailer intended that the rental which should form the basis for ascertaining children's provisions should not be different from that upon which widows' jointures were to be ascertained, and that the only deductions in either case should be "feu-duties and all legal public burdens," as expressed with reference to liferents to wives and husbands. Giving all due weight to the terms of the exception, I do not think it is sufficient to entitle the petitioner to claim the deduction in question. The actual decision in the case of *Paterson*,[1] mentioned by

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by subsequent legislation, the petitioner founds on the case of *Brodie* (1867, 6 Macph. 92). But the question there did not turn upon the construction of the entail, but upon the terms of the Aberdeen Act. The decision was that, where an Aberdeen provision was charged on the fee, it lost its character as a provision, and became a debt, and that not the capital, but only the annual interest, was to be taken into account in calculating the free rental. It does not appear to me that a decision upon the Aberdeen Act has any bearing on the present dispute.

"On these grounds I hold that neither the rent-charges nor the interest of debt are to be deducted in ascertaining the free rental for fixing children's provisions."

[1] 11 D. 1420.

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the Lord Ordinary, is not a direct authority in the present case, seeing that the language of the clause to which that case related was different from that of the clause under which the present question arises, the words being, "legal annual burdens" in *Paterson's*[1] case, and "legal and annual burdens" in the present case, and it does not seem to me that these expressions are identical, the latter having *prima facie* the larger signification, inasmuch as it might be held to include annual burdens which were not legal in the sense that they did not arise *ex lege*. But the reasoning of the Judges has a very important bearing. Thus Lord Mackenzie said,—"Is interest a legal annual burden on land? It is not a legal burden, and it is not a burden on the land at all, unless the personal obligation to pay it is not implemented."

As to the interest on the sums of £700 and £200, it is enough to say that these sums could not have been charged on the estate under the law existing at the date of the entail (1808), and that I do not think that the clause of exception could upon any reasonable construction be extended so as to include the interest on capital sums charged on the estate under the authority of subsequent Acts.

The view that the provisions cannot be larger than those authorised by the entail is confirmed by the declaration contained in the bond of provision granted by James Balfour-Melville, the last heir, under which the present question arises, that the provisions, so far as obligatory on the heirs of entail, should be effectual only so far as consistent with the terms and conditions of the entail, and that if they should be found disconform thereto they should be and were thereby restricted so as to be precisely consistant with the powers thereby bestowed upon the heirs of entail. The petitioner's counsel maintained that this provision only applied to the number of years to be taken into account, or the resulting amount, not to the mode of ascertaining the first factor of the calculation, but it does not appear to me to be so limited.

With respect to the claim to deduct the rent-charges amounting to £813, I may say, in the first place, that the same question was raised with reference to the same estate in 1884, and that on 13th March 1885 Lord Kinnear, after hearing counsel for the petitioner, decided "that the rent-charges did not fall to be deducted." The rent-charges with respect to which this decision was pronounced are of the same character as those now in question, and it appears that some of the charges with respect to which the claim for deduction is now made actually formed the subject of Lord Kinnear's judgment. Even if that judgment should not be held to constitute *res judicata*, it is an authority of much weight.

But, apart from any question of *res judicata* or authority, I consider that the decision then arrived at was correct, because I do not think that the rent-charges fall under the clause specifying the deductions which are alone to be allowed.

The petitioner's main argument upon that clause was that the only exception from "feu-duties and all other legal and annual burdens" introduced by the word "excepting" is "liferents to widows and widowers," and that the words which follow, viz., "and any debts contracted for improve-

[1] 11 D. 1420.

ments and buildings under the Act 10 Geo. III. cap. 51" are not governed by "excepting," so that they do not form exceptions from the permitted deductions, but are themselves permitted deductions. This does not however appear to me to be the true construction of the clause; on the contrary, I think that all the things mentioned after the word "excepting" form exceptions from the permitted deductions, and therefore cannot be allowed as deductions. I concur in the Lord Ordinary's criticism of the authorities relied on by the petitioner on this part of the case, and also in the reasoning upon which he arrives at the conclusion that the heir of entail in possession is not by the terms of the deed of entail assured in the enjoyment of one half of the free rents in a question relative to younger children's provisions.

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Upon the whole matter, I am of opinion that his Lordship's interlocutor should be adhered to.

LORD ADAM and LORD KINNEAR concurred.

LORD M'LAREN, not having been present at the hearing, gave no opinion.

THE COURT adhered.

CLARK & MACDONALD, S.S.C.—BALFOUR & SCOTT, W.S.—DUNCAN SMITH & M'LAREN, S.S.C.—ROBERT FLEMING, S.S.C.—DUNDAS & WILSON, C.S.—Agents.

JOHN TURNBULL SMITH AND OTHERS (Watherston's Trustees), Pursuers (Reclaimers).—*Ure, K.C.—Clyde.*
THE LORD ADVOCATE, Defender (Respondent).—*Sol.-Gen. Dickson —A. J. Young.*

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Revenue—Settlement Estate-duty—Estate contingently settled—Repayment—Finance Act, 1894 (57 *and* 58 *Vict. cap.* 30), *sections* 5 *and* 8.—Trustees were directed to hold the residue of a trust-estate for the truster's unmarried daughter in liferent, and her children in fee, it being provided that if she had no children the fee should go as she might direct by any writing under her hand, and, failing such direction, to certain third parties.

On the death of the truster in 1895 the trustees paid estate-duty and settlement estate-duty on the residue as a settled estate under the provisions of the Finance Act, 1894. The daughter died unmarried on 11th January 1898. On her death estate-duty was claimed and paid on the residue as an unsettled estate.

In an action by the trustees for repayment of the amount paid as settlement estate-duty, on the ground that the estate was only settled contingently on the daughter leaving issue, and that this contingency had not arisen, *held* (affirming judgment of Lord Stormonth-Darling) that as there was no enactment in the Finance Act, 1894, or otherwise entitling, the trustees to repayment, they were not entitled to repayment.

1ST DIVISION. LdStormonth-Darling.

BY the third purpose of his trust-disposition and settlement William Watherston, builder in Edinburgh, who died on 22d November 1895, directed his trustees to hold the residue of his estate for his daughter, Miss Christian Elizabeth Watherston, in liferent, and her children, if any, in fee, subject to her apportionment, or failing apportionment, equally, and failing children, then as Miss Watherston might direct by any *mortis causa* deed or writing under her hand, and failing such direction, then to her first cousins.

The trustees paid estate-duty on the trust-estate. Settlement

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estate-duty, amounting to £931, under section 5 of the Finance Act, 1894, was also claimed. The trustees at first objected, but after some correspondence paid this duty also.*

On 11th January 1898 Miss Watherston died unmarried.

On her death the Revenue authorities claimed estate-duty upon the trust-estate, as having passed on her death. The trustees admitted this claim, and brought the present action against the Lord Advocate, as representing the Revenue authorities, for repayment of the sum of £931, paid as settlement estate-duty, and also of £19, 8s. paid as interest thereon.

They pleaded, *inter alia*;—(2) On a sound construction of the Finance Act, 1894, and in respect that the contingency attaching to the settlement of said residue (if it was settled) has happened, the pursuers are entitled to repayment of the settlement estate-duty referred to.

In defence the Lord Advocate, on behalf of the Revenue authorities, pleaded, *inter alia*;—(4) In the case of a death prior to the commencement of the Finance Act, 1898, settlement estate-duty paid in respect of property contingently settled is not returnable.

On 9th November 1900 the Lord Ordinary (Stormonth-Darling) sustained the fourth plea in law for the defender, and in respect thereof assoilzied the defender.†

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* The Finance Act, 1894, enacts, sec. 5, subsec. 1,—"Where property in respect of which estate-duty is leviable is settled by the will of the deceased, or having been settled by some other disposition passes under that disposition on the death of the deceased to some person not competent to dispose of the property—(*a*) A further estate-duty (called settlement estate-duty) on the principal value of the settled property, shall be levied at the rate hereinafter specified . . . but (*b*) during the continuance of the settlement the settlement estate-duty shall not be payable more than once."

By sec. 8, subsec. 1, it is enacted,—"The existing law and practice relating to any of the duties now leviable on or with reference to death shall, subject to the provisions of this Act, and so far as the same are applicable, apply for the collection, recovery, and repayment of estate-duty, and for the exemption of the property of common seamen, marines, or soldiers who are slain or die in the service of Her Majesty, and for the purpose of payment of sums without requiring representation as if such law and practice were in terms made applicable to this part of the Act."

By the Finance Act, 1898 (61 and 62 Vict. cap. 10), sec. 14, it is enacted that "Where in the case of a death occurring after the commencement of this Act" (1st July 1898) "settlement estate-duty is paid in respect of any property contingently settled, and it is thereafter shewn that the contingency has not arisen, and cannot arise, the said duty paid in respect of such property shall be repaid."

† "OPINION.—The pursuers' claim for repayment of settlement estate-duty is so absolutely fair and equitable that I have considered it with every desire to hold it well founded in law, and it is with reluctance that I have come to the conclusion that the Commissioners of Inland Revenue are within their strict right in resisting it.

"There can be no doubt that the late Mr Watherston at his death on 22d November 1895 had so dealt with the residue of his estate as to make it 'settled property' within the meaning of the Finance Act of 1894. What he had done was to give directions to his trustees, by which they were to hold the residue for his daughter in liferent, and her children, if any, in fee. So long, then, as it was possible for Miss Watherston to have

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The pursuers reclaimed.

The arguments appear sufficiently from the opinions of the Lord Ordinary and the Lord President. For the respondent, the under-noted authorities were referred to.[1]

At advising,—

LORD PRESIDENT.—Mr Watherston died on 22d November 1895, leaving a trust-disposition and settlement, by which he conveyed his whole estate to the pursuers as trustees for certain purposes, of which the only one material to the present question is that which relates to the residue, which the trustees were directed to hold for his daughter Miss Watherston in liferent and her children, if any, in fee, subject to her apportionment, or failing apportionment, equally, and failing children, then as Miss Watherston might direct by any *mortis causa* deed or writing under her hand, and failing such direction, to certain other persons.

The pursuers paid estate-duty under the Finance Act, 1894, on the amount of the trust-estate, and the Commissioners of Inland Revenue also

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children, the residue was contingently settled; and the case of *Stewart's Trustees*, 1 F. 416, decides that property in that position is 'settled property' in the sense of the Finance Act, and as such is liable to settlement estate-duty.

"Miss Watherston died unmarried in January 1898, when, of course, it became evident that the contingency affecting the settlement had not arisen, and could not arise. It then became equally clear that Miss Watherston was at her death 'competent to dispose' of the residue, because her father had provided that, failing children, it was to go as she might direct by any *mortis causa* deed or writing under her hand. Accordingly, the Inland Revenue claimed estate-duty on the residue as having passed at her death, and there was no answer to the claim. But this state of matters presented the obvious inconsistency that, in 1895, the Crown had received settlement estate-duty on the footing that the property was settled, and then, in 1898, had received estate-duty on the footing that it was not settled. The whole purpose and meaning of settlement estate-duty, as correctly expressed by the editors of Mr Hanson's book at page 124, is to 'counterbalance the advantage given to settled property over other property by the direction contained in section 5 (2) that, when once estate-duty has been paid in respect of it, neither estate-duty nor the other scheduled duties shall be paid until the property has come out of settlement.' Here, of course, the Crown required no compensation of that kind, because they received estate-duty on the death of Miss Watherston, exactly as if there had been no settlement at all. If the deaths of Mr Watherston and his daughter had occurred three years later than they did, the question would have been ruled in the pursuers' favour by the Finance Act of 1898, which provides that, in a case like the present, settlement estate-duty shall be repaid. Unfortunately the Act, in remedying one injustice, created another, for it confined the remedy to the case of deaths occurring after 1st July 1898, and thereby created that inequality of treatment in precisely similar circumstances, which is the worst vice that can infect taxation.

"That being so, the pursuers are compelled to fall back on the provisions of the Finance Act of 1894. They rely on these words of section 8 (1) 'The existing law and practice relating to any of the duties now leviable on or with reference to death shall, subject to the provisions of this Act,

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[1] Inland Revenue v. Stewart's Trustees, Jan. 20, 1899, 1 F. 416; *In re* Webber [1896], 1 Ch. 914; Attorney-General v. Fairley [1897], 1 Q. B. 698; Attorney-General v. Clarkson [1900], 1 Q. B. 156.

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claimed settlement estate-duty upon the residue as being "settled property" within the meaning of that Act. The pursuers objected to this claim upon the ground that Miss Watherston was then unmarried, and was, according to their contention, "competent to dispose" of the residue. Ultimately, however, the pursuers paid settlement estate-duty as claimed.

Miss Watherston died unmarried on 11th January 1898, and the Commissioners of Inland Revenue claimed estate-duty upon the residue as having "passed" on her death. The pursuers have admitted this claim, but they demand from the Inland Revenue authorities repayment of the settlement estate-duty paid as above mentioned. These authorities, however, decline to repay that duty.

The pursuers allege on record that the residue of Mr Watherston's estate was not "settled property" within the meaning of the Finance Act, 1894, but they now admit that it is so, maintaining, however, that it is only "con-

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and so far as the same are applicable, apply for the purposes of the collection, recovery, and repayment of estate-duty.' Then they go on to point to sections 8, 17, 34, and 37 of the Legacy-Duty Act (36 George III. cap. 52), and to sections 35, 36, and 37 of the Succession-Duty Act (16 and 17 Vict. cap. 51), and they say that these, forming as they do the law and practice with regard to the repayment of previously existing death-duties, ought, by section 8, to be applied to repayment of estate-duty, including, of course, settlement estate-duty.

"If I could bring myself to think that section 8 (1) was intended to have any effect on questions of liability for duty, I should be very glad to agree with the pursuers. But I cannot think that it was intended to do more than to incorporate the provisions of the former Acts relating to procedure. Undoubtedly that must hold good where the provisions relate to the collection and recovery of the duty. Why should it be different when the provisions relate to repayment? There are sections in the Finance Act itself, such as 8 (12) and 9 (3), providing for repayment of estate-duty in certain circumstances; and it seems to me quite a sensible and sufficient construction of 8 (1) to read it as meaning that, where estate-duty has to be repaid in terms of these other sections, the same procedure is to be followed as in the case of the earlier Acts. On the other hand, I think it would be a strained construction to hold it as conferring a substantive right to repayment by analogy. The cases where the earlier Acts provide for repayment are all cases where the benefit taken by the legatee or successor has been destroyed or abridged by some supervening occurrence; and at best there is only an analogy between that and a case like the present, where it turns out that settlement estate-duty, which is exigible not from the individual beneficiary but from the whole estate, would never have been payable at all if the future could have been foreseen.

"A case on the construction of one taxing statute is never, perhaps, a very safe guide in the construction of another. But the argument of the pursuers has some resemblance to the unsuccessful attempt in *Hogg* v. *Parochial Board of Auchtermuchty*, 7 R. 986, to make out that a parish minister's exemption from poor-rates extended to school-rates. Reliance was there placed on a clause in the Education Act of 1872, providing that 'The laws applicable for the time to the imposition, collection, and recovery of poor's assessment shall be applicable to the school-rate.' It was urged that one of the laws applicable to the 'imposition' of poor's assessment was that it should not be imposed on parish ministers; but this view was rejected, and the clause was treated as one regulating procedure merely.

"I shall therefore sustain the defender's fourth plea in law, and assoilzie."

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tingently settled," inasmuch as it was possible that Miss Watherston might die competent to dispose of it, and that in the event of her doing so, the settlement would not take effect. The Inland Revenue authorities deny that the residue was merely "contingently settled," that being an expression which does not occur in the Finance Act, 1894, but was introduced by the later Finance Act of 1898, which does not apply to the present case. In the somewhat similar case of the *Inland Revenue* v. *Stewart's Trustees*,[1] it was held that the bequests to daughters were "settled property" in the sense of the Finance Act, 1894, and as such liable to settlement estate-duty under section 5 of that Act, but it does not appear to have been suggested in that case that the property was merely "contingently settled," and that consequently settlement estate-duty was either not due, or that if paid, repayment of it could be demanded. This is not surprising, as the question whether property is settled depends upon the state of things which existed at the death of the person to whom it belonged, not upon the course of events afterwards.

The claim of the pursuers to repayment is, as I understand, rested exclusively upon section 8 (1) of the Finance Act, 1894, which provides that,—"The existing law and practice relating to any of the duties now leviable on or with reference to death shall, subject to the provisions of this Act, and so far as the same are applicable, apply for the purposes of the collection, recovery, and repayment of estate-duty," and the pursuers maintain that this section imports into the Finance Act, 1894, sections 8, 17, 34, and 37 of the Legacy-Duty Act of 36 Geo. III. c. 52, and sections 35, 36, and 37 of the Succession-Duty Act of 16 and 17 Vict. c. 51, not only for the purpose of providing rules of procedure in regard, *e.g.*, to collection and recovery of estate-duty, but as specifying events in which it is to be repaid.

In considering whether and to what effect these sections are imported into the Finance Act, 1894, or in the language of section 8 (1) how far they are applicable, it should be kept in view that estate-duty (including settlement estate-duty), is the same in substance as the old probate-duty, although it is charged upon property, *e.g.*, heritage, in respect of which probate-duty was not payable. It is charged not upon the interest to which some person succeeds on a death, but upon the interest which ceased by reason of the death. This is a very essential distinction, and makes it necessary to observe much caution in applying to estate-duty statutory provisions made with respect to legacy or succession-duty.

Section 8 of the Legacy-Duty Act provides for the mode of charging the value of legacies given by way of annuity, declaring, *inter alia*, "that the value of any such annuity, if determinable upon any contingency besides the death of any person or persons, shall be calculated without regard to such contingency, provided always, that if any such annuity shall determine by the death of any person before four years' payment of such annuity shall become due and payable, then, and in such case, the duty shall be payable in proportion only to so many of the payments of the said annuity as actually accrued and became due and payable; and in case any such annuity shall at any time determine upon any other contingency than the

[1] 1 F. 416.

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death of any person or persons, then, and in such case, not only all payments of duty which would otherwise become due after the happening of such contingency, if any such would become due, shall cease; but it shall be lawful for the person or persons who shall have paid any duties which shall have previously become due, to apply for and obtain a return of so much of the duty so paid as will reduce the same to the like duty as would have been payable by such person or persons for such annuity, calculated according to the term for which the same shall have endured." Upon this provision it is sufficient to say that it is impossible to apply it to the present case. There is here no question of any legacy or other testamentary gift made by way of annuity, or of any duty payable by four yearly instalments, or of any annuity determining by the death of any person before four years' payment of the annuity had become due and payable, or of any of the other very special conditions under which repayment may be demanded. Further, the provisions of the section which relate to legacies, and consequently look to the benefits taken by legatees, would not upon principle apply to what is in effect a probate-duty which regards the estate left by the deceased.

Section 17 provides for the duty on legacies subject to contingencies being charged as for absolute bequests, declaring that if such contingency shall afterwards happen, and the property so bequeathed shall thereupon go in such manner that the same, if taken immediately after the death of the testator or testatrix, under the same title, would have been chargeable with a higher rate of duty than the duty so paid, the person or persons becoming entitled thereto shall be charged with, and shall pay, the difference between the duty so paid and such higher rate of duty. This is a provision in favour of the Revenue, and it is to be observed that if a contingency happens upon which the property goes to some person chargeable with a lower rate of duty, or not chargeable with duty at all, the section makes no provision for all or any part of the duty previously paid being returned. This provision also seems to me to be inapplicable to estate-duty (including settlement estate-duty) and if it were applied, it would not, for the reasons now given, aid the pursuers.

Section 34 declares "that if at any time after payment of duty on any legacy or residue, or part of residue, of the personal estate of any person deceased, any debt shall be recovered against the estate of such deceased person, or any loss shall happen, by reason whereof, or for any other just cause, any legatee or other person by whom any legacy or part of legacy, or any residue of any personal estate, hath been received or retained, shall be obliged to refund the same or any part thereof," the commissioners of stamp duties are required to refund what turns out to be an overpayment of duty. There is nothing in the present case equivalent to any of the conditions upon which repayment could be required under this section. No debt was recovered against Mr Watherston's estate which reduced the value upon which estate-duty had been paid. The whole residue passed under his testamentary settlement to the persons whom he intended to receive it, in the events which occurred.

Section 37 provides for the case of persons whose administrative title is declared void after they have paid legacy-duty, but there was no avoidance

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of any administrative title in this case, and, as has been already pointed out, Mr Watherston's testamentary settlement received full effect *modo et forma* according to its terms.

Section 35 of the Succession-Duty Act provides that, "in estimating the value of a succession, no allowance shall be made in respect of any contingent incumbrance thereon, but in the event of such incumbrance taking effect as an actual burden on the interest of the successor, he shall be entitled to the return of the proportionate amount of the duty so paid by him in respect of the amount or value of the incumbrance when taking effect." In the present case there was no contingent incumbrance which either did or did not take effect, or anything like it.

Section 36 declares that, "in estimating the value of a succession, no allowance shall be made in respect of any contingency upon the happening of which the property may pass to some other person, but in the event of the same so passing, the successor shall be entitled to a return of so much of the duty paid by him as will reduce the same to the amount which would have been payable by him if such duty had been assessed in respect of the actual duration or extent of his interest." This section well illustrates the distinction between a succession-duty which looks to the quality and value of the interest taken by a successor, and what is in effect a probate-duty which looks to the estate left by the deceased. In the present case the duty is assessed upon the latter basis, and section 36 cannot, either in form or in substance, have any application to it.

Section 37 provides for allowance or return of duty being made where it turns out that the duty, not being due from the person paying it, was paid in mistake, or in respect of property which the successor was unable to recover, or from or of which he was evicted or deprived by any superior title, or that for any other reason it ought to be refunded. None of the events, or anything like the events, upon which provision is here made for return of duty has occurred, or could occur, in the present case, and none of the provisions made for wholly different events apply, or could be made to apply, to it.

Upon this part of the case I need only add that the question in what cases repayment of estate-duty should be directed was considered and provided for in sections 8 (12) and 9 (3) of the Finance Act, 1894, and that these sections make no provision for repayment in such a case as the present.

The provision in section 14 of the Finance Act, 1898, that where in the case of a death occurring after the commencement of that Act settlement estate-duty is paid in respect of any property contingently settled, and it is thereafter shewn that the contingency has not arisen and cannot arise, the duty paid in respect of such property shall be repaid, seems a very reasonable and proper one, but the fact that it was considered necessary to make it by subsequent legislation affords additional evidence that the right to repayment in such a case did not already exist under the Finance Act, 1894.

For these reasons I am of opinion that the Lord Ordinary's interlocutor ought to be adhered to.

LORD ADAM and LORD KINNEAR concurred.

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LORD M'LAREN, not having been present at the hearing, gave no opinion.

THE COURT adhered.

HAMILTON, KINNEAR, & BEATSON, W.S.—SOLICITOR FOR INLAND REVENUE—Agents.

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Feb. 1, 1901. Barclay, Curle, & Co. v. M'Kinnon.

BARCLAY, CURLE, & COMPANY, Appellants.—*Campbell, K.C.—Younger.* JANET OSBORNE OR M'KINNON, Respondent.—*Shaw, K.C.—Findlay.*

Master and Servant—Workmen's Compensation Act, 1897 (60 *and* 61 *Vict. cap.* 37), *sec.* 7 (1).—*Employment "about" a Factory.*—The Workmen's Compensation Act, 1897, sec. 7 (1), enacts—"This Act shall apply only to employment by the undertakers . . . on or in or about a factory."

A rivetter was injured in the employment of a firm of ship-repairers, while repairing a ship in a public dock at a distance from his employers' factory of 550 yards in a direct line and about a mile by road. The employers' factory was not a shipbuilding yard. *Held* that the rivetter was not, when he received the injuries, employed "about" a factory in the sense of the Act.

2D DIVISION. Sheriff of Lanarkshire.

THIS was an arbitration under the Workmen's Compensation Act, 1897, in the Sheriff Court of Lanarkshire between Barclay, Curle, & Company, Limited, engineers, Whiteinch, Partick, and Janet Osborne or M'Kinnon, in which the Sheriff-substitute (Boyd) awarded Mrs M'Kinnon compensation in respect of the death of her husband, and, at the request of Barclay, Curle, & Company, stated a case.

The case set forth, *inter alia*, that the following facts were admitted or proved:—(1) The late John M'Kinnon, husband of the respondent, a rivetter, entered the employment of the appellants "and remained in their employment continuously until Saturday, 26th May, in their boilermaking and ship-repairing premises at Kelvinhaugh Street, Glasgow,—said premises being a factory within the meaning of the Workmen's Compensation Act, 1897,—and on certain vessels in Queen's Dock, Glasgow, and that his wages were at the rate of 8½d. per hour." On Thursday, 7th June, "while punching holes in a plate on board a steamer which the appellants were repairing at berth No. 27 in Queen's Dock, Glasgow, the plate bent and he fell to the bottom of the hold, sustaining injuries from which he died on 10th June 1900, leaving the respondent dependent upon him, and one daughter partially dependent upon him. (8) That in the Kelvinhaugh Street works ships are not made, finished, or repaired, but that the materials for repairing ships are prepared and made ready so far as that can be done for the repairs entrusted to the appellants. (9) That the Queen's Dock at its nearest point is distant from the appellants' Kelvinhaugh Street works about 367 yards on a bee line, and about 616 yards by road, and that berth 27 is distant from the works about a mile by road, and about 550 yards on a bee line."

"In these circumstances I found:—(1) That the said John M'Kinnon was employed in or about a factory belonging to and occupied by the appellants. (3) That as his average weekly wage was £1, 10s. 5d., his dependants were entitled to the sum of £237."

"I accordingly granted decree in favour of the respondent for this sum, and I also found her entitled to expenses."

The following question of law was, *inter alia*, stated:—"(1)

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Whether on the facts admitted and proved, the Sheriff-substitute was justified in holding that the employment at which the deceased was engaged was employment on or in or about a factory within the meaning of the Workmen's Compensation Act, 1897?"

Argued for the appellants;—This was a public dock, open to anyone to take berths in for any purpose, including repairs, and had no connection with, did not belong to, and consequently was not part of, the appellants' works. But if it was not part of their works, there was no case, because owing to the distance of the locality of the accident from the works it could not be said that the accident occurred "about" the works.[1] It was not only necessary that there should be proximity of locality, but also that the employment should be of the kind which was carried on in the factory; here the deceased was employed in work which could only be carried on outside the factory, in premises occupied by others than his employers. It was only the undertakers who could be liable, and it was settled that the fact of a ship lying in a dock while a workman of a firm was engaged in repairing it did not make the firm occupiers of the dock in such a sense as to make them undertakers in the sense of the Act.[2] The opinions as to the word "near," occurring in sec. 7 (3) of the Act, in *M'Millan* v. *Barclay, Curle, & Company*,[3] shewed that a wider interpretation was to be given to that word than to "about," and emphasised the element of physical contiguity implied by the latter.

Argued for the respondent;—The whole question was one of locality. That was a question of degree and circumstances. A factory comprehended not only the contents of its four walls and the immediate neighbourhood of them, but the area which was reasonably necessary for carrying on the business of the factory.[4] The question of what could reasonably be said to be the area, being one of degree, was so much a jury question that a Court of Appeal should not interfere with the finding of the Court below, unless that finding could not reasonably be arrived at in the circumstances. Here the dock in a reasonable sense was part of the area of the factory operations, without which the ship-repairing factory could not exist, and being within the area the fact that the employment was in premises belonging to others than the employers should not exclude the operation of the Act. The form of the question for the opinion of the Court no doubt suggested a question of law, but the Sheriff's finding shewed that it was really a question of fact. Where the question was one of fact the Court would not interfere.[5]

At advising,—

LORD JUSTICE-CLERK.—The question for decision in this case is, whether a workman sent out from the appellant's works to do some repairs on a ship lying in a dock 550 yards in a direct line, and about a mile by road, was at

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[1] Bell & Syme v. Whitton, June 16, 1899, 1 F. 942; Malcolm v. M'Millan, Jan. 30, 1900, 2 F. 525; Brodie v. North British Railway, Nov. 6, 1900, *ante*, p. 75; Fenn v. Miller, L. R. [1900], 1 Q. B. 788; Lowth v. Ibbotson, L. R. [1899] 1 Q. B. 1003; Powell v. Brown, L. R. [1899] 1 Q. B. 157.

[2] Low v. Abernethy & Co., March 8, 1900, 2 F. 722.

[3] M'Millan v. Barclay, Curle, & Co., Nov. 10, 1899, 2 F. 91.

[4] Collins, L. J., at p. 793 in Fenn v. Miller, *supra*.

[5] Lowth v. Ibbotson, Powell v. Brown, M'Millan v. Barclay, Curle, & Co., *supra*.

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the time of an accident at that place engaged in work "on or in or about a factory." I am of opinion that that question should be answered in the negative. I should so hold were this point being considered for the first time. But the same question has already been made matter of decision in more than one case. The case of *Malcolm* v. *M'Millan*[1] in this Court, and the case of *Fenn* v. *Miller*[2] in the Queen's Bench Division, are both cases distinctly in point, and there are others to the same effect. In the latter case the place was much nearer to the works than in this case, as the distance did not exceed 160 yards.

The cases to which the words "about a factory" can apply are quite different from the present. The words were evidently intended to meet the case of something being done in direct connection with the factory, though not exactly within it, as, for example, loading goods at a gate, or doing work in an annexe, though possibly separated from the principal yard by a street. It appears to me to be plain that this was the intention in inserting the word "about," and that it is not a word suitable to indicate that wherever a workman be sent to do work for his master, he, as it were, carries the factory to that place, or establishes a factory for his employers at that place, so that he is doing work "about" the factory. If that was what was meant it could easily have been expressed, and I see nothing to indicate that any such intention existed.

I would move your Lordships to answer the first question in the negative, and to find it unnecessary to answer the other questions.

LORD TRAYNER.—The first question put to us is, I think, already decided in the negative by the case of *Malcolm*,[1] decided in this Division of the Court, and the case of *Francis* v. *Turner*[3] decided in the Appeal Court in England. These cases, indeed, are *a fortiori* of the present, for whereas in them the injury to the workman was sustained in a factory, although not his employer's factory, in the present case the injury was sustained in a place that was not only not his employer's factory, but not a factory at all within the meaning of the statute.

I dissented from the judgment in *Malcolm's*[1] case, but I am bound to recognise its authority; and doing so, I think there is no alternative but to answer the first question here in the negative. That results in the present appeal being sustained, and the case being sent back to the Sheriff-substitute, with directions to him to dismiss the application.

LORD MONCREIFF.—The claim in this case is made solely under the Workmen's Compensation Act, 1897. The ground of claim is that the deceased workman was injured while in the employment of the appellants "in or about a factory."

The Sheriff has rightly found that the premises at Kelvinhaugh Street, Glasgow, in which the appellants carry on their business of boiler-making and ship-repairing, are a factory within the meaning of the Workmen's Compensation Act, 1897. But the workman M'Kinnon was not injured at these premises; he received the injuries of which he died on board a steamer

[1] 2 F. 525. [2] L. R. [1900], 1 Q. B. 788. [3] 16 T. L. R. 105.

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in Queen's Dock, Glasgow, at a distance of a mile by road from the Kelvinhaugh Street premises. The question of law—that is the only question of any difficulty—is, whether it can be held that when he received the fatal injuries M'Kinnon was engaged in the appellant's employment "about" their factory within the meaning of the statute. The Sheriff has held that M'Kinnon, when injured, was employed "in or about" a factory belonging to the appellants. I am of opinion that, in point of law, that finding is wrong.

It is clearly settled by decision that in order to bring the *locus* of an accident within the scope of the statute, it is not enough that the workman should at the time of the accident have been employed on the employer's business. Without referring to them in greater detail, I may mention the recent cases in this Division, viz., *Malcolm* v. *M'Millan*[1] and *Brodie* v. *North British Railway Co.*,[2] and the English cases of *Fenn* v. *Miller*[3] and *Francis* v. *Turner*.[4]

It is quite true that the use of the word "about" indicates that "employment" for the purposes of the Act is not to be strictly confined to the four walls of the factory. Certain operations closely connected with the work of the factory may have to be carried on outside the factory, at its gate, for instance, or in an adjacent yard, or even at an outlying bit of ground belonging to the owners of the factory, or which they have right to use in connection with their work.

But it is a totally different matter when the proprietors of the factory, having completed within the factory all the work which can be done there, send their workmen either to execute repairs or to fit up apparatus or furnishings in premises belonging to customers at a distance. No doubt such work may involve risks quite as great as those in the factory, and if injury results to a workman through the fault of his employers or those for whom they are responsible, he will at common law or under the Employers Liability Act be entitled to compensation. But the question here is, whether under the Workmen's Compensation Act such premises can be regarded in any proper sense as being "about" a factory.

The present case is one of some hardship. From the nature of the appellants' business their workmen are employed not merely to work in the Kelvinhaugh premises, but also to go if required to repair vessels lying in the docks. Probably their harder and more hazardous work is connected with the latter employment. This may have been a very proper case for the statute to provide for, just as it has made provision in regard to shipbuilding yards, section 7, subsection (3). But it has not done so, and I entertain little or no doubt that we should be straining the terms of the statute, and opening a very wide door to even more doubtful claims, if we were to hold that this case is covered by the terms of the 7th section. In order to demonstrate this it is almost sufficient to say that such a decision would apply to every case in which tradesmen or manufacturers whose premises come under the head of "factories," as defined in the statute, send their workmen to the houses or premises of their customers to execute

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[1] 2 F. 525.
[2] *Ante*, p. 75.
[3] L. R. [1900], 1 Q. B. 788.
[4] 16 T. L. R. 105.

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repairs, or fit up the materials or apparatuses which have been manufactured in the factory.

I am of opinion that we should sustain the appeal, and answer the first question of law in the negative.

LORD YOUNG was absent.

THE COURT answered the first question in the negative, and remitted to the Sheriff-substitute to dismiss the application.

MORTON, SMART, & MACDONALD, W.S.—J. & J. GALLETLY, S.S.C.—Agents.

No. 70.

Feb. 1, 1901. Lord Advocate v. Sprot's Trustees.

THE LORD ADVOCATE, Pursuer (Respondent).—*Sol.-Gen. Dickson—A. J. Young.*

SIR MARK J. M. STEWART, BART., AND OTHERS (Sprot's Trustees), Defenders (Reclaimers).—*Lorimer.*

Revenue—Entailed Estate—Money held in trust to purchase lands to be entailed—Estate-duty—Settlement Estate-duty—Finance Act, 1894 (57 *and* 58 *Vict. c.* 30), *sec.* 23, *subsec.* 16.—*Held* (*rev.* judgment of Lord Stormonth-Darling) that money vested in trustees for the purpose of purchasing land to be entailed is not "entailed estate" in the sense of sec. 23, subsec. 16, of the Finance Act, 1894, and is not liable as such to settlement estate-duty.

Opinion reserved (*per* Lord M'Laren) on the question whether the existence of successive liferents in a fund which is vested in trustees for the purpose of purchasing land to be entailed, and the income of which is payable to the person who would for the time be the substitute of entail, makes the fund a settlement of personalty, and as such liable to settlement estate-duty.

Statute—Construction.—Observations (*per* Lord M'Laren) on the construction of a series of statutes which are to be construed as one Act.

1ST DIVISION. LdStormonth-Darling.

THIS was an action at the instance of the Lord Advocate, as representing the Board of Inland Revenue, against Sir Mark John M'Taggart Stewart, Bart., and others, the trustees of the deceased James Sprot of Spott, in the county of Haddington, concluding for an account of the moneys remaining invested by the defenders in trust for the purpose of purchasing land to be entailed in terms of Mr Sprot's trust-disposition and settlement, and for payment of settlement estate-duty in respect thereof.

The claim for duty was founded on section 23 (16) of the Finance Act, 1894.*

The following narrative of the circumstances in which the claim was made is taken from the opinion of the Lord Ordinary (Stormonth-Darling):—"Mr Sprot of Spott, who died in 1882, left £100,000 to be applied by his trustees in the purchase of lands, which were to be entailed on his nephew Edward William Sprot and a series of heirs. Until the purchase should be made and the entail executed, the income or rents, as the case might be, were to be paid to Edward William Sprot, whom failing to the substitutes of entail. In pursuance of these directions the trustees spent part of the sum intrusted to them in the purchase of the estate of Drygrange, and they con-

* 57 and 58 Vict. c. 30, sec. 23 (16), enacts,—"Where an entailed estate passes on the death of the deceased to an institute or heir of entail who is not entitled to disentail such estate without either obtaining the consent of one or more subsequent heirs of entail, or having the consent of such one or more subsequent heirs valued and dispensed with, settlement estate-duty, as well as estate-duty, shall be paid in respect of such estate. . . ."

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veyed that estate to Edward William Sprot and the substitutes of entail in 1888. Edward William Sprot died on 1st February 1898, at which date there remained unexpended a balance of about £60,000, which is still held in trust for the purchase of lands in terms of James Sprot's will.

"On the death of Edward William Sprot his son succeeded to Drygrange and to the income of the entailed money. Estate-duty and settlement-duty were paid on Drygrange in February and September 1899. Estate-duty was also paid on the unexpended balance of £60,000, but the defenders explain that they made this payment in error, and that they are reclaiming it from the Crown. The present question, therefore, although it relates in form only to settlement estate-duty, is truly whether estate-duty and settlement estate-duty are exigible in respect of the unexpended balance of £60,000, just as they are admittedly in the case of Drygrange."

Mr Sprot's trustees lodged defences, and stated, *inter alia*,—"The balance of the legacy is 'settled property' within the meaning of that Act [Finance Act, 1894] as defined by section 22 (1, *h* and *i*), being property standing for the time being limited or in trust for persons by way of succession. It is also declared by the said Act, section 23 (14), that 'settled property' shall not include property held under entail. The late E. W. Sprot was not, in respect of the said balance of legacy, 'an institute or heir of entail in possession of an entailed estate' within the meaning of section 23 (15 and 16) of the said Finance Act. The said balance of legacy was personal property settled by the will of James Sprot, which took effect before the Finance Act, 1894, and the inventory-duty then exigible was in 1882 paid in respect thereof. It is accordingly entitled to the immunity from estate-duty and settlement estate-duty provided by section 21 (1 and 4)."

The pursuer pleaded;—(1) The moneys placed under trust for investment in lands to be entailed as directed, being entailed estate passing on the death of Edward William Sprot to an heir of entail not entitled to disentail without consents, settlement estate-duty falls to be paid in terms of the Finance Act, 1894. (2) The said moneys not being "settled property" within the meaning of the Act, the defenders are not entitled to the benefit of the exempting provisions on which they found.

The defenders pleaded;—(1) The balance of legacy being "settled property" within the meaning of the Finance Act, 1894, and the trust-deed having taken effect before the commencement of that Act, the defenders are not liable to settlement estate-duty. (2) The balance of legacy not being entailed estate within the meaning of the Finance Act, 1894, settlement estate-duty is not due.

On 18th July 1900 the Lord Ordinary (Stormonth-Darling) ordained the defenders to deliver the account called for in the summons.*

* "OPINION.—(After the narrative quoted *supra*)—Now, if this unexpended balance is 'entailed estate' within the meaning of the Finance Act of 1894, the answer to this question must be in the affirmative, because section 23 (16) of that Act provides that, 'where an entailed estate passes on the death of the deceased to an institute or heir of entail who is not entitled to disentail such estate without either obtaining the consent of one or more subsequent heirs of entail, or having the consent of such one or more subsequent heirs valued and dispensed with' (and that is the position of the present heir), 'settlement estate-duty as well as estate-duty shall be paid in respect

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The defenders reclaimed, and argued;—The question was whether money held in trust for the purchase of land to be entailed was, for the purposes of the Finance Act, 1894, to be treated as "settled property" or "entailed estate." If it was the former, then the defenders were entitled to exemption from estate-duty, and also settlement estate-duty, under section 21. The property was settled under the will of Mr James Sprot, who died in 1882, before the commencement of the Act, and the inventory-duty then exigible was paid in respect of the fund. But it was said that the duty claimed was payable under section 23 (16). The expression used in the subsection was "entailed estate." There was no express reference to the Entail Acts in the Finance Act, but the Inland Revenue had to invoke the special definitions contained in these Acts in order to expand the expression "entailed estate," so as to include money directed to be entailed. There was no warrant for this. The definitions and provisions in the series of Entail Statutes dealing with money held for investment in land to be entailed were limited to the purposes of the respective Acts, and did not affect the common legal meaning of the expression entailed estate. By the law of Scot-

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of such estate.' This provision is to be found in the part of the Act which relates to Scotland, and it precisely meets the present case, if, as I have said, the expression 'entailed estate' includes what for convenience may be called entailed money. It is perhaps unfortunate that that expression is not defined in the Act itself, even by way of reference to the Entail Statutes. The defenders say that the omission of any such reference is all the more marked, because section 22 (*i*), in defining the word 'settlement,' does refer to the English Settled Land Act of 1882. But I have come to think that, where an artificial expression like 'entailed estate' is used, there must of necessity be implied a reference to the statutes which created the legal conception of which it is the expression. Entails having no existence apart from statute, it is difficult to see how there can be any such thing as a popular meaning attached to them. And, if so, you cannot solve the meaning of 'entailed estate' by going to a dictionary or inquiring how the phrase is used in common conversation—you must go to the Entail Acts, and to these alone.

"If I am right so far, there cannot be much doubt of the construction which the phrase must receive. From the time of the Rutherfurd Act downwards it has been the policy of the Legislature to provide that (if I may quote the words of the rubric of section 27 of the Rutherfurd Act) 'money vested in trust for the purchase of land to be entailed may be dealt with as if it were the entailed land.' It is true that not till the Act of 1875 was there a distinct provision (by section 3) that 'entailed estate' should include 'all money or other property, real or personal, invested in trust for the purpose of purchasing land to be entailed,' but in the latest Act of all (the Act of 1882) it is provided by section 2 that the Entail Acts 'shall for all purposes and to all effects be read as one Act.' I admit that there are passages in these Acts where the context requires that the phrase 'entailed estate' shall be read in its more restricted meaning of landed property held under entail, but nevertheless the effect of the sections I have referred to is to make the phrase cover entailed money, and that is, of course, enough for the Crown's argument in this case.

"The main contention for the defenders is that you do not require to go outside the Finance Act itself, because this money answers the description of 'settled property' as there defined, and by the combined effect of section 21 (1) and (4) neither estate-duty nor settlement estate-duty shall be payable in respect of personal property settled by a will or disposition made by a person dying before the commencement of this part of the Act, at least as regards estate-duty, where inventory-duty has already been paid (as was the case here in 1882), unless the deceased was at the time of his death com-

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land, money could not be entailed,[1] and thus could never be entailed estate. The Lord Ordinary was wrong in applying a definition introduced for a special purpose as if it had changed the essential character of an entail or given a meaning of universal application to the expression "entailed estate." According to the practice under Revenue Acts, money to be entailed escaped duty as real estate if it had not been actually invested in the purchase of land.[2]

The argument for the pursuer sufficiently appears from the opinion of the Lord Ordinary.[3]

At advising,—

LORD M'LAREN.—The trustees of the late Mr James Sprot, who died in 1882, are possessed of an unexpended balance of £60,000, which they hold in trust to be applied towards the purchase of lands to be entailed. The income of this fund is in the meantime payable to the person who would be institute of entail if the trust were now executed. This action is brought by the Lord Advocate, as representing the Commissioners of Inland Revenue,

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petent to dispose of the property. But then section 21 must be read along with section 23 (14), which provides that 'settled property shall not include property held under entail,' and with section 23 (15), which provides that 'an institute or heir of entail in possession of an entailed estate shall, whether *sui juris* or not, be deemed for the purposes of this Act to be a person competent to dispose of such estate.' It is thus impossible, even on the view presented by the defenders, to avoid coming to a conclusion as to whether this unexpended balance is 'entailed estate' or not. If it is, the Finance Act forbids its being treated as 'settled property,' and declares that the late Mr Edward Sprot was competent to dispose of it. Accordingly the question comes back to that with which I have already dealt, and makes the whole thing depend on whether you are to interpret 'entailed estate' according to the definition in the Entail Acts, or according to some popular meaning which the words are supposed to bear, but which, in my opinion, has, and can have, no existence except as derived from these Acts.

"I do not know that considerations of hardship have much bearing on the construction of a Revenue Statute, but it did at first sight strike me as unfair that the Crown should claim to tax this money on the same footing as the land which has actually been purchased and entailed, and at the same time exact from it a considerable sum (£1789) of legacy-duty, which Drygrange has not borne anything corresponding to. It appears, however, that this apparent inequality of treatment arises from the special provision in the Finance Act (section 1 and schedule I.), whereby payment of estate-duty exempts from payment of succession-duty in the single case of the duty of 1 per cent payable on the succession of the lineal issue or ancestor. But for this provision Drygrange would have paid succession-duty, and the only inequality would have been in the rate (3 per cent as against 1 per cent), which, again, arises from the very special terms of the Legacy-Duty Act of 36 George III. c. 52. But considerations of that kind, while they may dispose one to adopt a construction of a Revenue Statute as favourable for the subject as the language will admit of, can have no place if the language is clear, and here, I think, the language fairly answers that description."

[1] Bailie v. Grant, May 21, 1859, 21 D. 838, 31 Scot. Jur. 465; Kinnear v. Kinnear's Trustees, June 5, 1875, 2 R. 765, June 20, 1877, 4 R. 705; Marquis of Bute v. Lady Bute's Trustees, Dec. 3, 1880, 8 R. 191.

[2] Lord Advocate v. Dunlop's Trustees, Jan. 12, 1894, 21 R. 348.

[3] *The Pursuer referred to the following cases*:—Dickson v. Dickson, June 8, 1855, 17 D. 814, 27 Scot. Jur. 449; Black v. Auld, Nov. 5, 1873, 1 R. 133.

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and concludes for an accounting, and for payment by the defenders, Sprot's trustees, of the sum of £600 "as settlement estate-duty in respect of the said moneys (the £60,000) remaining invested" in their hands. The Lord Ordinary has made an order for delivery of an account, on the ground, as explained in his Lordship's opinion, that settlement estate-duty is due, in terms of the 23d section of the Finance Act, 1894.

On the best consideration I have been able to give to the very careful examination of the question by the Lord Ordinary, I am unable to agree with his Lordship. I think the question is correctly stated by the Lord Ordinary when he observes that "where an artificial expression like 'entailed estate' is used, there must of necessity be implied a reference to the statutes which created the legal conception of which it is the expression." But then I think that the statute which created the conception of entailed estate, as we understand it, is the Scottish Statute of 1685, and according to that statute an entail is a settlement of lands. Such imperfect entails as were possible at common law were also confined to lands. Money standing in the name of trustees in trust for the purchase of lands to be entailed is not entailed estate, because the fee or capital is vested in the trustees, and until a suitable purchase is found, the prospective institute of entail has no other right at common law except the right to receive payment of the interest of the money from the trustees. This is a very different right from that of an institute or heir of entail, who is a fiar or proprietor, subject to no other restrictions except such as are laid upon him by the conditions of the deed of entail. If the meaning of the expression "entailed estate" is to be gathered from the Statute of 1685, which enabled proprietors to make effective entails of their lands, it is, I think, perfectly clear that this sum of £60,000 is not an entailed estate.

It is proper to notice that the Finance Act, 1894, does not profess to give a new definition of "entailed estate" for the purposes of the Act. The enactment is (section 23, 16),—"Where an entailed estate passes on the death of the deceased to an institute or heir of entail who is not entitled to disentail such estate without either obtaining the consent of one or more subsequent heirs of entail, or having the consent of such one or more subsequent heirs valued and dispensed with, settlement estate-duty as well as estate-duty shall be paid in respect of such estate." In the absence of a special definition, I think the expression "entailed estate" must receive its legal signification.

The judgment of the Lord Ordinary, as I understand, is founded on the provisions of the Entail Amendment Acts, and especially the 3d section of the Act of 1875, section 3, which provides that "entailed estate" shall include "all money or other property, real or personal, invested in trust for the purpose of purchasing land to be entailed." Now, this is a definition for the purposes of the Act in which it occurs. The powers given by the Act of 1875 are to extend to money held in trust as well as to land, but I am unable to see that this definition, which is only introduced for the purpose of avoiding repetition, throws any light on the construction of the Finance Act, 1894. Definition clauses, as they are now termed, are nothing more than interpretation clauses, which is the older and I think the better name for them. They are aids to the interpretation of the

statute in which they occur, and cannot affect the construction of other statutes, prior or subsequent. In some modern statutes these definitions have a very wide scope, and include subjects and things which have very little in common with the word defined. According to a recent Act of Parliament a ship is identified with a factory for the purposes of the Act, but it would not follow that other statutes relating to shipping are to be applied to factories. Indeed, the usual form of such clauses is that "in this Act" the words quoted shall have the meanings assigned to them.

The Lord Ordinary also points out that in the latest of the Entail Amendment Acts it is provided by section 2 that the Entail Acts specified in the schedule "shall for all purposes and to all effects be read as one Act." The schedule of Acts enumerated begins with the Scottish Statute of 1685, and this creates a difficulty, but as I think only an apparent difficulty. For many purposes of construction it may be convenient that a series of statutes should be construed as one Act. But there must be some limit to this convenient rule; because in each statute of the series something in the previous legislation is repealed or altered, and it is not possible to construe two inconsistent provisions as one. Each of the Entail Amendment Acts has an interpretation clause of its own. I, of course, except the "Act concerning tailzies," which is not an Amendment Act. These definitions, however, are not identical. I can hardly think that even within the system of the Entail Acts it would be sound construction to read a definition contained in one Act into another. If the definition of "entailed estate" which is found in the Act of 1875 is to be read into the Statute of 1685, then it would be lawful to any owner of personal estate, stocks, partnership estate, pictures, or chattels, to entail these subjects by deed of heritable title, recorded in the Register of Sasines and Register of Entails. This, of course, could not be intended; what is meant by reading the Act of 1685 along with the modern statutes is that when reference is made in these to the rights of an heir of entail, his disabilities, the order of succession, and the title, we are referred to the Scottish statute to see what these rights were, and what was the character of the succession according to the notion of an entail as originally constituted.

Giving the largest possible construction to the clauses on which the Lord Ordinary's judgment is founded, I do not think they will bear the meaning that in all future Acts of Parliament, whatever the subject of these Acts might be, the expression "entailed estate" should include money held in trust for the benefit of heirs of entail in their order. The definition in the 3d section of the 1875 Act does not bear to be prospective in its operation, the 2nd section of the Act of 1882 does to some effects make the definition retrospective, but does not make it prospective, and the Finance Act of 1894 (which was not passed until twelve years later) could not be within the contemplation of the Legislature which gave its sanction to either of the Entail Acts referred to.

I am, therefore, of opinion that in construing the Finance Act, 1894, the expression "entailed estate" must be interpreted according to the ordinary use of language, and that it has not the special meaning attributed to it. It follows, according to my opinion, that the defenders should be assoilzied from the action.

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I wish to add that the only question argued for the Crown was the question which I have considered, viz., whether the money held in trust is, or is not, "entailed estate." I, therefore, offer no opinion on the question whether the existence of successive life interests in this fund makes it a settlement of personalty, and as such liable to settlement estate-duty.

The LORD PRESIDENT, LORD ADAM, and LORD KINNEAR concurred.

THE COURT pronounced this interlocutor:—"Recall the said interlocutor; assoilzie the defenders from the conclusions of the action, and decern: Find the defenders entitled to expenses," &c.

THE SOLICITOR OF INLAND REVENUE—BLAIR & CADELL, W.S.—Agents.

No. 71.

DAVID NEILSON, Petitioner (Appellant)—*A. M. Anderson.*

Feb. 12, 1901.
Neilson.

Bankruptcy—Sequestration—Bankrupt—Discharge—Failure to pay 5s. in the £1—Bankruptcy and Cessio (Scotland) Act, 1881 (44 *and* 45 *Vict. cap.* 22), *sec.* 6, *subsec.* (1) (*b*).—A sequestrated bankrupt, whose estate paid no dividend, two years after his sequestration applied for his discharge. The reports of the trustee and of the Accountant of Court were favourable to the bankrupt, but objections were lodged by a creditor from whom the bankrupt had, about eight months prior to his sequestration, borrowed £250. A proof disclosed that the bankruptcy had been occasioned by losses incurred in working a mine, that the undertaking was of a speculative character, and that at the date when the bankrupt borrowed the £250 he was short of cash, and that he was being pressed by another creditor. His liabilities were about £2600, and assets about £60. The Court *refused* the application, in respect that the bankrupt had failed to discharge the *onus* of shewing that his failure to pay 5s. in the £1 had arisen from circumstances for which he could not justly be held responsible.

Bremner, June 30, 1900, 2 F. 1114, *distinguished.*

1ST DIVISION.
Sheriff of Lanarkshire.

ON 7th September 1896, the estates of David Neilson, Coatbridge, were sequestrated under the Bankruptcy Acts, and John Wishart, accountant, Glasgow, was appointed trustee in the sequestration. The estate paid no dividend.

In September 1898 Neilson presented a petition in the Sheriff Court of Lanarkshire for his discharge.*

The report of the trustee under sec. 146 of the Bankruptcy Act, 1856, produced with the petition, set forth that the bankrupt "has complied with all the provisions of the statute; that the bankrupt has made a fair discovery and surrender of his estate; that he has attended the diets of examination, and has not been guilty of any collusion, but that his bankruptcy has arisen from innocent misfortunes, and not from culpable or undue conduct."

On 24th September the Sheriff-substitute called for a report from

* The Bankruptcy and Cessio (Scotland) Act, 1881 (44 and 45 Vict. cap. 22), sec. 6 (1), enacts that "a bankrupt shall not at any time be entitled to be discharged of his debts, unless it is proved . . . that one of the following conditions has been fulfilled," "(*a*) that a dividend of five shillings in the pound has been paid, or security found for payment thereof," "(*b*) that the failure to pay five shillings in the pound as aforesaid has . . . arisen from circumstances for which the bankrupt cannot justly be held responsible."

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the Accountant of Court "whether the bankrupt has fraudulently concealed any part of his estate and effects, or whether he has wilfully failed to comply with any of the provisions of the Bankruptcy (Scotland) Act, 1856."

The Accountant of Court reported that in his opinion "the trustee's report, so far as regards the two points specified in the Sheriff's interlocutor, is correct, and that there is nothing unfavourable to the bankrupt to report on these two heads. No dividend has been paid to the creditors."

A note of objections was lodged by W. & P. Murray and Peter Murray, timber-merchants, Coatbridge, creditors.*

On 23d November 1898 the Sheriff-substitute (Mair) allowed a proof,† and on 24th March 1899, after hearing parties, deferred consideration of the petition until 6th October 1899 to give the bankrupt an opportunity of offering and providing for 5s. in the £ to his creditors, "and failing which the petition will be refused."

On 6th October the Sheriff-substitute by an interlocutor in similar terms continued the case until the 8th December 1899.

Thereafter on 17th October 1900, the Sheriff-substitute (Mair) found that the petitioner had failed "to adduce satisfactory evidence that his failure to pay 5s. in the £ . . . has arisen from innocent misfortune or from circumstances over which he had no control," and refused the petition *in hoc statu*. ‡

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* "The objectors, who are creditors of the bankrupt, object to his discharge on the grounds (1) that he has not paid 5s. in the £; (2) that his failure to do so arises from circumstances for which he is responsible; and (3) that he obtained a loan from the objectors of £250 by falsely representing to them that he was negotiating for the sale of his business, that he was solvent, had plenty of estate to pay all his debts, and merely wanted a temporary loan, whereas he was insolvent at the time, and used objectors' money to let other creditors of his off. Security which he promised and represented to be sufficient, has proved valueless."

† At the proof the only persons examined were the bankrupt and one of the objecting creditors.

The bankrupt deponed to the effect that about five years before his bankruptcy he had taken a lease of the Gartshaugh Colliery. That was his only business. The bankruptcy had terminated the lease. When he began working the mine he had £1500 of his own, all of which he had spent and lost in the mine. The mine had a bad roof, and troubled strata. Money had been lost by other people in it before he took a lease. When he borrowed the £250 he was short of cash and being pressed by another creditor, but he considered that the colliery would pay everything. He had given a Robey engine and other assets in security, and their value at the time was deemed amply sufficient. He was now assisting his son in a colliery business. He got very little from his son—his food.

‡ "NOTE.—When the proof in the present application was led before me, I was not favourably impressed by the petitioner's demeanour when under examination, nor was I satisfied with his explanation as to the business alleged to be his son's, and in which he stated he was assisting, but was receiving 'very little from my son—my food.' So much was I dissatisfied that on 24th March 1899 I pronounced an interlocutor deferring consideration of the petition, to give the petitioner an opportunity of offering and providing for 5s. per £ to his creditors, failing which, I had in view to refuse the present application. When the case again came before me at the expiry of the period mentioned it was only on the urgent request of the petitioner's agent that I again continued the case to give the petitioner a

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The petitioner appealed, and argued;—This was a clear case of innocently unfortunate trading. No moral blame could be imputed to the bankrupt, who had throughout been working the mine in the honest belief that it would eventually prove successful. He had given what at the time appeared to be ample security for the loan of £250. The fact that no dividend had been paid was not conclusive against his getting his discharge.[1] This was not like the case of *Clarke*,[2] for here, it was very important to note, both the trustee and the Accountant of Court gave in reports entirely in favour of the bankrupt. Keeping in view therefore that the bankrupt had been exonerated from anything like corrupt or improper conduct, the circumstances were such as to entitle him to his discharge.[3]

No appearance was made for the objectors.

LORD PRESIDENT.—This case depends on the effect of section 6, subsection 1 (b), of the Bankruptcy and Cessio Act, 1881, which is a provision restrictive of the right of a bankrupt to obtain his discharge. It provides—(His Lordship quoted the subsection). This subsection clearly lays upon the bankrupt the *onus* of proving that the failure to pay 5s. in the £ arose from circumstances for which he cannot justly be held responsible, because it declares that unless this or another condition has been fulfilled he shall not be entitled to be discharged. That proposition must be established affirmatively by the bankrupt, and the question is, has it been so established in this case?

I think that the Sheriff-substitute has dealt leniently and discriminatingly with the bankrupt, because he has adjourned the case several times to give him an opportunity of paying his creditors 5s. in the £, and it is only after prolonged failure to do so that he has refused the application *hoc statu*. The Sheriff-substitute seems to have carefully followed the statute, and to have placed the *onus* in the right quarter. We are asked to reverse his decision, but I do not think there are any grounds for doing so. The Sheriff-substitute says that he formed an unfavourable opinion of the bankrupt's demeanour at his examination, and he seems to have a shrewd suspicion that he has an interest in the business alleged to be carried on by his son. Mr Anderson says truly that neither the trustee nor the Accountant in Bankruptcy has stated any objection to the discharge, but here there is an objecting creditor, which there was not in some of the cases to which we have been referred, and I think that creditor has very good reason to object. The following are the material facts:—The bankruptcy arose from losses incurred by the bankrupt in working a mine, which was an unpromising

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further opportunity of offering or providing for 5s. per £ to his creditors. When the case was again called on 8th December 1899, the petitioner appeared and stated that he could not offer or pay 5s. or indeed any sum whatever, and in order to give him a further opportunity of satisfying me that he was really unable to make any offer to his creditors, I again ordered parties to be heard. No additional facts were, however, elicited through the debate, . . . and I am reluctantly, but in the interest of the creditors, compelled to refuse the present application for discharge *hoc statu*."

[1] Bremner, June 30, 1900, 2 F. 1114.

[2] Clarke v. Crockett & Co., Dec. 8, 1883, 11 R. 246.

[3] Boyle, June 20, 1885, 12 R. 1147; Phillips, Oct. 29, 1885, 13 R. 91.

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enterprise, as the strata were troubled, there was a bad roof, and several people had previously lost money in it. The bankrupt says that he was able to go on for a time, losing money all the while, and then, not at the commencement of the working, but when he was pressed for money, he borrowed £250 from the objecting creditor to enable him to carry on what he must have seen to be a bad business. That is conduct which requires explanation; whether he had any, and if any, what grounds for thinking that the £250 would not follow the money which he had already lost. Under the circumstances it was not unreasonable to ask him for some such justification, and none was forthcoming. In these circumstances, it is impossible to hold that the condition of the statute has been fulfilled. That would be *pessimi exempli*, and would defeat the object for which the condition was enacted. If the bankrupt shall hereafter find money to pay a dividend of 5s. in the £1 the question can be reconsidered, but as nothing has been paid after a course of reckless working and borrowing, I can hardly conceive a stronger case for upholding the judgment of the Sheriff-substitute.

LORD ADAM.—I am of the same opinion. The bankrupt here has not in point of fact paid 5s. in the £1—he has not paid anything at all, but that is not an absolute bar to his getting a discharge, because if he is able to shew that the failure to pay 5s. in the £ has arisen from circumstances for which he cannot be held responsible, he may still get his discharge. I agree, however, that the *onus* is on the bankrupt of shewing that he cannot justly be held responsible for the failure to pay 5s. That was most distinctly stated by the Lord President (Inglis) in the case of *Clarke* v. *Crockatt & Company*,[1] and I do not think that it is possible to maintain the contrary. Now, it appears to me that this is a case of reckless, not perhaps trading, but of reckless speculation. The bankrupt became the lessee of a coal mine, which several people had experimented in before him with the uniform result of failure. No doubt a man who has capital of his own is entitled to risk it if and as he likes. But here the bankrupt, starting with a small amount of capital of his own, and some borrowed money, goes on year after year losing it, until the whole of his original funds are gone, and then he borrows a sum of £250, which goes in exactly the same way as the rest. Now, I think that this course of conduct discloses a perfectly different case from that of *Bremner*.[2] I can quite understand that there the failure arose from circumstances for which the bankrupt could not be justly held responsible, for it appears that in that case there came about a great depression in the particular trade in which the bankrupt was engaged, which he could not be held bound to anticipate, and besides, he had apparently stopped trading before all his assets were gone, for these, when valued as at the date of the sequestration, were estimated to be sufficient to pay 8s. in the £ to his creditors. Here, on the other hand, the bankrupt only stopped trading after he had lost everything—after the whole of his creditors' money had gone. Accordingly, in my opinion, not only has the failure to pay 5s. in the £ not been proved to have arisen from circumstances for which the bankrupt is not responsible, but it has been distinctly proved to

[1] 11 R. 246.

[2] 2 F. 1114.

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have been due to the bankrupt's own fault. I agree, therefore, that the Sheriff's judgment should be affirmed.

LORD M'LAREN.—I concur with your Lordships. It is not necessary to support our judgment that we should be of opinion that the bankrupt was morally culpable, but I cannot hold that he was irresponsible for the form which his bankruptcy has taken—that it is a bankruptcy in which no dividend is available for his creditors.

LORD KINNEAR was absent.

THE COURT refused the appeal, and found "that the appellant has failed to prove that he is entitled to his discharge under section 6 of the Bankruptcy (Scotland) Act, 1881."

WILLIAM BALFOUR, S.S.C., Agent.

No. 72. Feb. 13, 1901. Bowman's Trustees v. Scott's Trustees.

PAUL GREGO AND OTHERS (Walter Bowman's Trustees), Pursuers (Respondents).—*Graham Stewart—J. G. Spens.*
ROBERT SCOTT AND OTHERS (James Scott's Trustees), Defenders (Appellants).—*Clyde.*

Process—Appeal—Competency—Appeal on question of expenses merely.—Held (1) that it is competent to appeal against a Sheriff's judgment disposing only of a question of expenses; but (2) (*diss.* Lord Trayner) that the Court will not sustain the appeal merely on the ground that the Sheriff's judgment is wrong.

2D DIVISION. Sheriff of Lanarkshire.

IN June 1899 the trustees of the late Walter Bowman, auctioneer, Glasgow, raised an action in the Sheriff Court at Glasgow against the trustees of the late James Scott, pawnbroker, Glasgow, for decree for various sums amounting in all to £681, 15s. 11d. alleged to be due by Scott to Bowman, less the sum of £343, 2s. 2d. due by Bowman to Scott.

After a variety of procedure the Sheriff-substitute (Guthrie), on 27th February 1900, pronounced this interlocutor:—"In respect parties concur in stating that the action has been settled, except as regards the question of expenses, and on joint motion, sends the case to the Motion-roll of this day week."

On 17th March 1900 the Sheriff-substitute pronounced an interlocutor which contained, *inter alia*, the following findings:—"Finds the defenders entitled to expenses since the debate; *quoad ultra* finds no expenses due; allows an account of expenses to be lodged, and remits the same to the Auditor of Court to tax and report."

The pursuers appealed to the Sheriff (Berry), who, on 18th June 1900, pronounced an interlocutor by which he recalled the Sheriff-substitute's findings as to expenses, "and in lieu thereof finds the pursuers entitled to expenses, including those of the appeal, subject to a deduction of one-third from the taxed amount: Allows an account thereof to be lodged, and remits the same to the Auditor of Court to tax and report to the Sheriff-substitute, and to the Sheriff-substitute to decern for the taxed amount, and decerns."

On 15th November 1900 the Sheriff-substitute, after disposing of objections to the Auditor's report, found the defenders liable to the pursuers in the sum of £19, 19s. 7d., being two-thirds of the taxed amount of the pursuer's expenses after giving effect to certain objec-

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tions to the Auditor's report which the Sheriff-substitute had sustained; found the pursuers entitled to the sum of £1, 10s. as the expense of the debate on the objections to the Auditor's report, and decerned for these sums.

The defenders appealed to the Court of Session.

Besides argument on the merits of the Sheriff's judgment as to expenses, the parties were heard on the question of the competency of the appeal. On the latter question Lord Young read the opinion of Lord Deas in *Fleming* v. *North of Scotland Banking Company*.[1]

LORD YOUNG.—In this case the Sheriff-substitute on 27th February 1900 pronounced the following interlocutor:—"In respect parties concur in stating that the action has been settled, except as regards the question of expenses, and on joint motion, sends the case to the Motion-roll of this day week." Then, following up that interlocutor, the Sheriff-substitute on 17th March pronounced an interlocutor finding the defenders entitled to expenses since the debate, and *quoad ultra* finding no expenses due. That interlocutor was appealed to the Sheriff, who on 18th June recalled the Sheriff-substitute's finding as to expenses, and found the pursuers entitled to expenses, subject to a deduction of one-third from the taxed amount, and ultimately decree was pronounced against the defenders for £19, 19s. 7d. being the amount of the expenses to which the pursuers were entitled under the Sheriff's interlocutor, and for £1, 10s. besides as the expenses of the debate on the Auditor's report.

I confess that my strong impression—indeed more than impression—is that the Sheriff would have acted more judiciously if he had abstained from interfering with the Sheriff-substitute's judgment in the matter of expenses. But notwithstanding my impression that the Sheriff-substitute's judgment should not have been interfered with, I have an equally strong impression against the propriety of an appeal to this Court in a case of this sort, especially as we have no precedent for such an appeal except the case of *Fleming*,[1] where the Court, in face of a strong dissent by Lord Deas, sustained the competency of an appeal against the judgment of a Sheriff on a question of expenses merely. Although I think that the Sheriff ought not to have interfered with the Sheriff-substitute's judgment, nevertheless, upon general considerations of discretion and good sense, to which I think it well to attend in the interests of the public, I am more than indisposed to countenance an appeal to this Court upon a mere question of expenses in such circumstances and for such sums as we have here. The result is, that although I am disposed to think that I myself would have come to a different conclusion from that of the Sheriff, I am of opinion that we ought to refuse this appeal.

LORD TRAYNER.—With regard to the competency of this appeal, I think that the case of *Fleming*[1] is a sufficient authority for us to sustain the appeal as competently before us. Assuming the competency of the appeal, as I understand your Lordship also to do, I sympathise very strongly with the view expressed by your Lordship as to the inexpediency of an appeal to

[1] Oct. 20, 1881, 9 R. 11, at p. 13.

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this Court about a question as to expenses, especially where the amount is so trifling as £19. At the same time I am somewhat embarrassed in reaching the conclusion to which your Lordship has come by reason of the consideration that I think the Sheriff's judgment is wrong and that of the Sheriff-substitute right. I cannot say that I have a very strong opinion on that point, because I do not feel confident I am fully acquainted with the circumstances and the procedure in the Sheriff Court, but looking at the case as it was presented to us here, I think that the interlocutor of the Sheriff-substitute was right. If the appeal to us is competent, and if I am to exercise my independent judgment on such materials as the parties have brought under our notice, the conclusion to which I should come would be that we should recall the Sheriff's interlocutor and revert to that of the Sheriff-substitute.

LORD LOW.—I am of the opinion expressed by your Lordship in the chair. I think that the case of *Fleming*[1] is a sufficient authority for the competency of an appeal merely on a question of expenses. I think that the judgment in that case is sound, because cases may occur of such serious and obvious injustice as to make it desirable to have an appeal in order to remedy that injustice. But while I think that an appeal on a question of expenses merely is competent, I am of opinion that the Court ought not to sustain such an appeal unless that is necessary in order to set right an undoubted miscarriage of justice in the Court below. Now, in the present case my impression is that the Sheriff-substitute dealt with the question of expenses in a very reasonable way. At the same time I am not prepared to say that the Sheriff is so clearly wrong as to make it necessary for us to interfere, especially when the amount at stake is only £19. I only wish to add that I think an appeal from the Sheriff-substitute to the Sheriff stands, in this matter, in a very different position from an appeal from the Sheriff Court to this Court.

The LORD JUSTICE-CLERK and LORD MONCREIFF were absent.

THE COURT pronounced the following interlocutor:—"Dismiss the appeal: Affirm the interlocutor appealed against, and decern: Find the pursuers entitled to expenses in this Court, and remit," &c.

CLARK & MACDONALD, S.S.C.—DONALDSON & NISBET, S.S.C.—Agents.

No. 73.

ASSESSOR FOR GREENOCK, Appellant.—*M'Lennan.*
FRANCIS BULLEN, Respondent.—*Johnston, K.C.—F. T. Cooper.*

Feb. 13, 1901. Assessor for Greenock v. Bullen.

Valuation Acts—Consideration other than the rent—Grassum—Public-House—Valuation of Lands (Scotland) Act, 1854 (17 *and* 18 *Vict. cap.* 91), *sec.* 6.—Rae, the outgoing tenant of a public-house, sold the goodwill of the business to Bullen for £700, it being a condition of the sale that the licence should be transferred to Bullen, and that the proprietor should grant a new lease for seven years to him at the existing rent of £49. In consequence of the state of the premises, the Magistrates refused to transfer the licence. It was then arranged between the landlord, Rae, and Bullen, that

[1] 9 R. 11.

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the proprietor should make the necessary alterations on the premises, and that Rae should contribute £100 towards the cost. The improvements having been made in accordance with this arrangement, Bullen obtained a licence from the Magistrates, and a lease for seven years from the proprietor at a yearly rental of £49. The Assessor entered the subjects in the Valuation-roll at £63, being the rent in the lease, with one-seventh of £100 added.

Held that the sum of £100 having been paid to the proprietor as part of an arrangement to which Bullen was a party was a consideration other than the rent to be taken into account in determining the value of the subjects, and that the value to be entered into the roll was £63.

Paton v. *Assessor for Hamilton*, 1 F. 588, *followed*.

Lands Valuation Appeal Court.
Ld. Kyllachy.
Ld Stormonth-Darling.

Case 211.

AT a meeting of the Magistrates of Greenock, on 19th September 1900, for hearing appeals against valuations made by the Assessor of the burgh under the Valuation of Lands (Scotland) Acts, Francis Bullen, wine and spirit dealer, 4 Watson's Lane, appealed against the entry in the roll for the year ending Whitsunday, 1901, of his shop at 4 Watson's Lane at £63, and craved that the value should be reduced to £49.

The case for appeal after mentioned stated that the following facts were admitted:—James Rae, sometime wine and spirit merchant in Greenock, was from 3d August 1891 tenant of the licensed premises No. 4 Watson's Lane, Greenock, at the yearly rent of £49. No other consideration was paid by him.

By minute of agreement dated 9th December 1898, Rae sold the goodwill, fittings, &c., of the business to Bullen for the sum of £700. It was a condition of the sale that the licence certificate should be transferred to Bullen, and that he should be accepted as tenant by the proprietors, and should receive a lease for a period of seven years at the rent of £49. The proprietors agreed to accept Bullen as tenant, and to grant a lease. He thereupon applied to the Magistrates for the transfer of the licence certificate then in the name of Rae. The application came before the Magistrates on 19th December 1898, when the Chief Constable reported to the Court, *inter alia*, that the premises were in a dilapidated and insanitary condition, and, in his opinion, unfit to be licensed. The Magistrates, after considering this report, refused to transfer the licence.

A plan was thereafter prepared, shewing the repairs and alterations necessary to be made upon the premises to render them fit to be licensed. "The said James Rae agreed with the proprietors to contribute £100 towards the expense of said repairs and alterations. The said Francis Bullen then agreed, provided the premises were put in a satisfactory condition, to abide by his former offer, and renew his application for a transfer of the licence." The repairs and alterations were carried out by the proprietors during Rae's tenancy. Bullen obtained a licence certificate on 4th May 1899. "The said James Rae thereafter paid the said sum of £100 to the proprietors, on whose instructions the repairs and alterations had been made. The whole of the said sum was expended upon the said repairs and alterations. No part of it was paid to the proprietors by the said Francis Bullen." Bullen then obtained a lease of the premises from the proprietors for the period of seven years, at the rent of £49 per annum.

The factors for the proprietors, in making their annual return under the Lands Valuation Acts for the year 1900, inserted the rent at £49, but stated that "James Rae, the former tenant, paid £100 to the owners in consideration of an undertaking to enter into a lease

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for seven years at £49 with a suitable person who might purchase the business and get transfer and confirmation of the licence." Bullen stated that this statement was not in accordance with the fact, and he produced pencil note in handwriting of the factors, and granted by them at the time, that the alterations in accordance with the plan would be carried out on getting Rae's agents' undertaking to repay £100 of outlay. There was also read to the Magistrates, at the request of the Assessor, a letter dated 29th December 1898, from Rae to Bullen, stating the terms of the transaction between them, and containing, *inter alia*, the statement that Rae had agreed to contribute £100 towards the alterations and repairs upon the property, and that he undertook to pay this sum out of the price of the goodwill.

The Assessor reached the annual value of £63 by dividing the sum of £100 by the number of years of the lease, and adding the quotient to the rent of £49 stipulated in the lease.

Bullen maintained that no payment had been made, or other consideration granted, by him to the proprietors in consideration of their having accepted him as a tenant; that the sum of £100 had been paid by the previous tenant, and expended on the property during his tenancy, in order to make the premises tenantable and fit for the purpose of having a licensed business carried on therein; and that £49 was a reasonable rent for the premises as repaired and altered, compared with the rents of the public-houses in the immediate vicinity.

The Assessor maintained that the case was not one of ordinary goodwill, but of a rent which had been conditioned at £49 per annum on payment of £100 by Rae, the outgoing tenant, on behalf of Bullen, the incoming tenant, and under agreement with Bullen, and consequently that he, as Assessor, had rightly dealt with the payment.

The Magistrates held, by a majority, that "the said payment was not, upon the facts disclosed, a consideration other than rent requiring to be taken into account, and after fully considering the whole circumstances, together with the rents of similar premises in the neighbourhood," sustained Bullen's appeal, and reduced the valuation to £49.

The Assessor obtained a case, from which the foregoing narrative is taken.[1]

LORD KYLLACHY.—I confess I think that this is a clear case of consideration over and above the rent, and therefore that the Magistrates' determination is wrong. I think the case is one which is covered by, and is indeed *a fortiori* of, the case of *Paton*.[2]

The facts, as I read them, are shortly these:—Rae, the outgoing tenant of this public-house, made an arrangement with Bullen, the appellant, for the sale to the latter of the goodwill, &c., of the business at the price of £700. It was a condition of the sale that the licence should be transferred, and that the proprietor should grant to Bullen a new lease for seven years at the existing rent of £49. Some difficulty, however, arose in getting the licence transferred—a difficulty connected with the state of the premises. In consequence it became necessary to modify the original agreement, and

[1] *Cited to the Appeal Judges:*—Assessor for Kilmarnock v. M'Nally, March 9, 1887, 14 R. 582; Macdonald, Fraser, & Co. v. Assessor for Glasgow, March 18, 1893, 20 R. 624; Shiel v. Assessor for Hawick, Feb. 18, 1898, 25 R. 592; Paton v. Assessor for Hamilton, Feb. 16, 1899, 1 F. 583.

[2] 1 F. 588.

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accordingly it was modified to the effect that the landlord should make the necessary improvements on the premises, and that in respect of his doing so he should receive, in addition to the original rent, a sum of £100 down. This new arrangement was duly carried out, and the appellant, Bullen, obtained the licence, and obtained the lease, and entered into possession.

Now, it is of course clear that the landlord has received in connection with the new tenancy a benefit equal to the sum of £100 in addition to his rent, and it can make no difference how he managed to obtain that benefit, or that the benefit took the form of an improvement of his premises, which of course improved their value. Accordingly, if the payment had been made by Bullen, and not by Rae, it was hardly, I think, disputed that the £100 was really a grassum, which, for the purposes of the Valuation-roll, must be added to the rent.

What is said, however, is that the money being paid by Rae, that circumstance makes all the difference. Now, I am quite unable to see that it does so. Bullen pays Rae £700, and Rae out of that sum pays £100 to the landlord. He does so to secure Bullen's tenancy. He does so, I think, plainly as part of an agreement to which Bullen was a party. It appears to me that that is enough, and that the case would not have been really different if the landlord had been asked to make the necessary improvements at his own expense, and received for doing so, instead of a lump sum down, an additional rent paid yearly during the lease, either by Bullen directly or by Rae acting under an arrangement between him and Bullen.

LORD STORMONTH-DARLING.—I concur.

THE JUDGES were of opinion that the determination of the Magistrates was wrong, and that the annual value should be entered at £63.

MILLER & MURRAY, S.S.C.—JAMES PURVES, S.S.C.—Agents.

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Feb. 13, 1901.
Clark v. Assessor for Middle Ward of Lanarkshire.

WILLIAM SHEARER CLARK, Appellant.—*Cook.*
ASSESSOR FOR THE MIDDLE WARD OF LANARKSHIRE, Respondent.—*Cullen.*

Valuation Acts—Value—Consideration other than the rent.—Where a lease contained stipulations binding on the tenant of an unusual character, and of a kind difficult to estimate with precision in money value, *held* that the rent in the lease fell to be disregarded altogether in fixing the valuation of the subjects, and that the subjects had rightly been valued by a comparison with the letting value of similar subjects in the neighbourhood.

Lands Valuation Appeal Court. Ld. Kyllachy. Ld. Stormonth-Darling.

Case 208.

AT a meeting of the Valuation Committee for the Middle Ward of Lanarkshire, held at Hamilton upon 11th September 1900, William Shearer Clark, spirit-merchant, Chapel, Newmains, appealed against entries in the Valuation-roll for the year ending Whitsunday 1901 of two shops at Chapel, of which the Chapel Coal Company, Limited, were entered as proprietors, and the appellant as tenant, at the rents or yearly values of £100 and £30 respectively, the shop entered at £100 being a public-house.

The appellant was tenant of the subjects in question under a lease between him and the Chapel Coal Company, constituted by a missive

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offer addressed to him by the company, dated 10th April 1899, and an acceptance by him of the offer, dated 20th April 1899, in which the rent was stated at £75. The material terms of the offer are quoted below.*

* The missive offer contained the following provisions:—"We hereby offer to grant you a lease of premises at Morningside, in course of erection by us on the west side of the road leading to Chapel, and at the south corner thereof, to the extent and on the following terms and conditions:—

"(First) A lease to be granted to you and your heirs and assignees whomsoever for the period of our own present lease of Chapel coalfield [19 years from 1899], but in the event of our giving up that lease prior to the natural termination thereof, your lease to terminate at the same time, and in the event of our obtaining a renewal or extension of our said lease you shall be entitled to obtain a renewal of your lease for a similar period and on similar terms to this lease, provided we can grant such free of any expense or financial liability in connection with such renewal.

"(Second) The subjects to consist of three houses of room and kitchen each, but it is understood we are not to finish the subjects as dwelling-houses, but merely to erect them to the length of being ready for plaster, including floors, doors, and windows, and to enclose the background with fences or boundary walls, all in terms of our original contract with the tradesmen therefor. You to have the power at your own expense to increase the height beyond what is shewn on the plans, and also to increase the width of the openings, or to make such other alterations on the original plans as may be mutually agreed upon between us, all, however, at your own expense, and in respect that no outhouses are to be built by us in connection with said premises we shall pay you to account of any extra structural additions you may make or expense you may incur in connection therewith the cost of such outhouses as if they had been built: Further, you are to have the absolute use of the background corresponding to the subjects let, with liberty at any time you may think proper to build thereon either an extension of the front premises or separate buildings, but any such extensions or buildings shall at the end of the lease or continuations or renewals thereof, as mentioned in article first hereof, become our absolute property without payment therefor.

"(Third) The subjects shall be used by you as a public-house, or store, or both, but you having the option at any time to convert the premises into dwelling-houses, in which latter event the houses shall be let to us if desired at a rent to be fixed by arbiters should we differ.

"(Fourth) At the end of the lease, or continuations, or renewals thereof as aforesaid, you shall be entitled to remove all fixtures and fittings in connection with the store and public-house, but we shall have the option of acquiring said fixtures and fittings by mutual valuation, on the basis of their being applicable to a going concern.

"(Fifth) As at May 15, 1899, you shall pay us a bonus of £120, and as soon as the workmen's houses are completed, which we are now in course of erecting, and which are to cost £3000 or thereby, you shall lend us or get on loan for us the sum of £2000 at 3½ per cent interest, on bond and disposition in security, to be granted by us to the lender in ordinary form, but you shall grant us a separate obligation that although said sum is under call of the lender in ordinary course, you shall in the event of its being called up renew or get renewed said bond from time to time; that is, so long as you hold the lease from us, and we maintain the houses in first-class repair and keep up the value of same as at date of loan; we, of course, shall pay the expenses of said loan, insurance, &c., as is usual. If any valuation of the houses, however, is required, you must pay the cost thereof.

"(Sixth) We to have the subjects erected to the stage mentioned in

No. 74.

Feb. 13, 1901. Clark v. Assessor for Middle Ward of Lanarkshire.

The appellant stated no objection to the valuation of the shop at £30, but he contended that the valuations of the two shops should be the rent stipulated in the lease, viz., £75, apportioned in the proportions of £45 to the public-house which was the subject of the appeal, and £30 to the other shop. At the hearing before the Valuation Committee, however, the appellant conceded that in arriving at the valuation of the subjects, the bonus of £120 mentioned in Article 5 of the missive offer fell to be taken into account by being apportioned over the years of the lease.

The Assessor contended that the rent in the lease and the bonus did not represent the full consideration contracted to be paid or given by the appellant to the landlords for the occupation of the premises, and that in respect of the various other considerations stipulated, the rent in the lease fell to be disregarded altogether in fixing the valuation.

The Valuation Committee were of opinion that in view of the considerations in the lease other than the rent they were not bound to regard the rent and the proportion of bonus as conclusive, and that they were entitled to take into account the whole circumstances, including the letting value of other similar subjects in the locality, and to form their own judgment as to the probable rent which the subjects would fetch. Proceeding on this principle, the Committee were of opinion that the public-house might fairly be expected to be let at £100. The Committee accordingly dismissed the appeal.

The appellant obtained a case for the opinion of the Valuation Appeal Judges.[1]

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article second hereof by 13th April 1899, which shall be the date of your entry. Failing this you are to be entitled to share in the damages we may recover from the contractors for the erection of the houses for the breach of contract.

"(Seventh) The whole expenses of the lease shall be paid by you.

"(Eighth) The rent shall run from Whitsunday 1899 onward, and from that date till 1900 the rent shall be £25 sterling, and until you get the licence £37, 10s.; but after that it shall be £75 sterling per annum, no rent being payable for the period from the date of entry till Whitsunday 1899. In connection with the above provision as to modified rent till you get the licence, it is understood that you shall use every endeavour to get the licence, and do everything in your power both by yourself and through your friends to get the same.

"(Ninth) We shall bind ourselves in the lease, and in the continuations or renewals thereof as aforesaid, not to sell, feu, or let, directly or indirectly, any ground, houses, or premises to be licensed, nor shall we apply for a licence ourselves, but we oblige ourselves to use all our influence to assist you in obtaining a licence for the premises in question, and to oppose Mr Steel, or any other person, in his application for licence for premises at Morningside or Newmains."

[1] *Cited to the Valuation Appeal Judges by the Appellant:*—Patrick v. Assessor for Renfrewshire, May 30, 1890, 17 R. 852; Stevenson v. Assessor for Kilmarnock, Feb. 19, 1895, 5 Poor-Law Mag. 253; Glengarnock Iron and Steel Company v. Assessor for Ayrshire, March 14, 1895, 5 Poor-Law Mag. 325; Shiel v. Assessor for Hawick, Feb. 18, 1898, 25 R. 592. *By the Respondent:*—Trustees of Dundee Harbour v. Assessor for Dundee, March 19, 1886, 13 R. 829; Prestongrange Coal and Firebrick Coal Company, Limited, v. Assessor for Haddingtonshire, March 9, 1887, 14 R. 589.

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LORD STORMONTH-DARLING.—The question here is whether the value of these two subjects is to be accepted as stated in the lease, or whether the Valuation Committee were right in disregarding the lease, on the ground that it contained a number of stipulations of so complex a character that it was impossible either to adopt the figures in the lease or to put a value on these other stipulations by way of addition to the stipulated rent. The method which the Committee adopted was to set aside the rent altogether, and to make up their own minds what the subjects would probably fetch if put into the open market. They have done so by comparison with other subjects in the neighbourhood, the result being that they have fixed the valuation at £130 instead of at £75. I do not understand it to be disputed that, if they were entitled to take this course, they have arrived at a fair enough conclusion.

Now, I see no reason to differ from the course which the Committee have adopted. To begin with, it is not disputed by the appellant that £75, the amount of the stipulated rent, cannot be taken, because he admits that to that sum you must add the amount of the bonus of £120 spread over the duration of the lease, which would bring the rent to a little over £80. But then that is not the only stipulation which makes this lease peculiar. There is, in the first place, a stipulation that the tenant should get a monopoly of the right to sell liquors in this neighbourhood, because the landlords bound themselves not to sell, feu, or let, directly or indirectly, any ground or premises for the purposes of a licensed house, nor to apply for a licence themselves. On the other hand, the tenant's occupation is somewhat precarious, because it is to depend upon the duration of the landlord's own lease.

The next thing which may be described as an unusual stipulation is that the tenant was taken bound to complete the buildings. Mr Cook urged that the manner of doing so was very much left in his option, but it is not possible to read the stipulation without seeing that, although he may have had a certain discretion as to the precise mode in which the work was to be carried out, it was in the contemplation of both parties that the subjects should be occupied as a public-house. It also appears to be matter of express agreement that the tenant was to do everything in his power to get the licence, and that the premises, which the landlord undertook to finish only to a certain extent, must have required a great deal of internal work by the tenant before they could have been fitted for occupation as a public-house. We have not very precise information as to the amount so expended, but there is a statement on one side that the sum was £250. That is not admitted, but it is the only figure before us.

The next stipulation is that the tenant should lend, or should be bound to find a lender of, £2000 over certain other houses in the neighbourhood, which were to be erected or were in course of erection by the landlords. The rate of interest was stipulated at 3½ per cent, which was not a high rate of interest in the case of houses of that description. It may be that, as the tenant states, the obligation to procure a loan was not of any great pecuniary value to the landlords, as the security was a marketable security, and the rate of interest something like the current rate. But the landlords must be presumed to have attached some value to the stipulation, else they would not have inserted it.

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Now, when you take all these things together, it does seem to me that you have a congeries of stipulations of an unusual kind, and of a kind difficult to estimate with any precision. If the obligations on the tenant had merely been to expend a certain definite sum upon the property, then, according to the decisions, it might have been proper to spread the sum so expended over the years of the lease, and to regard each portion as an addition to the rent. But when you have a number of stipulations of this widely differing kind, the only alternative is to disregard the rent in the lease altogether, and to arrive at a figure independently by the ordinary methods.

LORD KYLLACHY.—Your Lordship has exactly expressed my own opinion, and I have nothing to add.

THE JUDGES were of opinion that the determination of the Valuation Committee was right.

GILL & PRINGLE, S.S.C.—BRUCE, KERR, & BURNS, W.S.—Agents.

No. 75.

Feb. 13, 1901.
Stevenson v. Assessor for Upper Ward of Lanarkshire.

JAMES STEVENSON, Appellant.—*E. Macpherson.*
ASSESSOR FOR THE UPPER WARD OF LANARKSHIRE, Respondent.—*Cullen—J. H. Scott.*

Valuation Acts—Subjects to be entered in roll—Ground belonging to private person used as public square—Payments for temporary right of occupancy.—Certain ground in the centre of a town, belonging to a private individual, was used as a public square, the public being allowed to walk over it. Being so used it was valueless as an agricultural subject. At certain seasons it was occupied as a show ground by the owners of travelling shows, who erected their booths, &c. on the ground, and paid the proprietor of the *solum* sums amounting to about £20 a year in all, for the temporary right of occupancy.

Held (1) that the ground in question fell to be entered in the Valuation-roll; (2) that it ought to be entered as "land (market-place)"; and (3) that the value to be entered was £20—the amount of the sums paid by the owners of the shows to the proprietor.

Lands Valuation Appeal Court. Ld. Kyllachy. Ld Stormonth-Darling.

Case 210.

AT a meeting of the Valuation Committee for the Upper Ward of Lanarkshire, held at Lanark on 10th September 1900, Colonel James Stevenson of Braidwood, Commissioner for Captain James Stevenson Hamilton of Kirkton, appealed against an entry in the Valuation-roll for the parish of Carluke for the year ending Whitsunday 1901, of "market stances," of which Captain Hamilton was entered as proprietor and occupier at the rent or yearly value of £20, the column headed "tenant" being left blank. The appellant craved that the entry should be deleted from the roll.

The facts as stated in the case for appeal after mentioned were as follow:—"The ground in question is situated in the centre of the town of Carluke, and may be said to form the public square—the public being allowed to walk over and through it. At certain seasons this ground is used as a show ground by travelling shows, such as shooting-saloons, roundabouts, swings, and such like, and the owners of these shows pay the appellant (whose title to the land, subject to any rights of access the feuars have acquired over it, is not disputed) for the privilege of being allowed to erect their booths, &c., upon the ground. The appellant agreed that the total amount of these payments for the year in question might be taken at £20; and in reply to an inquiry

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by the Committee, it was stated on his behalf that no deductions fell to be made from such gross amount in respect of management or other *per contra* charges. The ground is of small extent, and apart from the profit-earning capacity resulting from its use as a show ground, the Assessor admitted that inasmuch as it formed part of the public thoroughfare, it was, in its present unfenced condition, valueless as an agricultural subject."

The appellant, Colonel Stevenson, maintained that "market stances" did not fall within the definition of "lands and heritages," as defined in the Lands Valuation (Scotland) Acts, and therefore did not fall to be entered in the Valuation-roll; that if this piece of land described as "market stances" were let to tenants, the names of such tenants ought to be inserted in the Valuation-roll, and that the use to which this piece of land was put by him did not enhance its value as a rateable subject, but that the payments received were of the nature of profits arising from the occupation of the land, and could not therefore be considered as rent.

The Assessor stated that in entering the subject as "market stances" he intended to indicate that it was land devoted to stances for the sale of wares, and for shows at market times. He admitted that the designation was not quite appropriate, and expressed his willingness to have "show ground," or "land, market-place" substituted for it. He admitted that tolls of this kind were not mentioned by name in the Valuation Acts; but he argued that these payments enhanced the value of the land—that it was in fact a piece of land devoted to a profitable purpose—and that he was entitled and bound to enter it in the Valuation-roll. He explained that this subject would have appeared in the rolls of past years had he been aware these payments were exacted. He stated that the proprietor had been entered as occupier on the same footing as the proprietors of grass parks let by the season were dealt with—the tenancy being for less than a year, and the land being all the while under the proprietor's control.

The Committee were of opinion (1) that the subject fell to be entered in the Valuation-roll; (2) that in fixing the valuation the Assessor was entitled to take into account the sums received for the use of the subject as a show ground; and (3) that, as these sums amounted to £20, that amount fell to be entered as the yearly value of the subject.

Colonel Stevenson took a case for appeal.[1]

LORD KYLLACHY.—This ground, it is not disputed, belongs to the appellant, Colonel Stevenson. It is his property, subject only to certain public uses. He could, of course, therefore, let it either from year to year, or for a period of years, and if he did so, his tacksman would draw the various payments made by showmen and others. If it had been so let, there could, I suppose, have been no question that the rent stipulated and paid by the tacksman must have appeared in the Valuation-roll. And that

[1] *Cited to the Judges by the Appellant*:—Town of Inverness, June 3, 1874, 4 R. 1144; Burgh of Inverurie, May 26, 1875, 4 R. 1147; Aberdeen City Treasurer, April 2, 1877, 4 R. 1149; Maxwell Scott v. Assessor for Roxburghshire, May 30, 1890, 17 R. 833. *By the Respondent*:—Allan v. Maitland, Oct. 9, 1858, 20 D. 1356; Ross v. Assessor for the Upper Ward of Lanarkshire, Feb. 17, 1898, reported *infra*, p. 461.

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being so, I am not able to see how it makes any difference that the proprietor keeps the subject in his own hands, and receives direct the payments which are obtained for the use of the ground. I see no reason to doubt the decision of the Valuation Committee.

LORD STORMONTH-DARLING.—This case has been very well argued on both sides, but I have no doubt that the Valuation Committee is right. The subject of the entry complained of is not very accurately described as "market stances," and we propose to alter the entry and to substitute, as is proposed in the body of the case, the words "land (market-place)." This is not a question of stances for carrying on the sale of small merchandise. It is the case of an ordinary public square in a small town, the *solum* of which belongs to the appellant, and over which the public have a right of passage. The proprietor has long been in the habit of granting temporary rights of occupation to owners of travelling shows, and people of that kind, which enable them to occupy portions of this ground against all-comers, without injury to the public right of passage. The only person who can give them this right is the appellant. His right to do so is not disputed, and it is proved that in this way he draws about £20 a year. The only question is whether the subjects fall under the description of "lands and heritages" in the sense of the Valuation Act, and ought to be assessed. I have no hesitation in answering that question in the affirmative.

THE JUDGES issued the following opinion:—"We are of opinion that the determination of the Valuation Committee is right, and that the subject should be entered as 'Land (Market Place).'"

MACONOCHIE & HARE, W.S.—BRUCE, KERR, & BURNS, W.S.—Agents.

No. 76.

Feb. 13, 1901.*
Ross v. Assessor for Upper Ward of Lanarkshire.

SIR CHARLES H. A. F. L. ROSS, Appellant.—*Pitman.*
ASSESSOR FOR UPPER WARD OF LANARKSHIRE, Respondent.—*Cullen.*

Valuation Acts—Subjects to be entered in roll—Waterfalls—Charge for permission to visit.—The proprietor of the Falls of Clyde charged each visitor 6d. for passing through his woods to view the Falls. *Held* that the valuation of "land under wood and Clyde Waterfalls" rightly included the income derived from this source.

Lands Valuation Appeal Court.
Ld. Kyllachy.
Ld Stormonth-Darling.

AT a meeting of the Valuation Committee for the Upper Ward of Lanarkshire, held on 13th February 1897, Sir Charles Ross of Bonnington and Balnagowan, appealed against an entry in the Valuation-roll of "land under wood and Clyde waterfalls," of which he was entered as proprietor, tenant, and occupier, at the yearly rent or value of £435. The appellant craved that the words "and Clyde waterfalls" should be deleted from the roll, and the valuation reduced to £71—admittedly the yearly rent or value of the "land under wood." The appellant had for many years made a charge of 6d. per visitor for the right to walk through the woods and view the Falls of Clyde on his estate of Bonnington. The net amount received in respect of this charge for the year 1896, after deducting necessary outgoings for proprietor's expenditure on roads, paths, fences, and tickets, was

Case 189.

* Decided Feb. 17, 1898.

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£207, 3s. The appellant maintained that the Falls of Clyde could not be said to be "lands and heritages" within the meaning of section 42 of the Lands Valuation (Scotland) Act, 1854; that they were not of any value to the appellant as a heritable subject, and that, in any view, the revenue derived from visitors to the Falls should not be taken into account as an element in fixing the value of the subjects. The Assessor maintained that rights such as the present fell within section 42 of the Act of 1854, and that the payments by the visitors were of the nature of tolls, and as such fell to be entered in the roll. He cited the *British Seaweed Company, Limited*,[1] and the *Glasgow Bridge Trustees*.[2] The Committee being of opinion that the payments made by the public for admission through the woods to view the Falls were in respect of a heritable right, the appellant being both owner and occupier of the woods, retained the entry in the roll, but of consent reduced the amount to £278. The appellant having obtained a case,[3] the Valuation Judges were of opinion that the determination of the Committee was right.

J. & F. ANDERSON, W.S.—BRUCE, KERR, & BURNS, W.S.—Agents.

No. 77.

Feb. 13, 1901. Peggie v. Assessor for Kirkcaldy.

WILLIAM PEGGIE, Appellant.—*Johnston, K.C.—F. T. Cooper.*
ASSESSOR FOR KIRKCALDY, Respondent.—*Party.*

Valuation Acts—Subject of Valuation—Erections or Structural Improvements—Lands Valuation (Scotland) Amendment Act, 1895 (58 *and* 59 *Vict. cap.* 41), *sec.* 4.—In May 1898, in order to meet objections taken at the Licensing Court, a side door in a public-house was built up, and a window was knocked out and a door put in at the front of the house. These alterations were made by the tenant at a cost of £25. The tenant held the subjects on a lease for ten years from Whitsunday 1895, at a rent of £40. The tenant having died, his trustees in November 1899 sold the goodwill of the business and the lease to a new tenant for £2505. No part of this sum was paid to the proprietors of the public-house. In the Valuation-roll for the year ending Whitsunday 1901, the Assessor continued the entry of the public-house at £40, the rent in the lease, and he also made a new separate entry of "part of public-house" at £60. With respect to the latter entry, he maintained that where erections or structural improvements were made in a subject, the Lands Valuation (Scotland) Act, 1895, sec. 4, made it competent entirely to revise the valuation of the subject, and he further maintained that of the great increase in the annual value of the public-house in question, as shewn by the large sum paid in 1895 for the goodwill and the remainder of the lease, £60 was a fair sum to attribute to the alterations made in 1898. There was no evidence that these alterations had, in fact, increased the letting value of the subjects.

Held that the separate entry at £60 fell to be deleted from the roll, in respect that there was no evidence that the letting value of the public-house was increased in consequence of the alterations.

Observed (*per* Lord Stormonth-Darling) that, under section 4 of the Lands Valuation (Scotland) Act, 1895, the mere fact that alterations had been made on the subjects did not open the way to a revision on general grounds.

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[1] Feb. 4, 1866, 4 Macph. 1139.

[2] June 18, 1870, 4 Poor-Law Mag. 22.

[3] *Cited to the Appeal Judges*:—Maxwell Scott v. Assessor for Roxburghshire, May 30, 1890, 17 R. 833.

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Opinions reserved on the question whether the alterations were "erections or structural improvements" within the meaning of the Act.

AT a meeting of the Provost, Magistrates, and Council of the Burgh of Kirkcaldy, on 13th September 1900, for the purpose of hearing appeals against the valuation of properties by the Burgh Assessor for the year from Whitsunday 1900 to Whitsunday 1901, William Peggie, spirit-merchant, appealed against an entry of "Part of Public-House" in Nicol Street, of which he was entered as tenant and occupier, at the yearly rent or value of £60. The trustees of Thomas Angles, the former tenant, by whom the alterations after mentioned were made, were entered as proprietors in this entry.

Case 209.

There was also an entry of "public-house" in Nicol Street (the same house as that to which the first-mentioned entry related), Mrs Sophia Orr and Mrs Lilias Telfer (the owners of the house) being entered in this entry as proprietors, and the appellant as tenant and occupier, at the yearly rent or value of £40.

No question was raised as to this latter entry, but the appellant craved that the entry appealed against should be deleted from the roll, the question raised being whether certain alterations, made by Thomas Angles, were "erections or structural improvements" within the meaning of the Lands Valuation (Scotland) Amendment Act, 1895, sec. 4,* justifying the entry appealed against.

The facts as stated in the case for appeal after mentioned were as follows:—By a minute of lease dated 6th and 11th September 1894, Mrs Sophia Orr and Mrs Lilias Telfer, the proprietors of the public-house, let it and certain shop-fittings to Thomas Angles, for ten years from Whitsunday 1895, the rent under the lease for the shop being £37, and for the shop-fittings £3. At the Licensing Court in April 1898 objection was taken by the Chief Constable of the burgh to a side door in the public-house. In May 1898, accordingly, this door was taken out and built up by Angles, and a window was

* The Lands Valuation (Scotland) Amendment Act, 1895 (58 and 59 Vict. cap. 41), sec. 4, enacts:—"Section six of the Valuation Act, 1854, shall be read and construed as if the following proviso were inserted after the words 'as compared with the amount of such valuation,' that is to say:—

"Provided also, that where any lessee of any such lands and heritages holding under a lease or agreement, the stipulated duration of which is twenty-one years or under from the date of the entry under the same, and in the case of minerals thirty or under from the date of such entry, has made or acquired erections or structural improvements on the subjects let, and where the actual yearly value of such erections or structural improvements cannot, under the provision of section six of the Act, be entered in the Valuation-roll, such erections or structural improvements shall be deemed to be lands and heritages within the meaning of this Act, and such lessee shall be deemed to be proprietor thereof for the purposes of this Act, and the Assessor shall ascertain the yearly value of such erections or structural improvements as a separate subject, by taking the amount of rent, if any, in addition to the rent stipulated to be paid under such lease or agreement at which, one year with another, the subjects let, and such erections or structural improvements might together in their actual state reasonably be expected to let from year to year in consequence of such erections or structural improvements having been made, and shall make a separate entry thereof in the Valuation-roll, setting forth all the particulars relating thereto, as hereinbefore provided with respect to other lands and heritages."

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knocked out and a door put in at the front. The cost of these alterations was about £25. In November 1899, Angles having died, his trustees sold the goodwill of the business and the lease of the premises to the appellant Peggie, the price paid by the appellant to Angles' trustees being £2505. No part of this sum was paid to the proprietors of the public-house.

The appellant led evidence to the effect that the alterations made in 1898 on the public-house were a disadvantage from a licence-holder's point of view. There was no evidence that the letting value of the house was increased in consequence of these alterations.

The appellant maintained that the entry appealed against ought to be deleted on the grounds that the facts proved did not justify the entry complained of or any entry for erections or structural improvements under the Lands Valuation (Scotland) Amendment Act, 1895, sec. 4; that the alterations in question being made against the desire of the former lessee, Angles, in respect they were ordered by the licensing authorities, were practically compulsory alterations; that from a licence-holder's point of view these alterations were a distinct disadvantage; and that no part of the price paid by the appellant for the business was paid to the proprietors of the public-house.

The Assessor maintained;—The balance of the lease having been disposed of for £2505, shewed that a great increase in value had taken place. It shewed that the privilege of carrying on this business for five and a half years was considered by the appellant to be worth a rent of £500 or £600 a year. If any part of the goodwill had been paid to the proprietors, or if a sum had been secured by them for the transfer of the lease, as was usual, the yearly value would have been increased as against them. The whole was secured by the representatives of the late lessee, but as before his death and in the currency of the lease he had expended certain sums in structural alterations and improvements, it was competent under the Act of 1895 to revise the valuation, and to consider the enhanced yearly value of the subject. This was one of the cases dealt with by that Act, in intention, if not specifically, where, owing to the limitations of the Act of 1854, a subject was entered in the roll at less than its clear yearly value. It was fair to assume that some portion of the remarkable increase was due to the structural alterations in question. Having regard to the values and rentals of other public-houses in Kirkcaldy, similar in character, business, and situation, a valuation of £100, made up of £40, the original rent in the lease, and £60 for the improvements, was just and moderate.

The following was the determination of the Town-Council:—"The Council considered that the facts proved shewed that the present letting value of the subjects as they now stand, with the alterations before referred to, is at least £500 a year, being an increase over the sum in the lease of £460, and the council were of opinion that of this increase of £460 a sum of £60 might fairly be held as being attributable to the structural alterations before referred to. The Council accordingly dismissed the appeal."

Peggie obtained a case for appeal.[1]

LORD KYLLACHY.—I do not desire to offer any opinion as to whether

[1] *Cited to the Judges by the Appellant*:—Hughes v. Assessor for Stirling, June 7, 1892, 19 R. 840.

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these improvements were or were not erections or structural improvements in the sense of section 4 of the Act of 1895. It appears to me that that raises a delicate question, and one which may come up in some future case under circumstances which will raise the question much better than it is raised here.

But while that is so, I think the appellant has made good his case on a different ground. It appears to me that there is no evidence before us, and that there was no evidence before the Magistrates, to justify the conclusion that the sum of £60 represents an additional annual value attributable to these structural alterations here in question,—that is to say, that if these subjects were put into the market with the structural alterations and as they stand, a yearly rent of £60 in addition to the existing rent of £40 would be got for them—and got for them in respect simply of these structural alterations. There was, I say, no evidence to justify such a finding. Nor do the Magistrates profess that they applied their minds to that question. In fact it is quite plain that they did not consider the matter in this light at all; and it being certainly not presumable that the shutting up of one door and the slapping out of another would add £60 to the rent of this public-house, I have, I confess, no doubt that we should sustain this appeal.

LORD STORMONTH-DARLING.—I agree with your Lordship, and I should just like to add this: It is quite true that there was no evidence before the Magistrates, in the sense of sworn testimony, which could support their finding that the sum of £60 a year might be held as attributable to the structural improvements, which themselves cost only £25 in all. At the same time we should always pay the greatest deference to the opinion of local magistrates founded upon their local knowledge. But I think that in the very candid and able statement of the Assessor he practically conceded that the Magistrates did not apply their minds to the enhanced value caused by the structural improvements, but really adopted his view that the fact of these having been made opened the way to a revision of the valuation on general grounds. Now, if they did that, they went quite beyond the scope of the statute of 1895. The statute only allows separate entries in the Valuation-roll when it appears, in the first place, that the erections or structural improvements have been made by the tenant, and in the second place, that these erections or structural improvements have added to the present letting value of the subjects. If the Magistrates had confined themselves to that question, their opinion would have had great weight with us. But, as matters stand, there are no materials before us to enable us to arrive at a conclusion as to enhanced value, and I agree with your Lordship that the Magistrates' determination cannot stand.

I quite agree that it is not desirable to endeavour to lay down any rule as to what kind of erections and structural improvements are covered by the statute. But I should desire to reserve my opinion on the question whether trifling repairs of this description were of that nature or not.

THE JUDGES were of opinion that the determination of the Council was wrong, and directed that the entry complained of be struck out.

JAMES PURVES, S.S.C., Agent.

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Feb. 18, 1901.*
Andrew Lowson, Limited, v. Assessor for Arbroath.

ANDREW LOWSON, LIMITED, Appellants.—*Craigie—R. S. Horne.*
ASSESSOR FOR ARBROATH, Respondent.—*Young—Baxter.*

Valuation Acts—Value—Flax-mill in occupation of owner—Recent sale of subjects.—In 1900 certain subjects, consisting of flax-mills and warehouses, after being thrice exposed to public sale, without finding a purchaser, were bought by private bargain at the upset price. In the Valuation-roll for the year ending Whitsunday 1901 the Assessor entered the subjects (which were in the occupation of the purchasers) at a valuation reached by taking 7½ per cent on the value of the subjects, as ascertained, in the case of the buildings, by measuring the cubic contents and applying a rate varying from 1d. to 2d. per cubic foot, and, in the case of the heritable machinery, by applying the rate of 20s. per indicated horse-power.

Held on appeal by the owners of the subjects that in view of the recent sale of the subjects, after the market had been fully tested, the principle of valuation adopted by the Assessor ought not to be followed, and that the value to be entered was 7½ per cent on the price paid for the subjects (deducting the value of the moveable machinery included in the sale), *plus* the amount of the feu-duty.

Lands Valuation Appeal Court. Ld. Kyllachy. Ld Stormonth-Darling.

Case 212.

AT a meeting of the Valuation Committee of the burgh of Arbroath, held on 12th September 1900, Andrew Lowson, Limited, flaxspinners and manufacturers, Arbroath, appealed against the entry in the Valuation-roll for the year ending Whitsunday 1901 of a number of mills, warehouses, &c. (eighteen in all) belonging to the appellants, at the total yearly rent or value of £3859, 10s., and craved that the valuation should be £1250, being the amount fixed for the previous year by the Valuation Appeal Judges on February 14, 1900—2 F. 608.

Prior to the valuation proceedings for the previous year the subjects in question were thrice exposed for sale by the judicial factor on the estate of Mr Andrew Lowson (to whom the subjects had belonged), the last exposure being on 15th February 1899, when the whole subjects, including the moveable machinery, were exposed for £32,750, without finding a purchaser. The subjects were then let by the judicial factor to Mr A. D. Lowson, Mr Andrew Lowson's son, on a lease, terminable at three months' notice, at a rent of £1250. The result of the appeal to the Judges last year (2 F. 608), was that the subjects were entered in the Valuation-roll at the total value of £1250 (the rent in the lease), the valuation of the Assessor, sustained by the Valuation Committee, at £3574, 10s., being held to be wrong.

After the date of the appeal of last year the subjects, including the machinery, heritable and moveable, therein, were sold to the present appellants at the price of £32,750.

In the present appeal the appellants contended to the Valuation Committee that the Committee were bound to adhere to the valuation of last year in respect that there was no change in any of the properties since the former appeal and judgment of the Valuation Appeal Judges; that of the price at which the subjects had been sold £18,000 represented the moveable property; and that the rent in the former lease and the price paid for the subjects shewed that the valuation of the last year was the true valuation.

The Assessor maintained that the sum of £1250 did not represent the true valuation of the subjects, or the rent at which, one year with another, the subjects might be reasonably expected to let. He

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denied that £18,000 represented moveable property, and contended that the value of the moveable portion was much less than the value of the heritable portion of the property.

The case for appeal after mentioned set forth, *inter alia*, as follows:—"It appeared that the consequence of the decision of the Judges in last year's appeal was to rate, last year, the subjects now belonging to the appellants in a different ratio from other mills and manufactories in Arbroath of similar extent or value. This was brought under the notice of the Magistrates and Council, who resolved that it was proper to have a re-valuation of the whole mills and factories in the burgh, and directed that this should be made; and they authorised the burgh assessor to obtain special assistance in order that a satisfactory valuation might be arrived at."

A proof was led before the Valuation Committee, at which, *inter alia*, the Assessor adduced evidence shewing the principles and results of the revaluation directed to be made by the Magistrates and Council. The Assessor and Mr William Blackadder, C.E., Dundee (who had been employed in the revaluation), deponed that the principle on which the Assessor's valuation proceeded was to take 7½ per cent on the present value, as ascertained, in the case of buildings, by measuring the cubic contents of each building, and applying a rate of from about 1d. to about 2d. per cubic foot according to the nature of the building, and, in the case of heritable machinery, by applying the rate of 20s. per indicated horse-power; that this gave a capital value for the buildings equal only to about half the sum which it would cost to put up the buildings at the present time; that the result had been checked by a rate per spindle, and a rate per loom, and a rate per square yard of floorage; that on these principles the buildings were valued at £30,820, and the heritable machinery at £22,400, giving a total of £53,220; that the Assessor's valuation of £3859, 10s. was based on these figures; and that these principles had been in use in valuing property of this kind for many years.

The appellants adduced evidence to the effect that the valuation of the moveable machinery in the subjects as a going concern was £18,546, and that the break-up value was about £10,000.

The feu-duties for the subjects amounted to £156.

The case set forth:—"The Committee were of opinion that the appellants' contention could not be sustained. The Committee found as a matter of fact that since the date of last appeal the appellants had" purchased the subjects "by private treaty, at the price of £32,750, which included moveable machinery, and that the value of the moveable machinery was less than one-third of the value of the heritable portion of the subjects.

"The Committee also found that practically every mill in Arbroath, as well as in Dundee, was in the occupancy of the proprietor, that a lease of a mill in Arbroath and Dundee was almost unknown, and that the circumstances in which the subjects had last year, under a private temporary arrangement, been let . . . for a limited period, and subject to three months' notice, were very exceptional.

"The Committee also found that the rent agreed upon under the temporary arrangement with the judicial factor did not afford any just criterion of the rent which the subjects in question would fetch if let from year to year, and that the purchase price did not give any adequate indication of the structural value. It was proven to their

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satisfaction that the valuations appealed against had been made on the principle of taking a percentage on the structural value, and thus in accordance with the usage which is, and has long been, followed throughout Scotland, and particularly in the centres of the flax trade, in the valuation of mills occupied by their owners.

"The details of the measurements and the calculations on which the valuations had been arrived at were submitted to the Committee, along with similar particulars of the revised valuations of the other mills and factories in Arbroath, and they found that in all other cases the valuations had either been adjusted with the Assessor by the owners, or, where appeals had been intimated, the valuations had either been adjusted or the appeals had not been proceeded with.

"The Committee had no facts before them which, in their opinion, could justify a valuation of the appellants' works on a different footing from that which they found to be universally applicable to other works of the same kind.

"In dealing with the valuations made by the Assessor the Committee had in view the facts proved, and the circumstances known to them relating to the condition, as well as the character and situation, of the several subjects and their surroundings, and they finally arrived at the following determination," which was to reduce the Assessor's valuation in the case of certain of the subjects, and to sustain that valuation in the case of the remaining subjects, the result being that the total valuation as fixed by the Committee was £3508, 10s.

The appellants obtained a case for appeal.[1]

At advising,—

LORD STORMONTH-DARLING.—Notwithstanding our decision of last year, the Committee were quite justified in reconsidering the valuation of these subjects, because this year the situation was materially changed. Last year the subjects were held under lease, and, although we did not decide that the Committee were absolutely bound by the rent in the lease, still we held, on the information then before us, that it was the best available test of value. The lease, however, expired at Whitsunday 1900, and now the subjects are in the occupation of the owners, who bought them privately at the price of £32,750, that being the price at which they had been thrice exposed to public sale without finding a purchaser. Accordingly, the problem which the Committee had to solve—always a difficult one in the case of property of a kind which is rarely leased—was to ascertain the rent at which it might be reasonably expected to let from year to year.

This they proceeded to do by obtaining a re-valuation of the whole mills and factories in the burgh, on the principle of first measuring the cubic contents of the buildings, then taking an arbitrary rate of so much per cubic foot according to the nature of the structure, so as to arrive at the capital value, and then putting a percentage on the capital value to ascertain the probable rent. By this means they brought out the figure of £3508, 10s., which was slightly less than the Assessor's valuation.

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[1] *Cited to the Judges by the Assessor*:—Shields, May 27, 1875, 4 R. 1146; Lockhart v. Assessor for Kirkcaldy, March 16, 1888, Lands Valuation Appeal Cases, No. 92; Cowan & Sons v. Assessor for Midlothian, May 25, 1894, 21 R. 812; Stocks v. Inland Revenue, June 28, 1899, 1 F. 1020.

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Now, I do not desire to say anything against the method of valuation when no other test is available. It is said to be in accordance with usage, particularly in the centres of the flax trade, in valuing mills occupied by their owners. It is plainly somewhat arbitrary, but so, perhaps, must every method be which proceeds upon the generalised opinion of experts, and it has the merit, at least among the mill-owners themselves, of being uniform and equal.

The peculiarity of this case, however, is that another test is available, and that the Committee have chosen to disregard it entirely. I do not refer to the rent in the lease, which is now at an end, but to the price at which the subjects were bought little more than a year ago. It is not suggested that there was anything simulate about the sale, or even that the time was unfavourable for getting a good price. The market had been amply tested by three exposures, so that the price must be regarded as all that the subjects would fetch under fairly favourable conditions.

Now, why should a test of this recent and practical kind be rejected in favour of a purely hypothetical estimate? The Committee supply no answer to that question, except where they say that, in their opinion, "the purchase-price did not give any adequate indication of the structural value." But the statute says nothing about structural value. It takes the rent where there is a rent conditioned as the fair annual value, without grassum or other consideration, and thereby indicates very clearly its favour for the open market as affording the best criterion of value. Where there is no rent answering this description, it conjures up the hypothetical tenant; but there can be no safer way of arriving at what rent the hypothetical tenant might be expected to pay than to ascertain what price an actual purchaser has recently paid under ordinary commercial conditions; for purchasers are naturally guided by the annual return to be looked for, and prudence will prevent them from paying too much, while competition may safely be trusted to interfere with their paying too little. In the present case it is hard to believe that the public would allow a property to go for £32,750, if the heritable part of it (which the Committee calculate at about two-thirds of the whole), might reasonably be expected to let for £3500, or a return of over 16 per cent.

Accordingly, I think it is impossible to accept the Committee's valuation in the face of the actual price obtained in what must be regarded as the open market. I propose that we should adopt that price as the basis of value. But of course there must be a deduction for the moveable machinery included in the sale, and the value of that may, I think, be taken at a sum midway between the break-up value, stated in the evidence at £10,000, and the going-concern value of £18,546. Taking it, then, at £14,250, and deducting it from the gross price, we have a balance applicable to the heritable part of the property of £18,500, on which 7½ per cent (which everybody agrees is a fair percentage for subjects of this kind) would yield an annual return of £1387, 10s. To this must be added the feu-duty of £156, making a total valuation of £1543, 10s. That is the figure which, I think, ought to be substituted for the Committee's total valuation, to be apportioned among the separate subjects in the same proportions as in the entries fixed by the Committee.

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LORD KYLLACHY.—I quite agree, and have nothing to suggest.

THE JUDGES issued the following opinion:—"We are of opinion that the determination of the Valuation Committee is wrong, and that the valuation of the subjects . . . should be fixed at £1543, 10s., the same to be apportioned among the subjects in the same proportions as in the valuations fixed by the Committee."

ALEXANDER CAMPBELL & SON, S.S.C.—DUNCAN SMITH & M'LAREN, S.S.C.—Agents.

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Feb. 14, 1901. Kerr v. Marwick and Gray.

MRS MARION KERR AND HUSBAND, Pursuers (Respondents).—*Sol.-Gen. Dickson—A. O. M. Mackenzie.*

SIR JAMES DAVID MARWICK, Defender (Reclaimer).—*Ure, K.C.—Deas.*

GEORGE GRAY, Defender (Respondent).—*Dundas, K.C.—A. S. D. Thomson.*

ROBERT ANDERSON AND ANOTHER, Defenders.

Public-House—Certificate—Application refused by Magistrates, but granted on appeal by Quarter Sessions—Official to grant certificate—Home Drummond Act, 1828 (9 *Geo. IV. c.* 58)—*Public-Houses Acts Amendment (Scotland) Act*, 1862 (25 *and* 26 *Vict. c.* 35).—*Held* that where the decision of the magistrates of a burgh refusing a public-house certificate is reversed on appeal by the Quarter Sessions, the clerk of the magistrates, and not the clerk of the Justices in Quarter Sessions, is the proper official to issue the certificate.

1ST DIVISION. Lord Kincairney.

AT the half-yearly licensing meeting of the Magistrates of Glasgow, held on 11th April 1900, Mrs Marion Mann or Kerr, wine and spirit-merchant, presented an application for the renewal of the public-house certificate for the premises where she carried on business at 21 Argyle Street, Glasgow. The Magistrates refused the application, and an entry to that effect was made by the town-clerk, Sir James David Marwick, in the statutory register of applications.

Mrs Kerr having appealed to the Quarter Sessions of the Peace for the county of the city of Glasgow, in terms of sec. 14 of the Home Drummond Act (9 Geo. IV. c. 58), the appeal was sustained, and a remit was made "to the town-clerk of Glasgow to issue the necessary certificate under the Public-Houses Acts to the applicant and appellant, as applied for."

Thereafter, both the town-clerk and the clerk of the Peace having refused to make out and deliver to Mrs Kerr a public-house certificate, she, with consent of her husband, raised an action against Sir James David Marwick, the town-clerk, and George Gray, the clerk of the Peace, and also against the respective chairmen of the meetings of Magistrates and Quarter Sessions, for decree ordaining the Town-clerk and Clerk of the Peace, or one or other of them, to make out and deliver to her a public-house certificate.

The pursuer, after narrating the foregoing facts, which were admitted, averred that in consequence of the defenders unlawfully withholding delivery of a certificate, she was unable to obtain a regular Excise licence.

Defences were lodged for the Town-clerk and Clerk of the Peace respectively, each of them denying that it was his duty to make out and deliver a certificate.

The pursuer pleaded;—(1) The application of the pursuer, Mrs

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Marion Mann or Kerr, for a public-house certificate, having been granted as condescended on, she is entitled to have said certificate made out and delivered to her.

The sections of the Home Drummond Act, 1828 (9 Geo. IV. c. 58), referred to by the parties, are quoted in the opinion of the Lord Ordinary.

On 30th November 1900, the Lord Ordinary (Kincairney) pronounced the following interlocutor:—"Sustains the first plea in law for the pursuers: Assoilzies the defender George Gray from the conclusions of the summons, and decerns: Finds that the defender the town-clerk of Glasgow is the official whose duty it is as clerk to the Magistrates to deliver a certificate to the pursuer Mrs Marion Mann or Kerr: Finds the pursuers and the defender George Gray respectively entitled to expenses against the defender Sir James Marwick as town-clerk of the city of Glasgow," &c.*

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* "OPINION.—The pursuer Mrs Kerr seeks by this action to obtain a public-house certificate for the Anchor Tavern, 21 Argyle Street, Glasgow. Her position is somewhat embarrassing, but the facts are as simple as possible. An application by her for renewal of her public-house certificate for these premises was refused at the general half-yearly meeting for granting publicans' certificates held by the Magistrates of Glasgow on 11th April 1900. Against this deliverance she, as empowered by section 14 of the Home Drummond Act, appealed to the Quarter Sessions of the Peace. Her appeal was sustained on 9th May 1900, and a remit was made by the Justices 'to the town-clerk of Glasgow to issue the necessary certificate under the Public-House Acts.'

"In order to enable the applicant to carry on her business she requires a double authority—(1) a certificate in the statutory form from the authority whose function it is to grant it, and (2) a licence from the Commissioners of Excise. Section 18 of the Home Drummond Act provides that no licence shall be granted to any person 'unless such person shall have previously obtained from the Justices a certificate under this Act . . . and every licence granted by the Commissioners of Excise, or by any officer of Excise, contrary to this provision shall be null and void to all intents and purposes.' Section 5 of the Public-Houses Acts Amendment Act, 1862 (25 and 26 Vict. cap. 35), is to much the same effect, and also contains a clause of nullity. Hence it appears that she cannot get a licence unless she gets a certificate, and the statutory form of certificate bears that it is conditional on the person in whose favour it is issued obtaining also a licence from Excise. I understand that the Commissioners of Excise have declined to grant a licence except on production of the certificate required by the statutes. Meantime, if she carries on her business, she may become liable to penalties under section 30 of the Home Drummond Act and section 17 of the Act of 1862. There is no doubt that the judgment of the Justices at Quarter Sessions, sustaining her appeal, authoritatively affirmed her right to carry on her business at the Anchor Tavern. But that judgment has as yet been wholly unavailing, because she has never been able to obtain her certificate or licence.

"She has applied to the town-clerk of Glasgow, and he has refused to issue a certificate, and a request to the clerk of the Peace has met with a similar refusal. It is undoubtedly a startling defeat of justice. Of course both of these gentlemen desire only to obey the statutes under which they act. I understood from the bar that in similar circumstances the town-clerk of Glasgow was in use to grant a certificate, but that on closely examining the statutes he has come to the conclusion that they do not empower him to do so. His scruple is entitled to much respect, and I need not say that both gentlemen are acting in perfect *bona fides*. But none the

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The Town-clerk reclaimed, and argued;—The right of the pursuer to a certificate was not disputed. The question was, who was the proper official to issue it. The duty of the town-clerk in the matter was ascertained by secs. 12 and 16 of the Home Drummond Act. It was strictly limited to carrying out the Magistrates' deliverance, and if he were to issue the certificate in the present instance—when it had been refused by the Magistrates—he would be acting against the express authority of the statute. There was no such statutory limitation of the authority of the clerk of Quarter Sessions. The Quarter Sessions being a Court for a long time existent as a Court of Appeal, and having an established practice,[1] there was no occasion for making detailed provisions as to its procedure. It was the duty of their clerk, accordingly, in ordinary course to give effect to their judgments. It would require very express authority to warrant the Court remitting to another Court to issue its judgments. There was no such authority here.

Argued for the Clerk of the Peace;—The town-clerk now proposed to invert the practice of nearly three-quarters of a century. There was on him, therefore, an *onus* to shew that there was something

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less the position in which the pursuer finds herself involves a defeat of justice, and the result is so absurd, from a legal point of view, that it cannot be accepted if it be possible to avoid it.

"The pursuer, has therefore, raised this action, and has called as defenders (1) the town-clerk, (2) the clerk of the Peace, and (3 and 4) the preses of the two meetings, and she concludes that the two first defenders, or one or other of them, should be ordained to deliver to her a certificate. Defences have been lodged for the town-clerk and the clerk of the Peace. Preliminary defences are stated, but so far as I remember nothing was said about them, and the question was argued whether the statutes admit of either the Magistrates or the Justices in Quarter Sessions granting a certificate, and on which of them, if on either, the duty falls.

"I have been referred to the Irish law, in which the difficulty is met very simply, and the duty is thrown on the clerk of the Peace (23 and 24 Vict. cap. 35). The provisions in the English Acts seem hardly so plain; but there are no provisions of that kind in the Scotch Statutes.

"The Scotch Statutes bearing on the question are the Home Drummond Act, 1828 (9 Geo. IV. cap. 58), and the Public-Houses Acts Amendment Act, 1862; but it depends chiefly on the Home Drummond Act, which is certainly expressed as regards the matter in hand in the most perplexing manner, the reason for which seems not far to seek.

"The most important provisions are as follows:—By section 1 of the Home Drummond Act two general meetings of the Magistrates of every royal burgh are appointed, to be called 'the general half-yearly meetings for granting public-house certificates.' The section relates to Justices of the Peace also, but I require to refer only to the Magistrates. By section 7 it is provided that the Magistrates may at these meetings grant such certificates to keep common inns, &c., as they may think most convenient, within which excise liquors may under excise licences be sold in retail, and that such Justices shall deliver to every person so authorised a written certificate, and the section concludes with the somewhat formidable and apparently unambiguous declaration, 'and any certificate granted otherwise than at such meetings shall be void and of no effect.' I think this clause gives rise to the chief difficulty in the case, because, if enforced literally, it would

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[1] Muckersie v. M'Dougall, Dec. 11, 1874, 2 R. (Just. Cases) 12, 3 Coup. 54; Wilson v. M'Intosh Brothers, Feb. 19, 1878, 5 R. 1097.

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illegal in that practice. He had failed to do so. The case of *Mackintosh*[1] appeared to be the only case in which the duty of the town-clerk to issue the certificate was considered, but there was no decision on the present question. The register, which the town-clerk had to keep, of applications was intended to shew how each application was finally disposed of. When the Quarter Sessions reversed the order of the Magistrates, it was not necessary to alter the original entry in the register; an addition fell to be made; just as a note of a conviction for breach of certificate had to be added. There was no register kept by the Quarter Sessions, and the statute made no provision at all for their clerk under any circumstances issuing a certificate. A formal remit to the Magistrates' clerk was not necessary. Intimation to him of the reversal was a sufficient warrant to him.

LORD PRESIDENT.—We have a very full and carefully considered opinion appended to the Lord Ordinary's interlocutor, and I entirely agree in the conclusion at which his Lordship has arrived. There seems to be no doubt that section 14 of the Home Drummond Act was introduced into the Bill,

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plainly make it impossible for either Magistrates or Justices to issue a certificate after an appeal, and so the statute would be defeated.

"Section 12 provides for the keeping of a book or register by the clerk of the Magistrates containing the names of applicants for certificates, with various particulars, and, among others, the manner in which the application is disposed of; and it provides that at the end of the meeting for each day a deliverance shall be written in the book and then and there signed by the majority of the Magistrates assembled, or the preses; and the section proceeds 'and it shall not be lawful for the Justices or Magistrates at any adjourned meeting to alter anything which was done at any previous meeting in granting or refusing such certificates, and the clerk of such Justices or Magistrates shall make out a certificate' in the form provided (which now is that given in the schedule to the Act of 1862). Although the Magistrates are required to sign these entries of their dates, yet it does not follow that the entries might not be modified afterwards. The Magistrates, it is true, cannot recall their own deliverance, but it does not follow that the entry in the register cannot be altered. On the contrary, for example, section 28 provides that all convictions for breach of certificate shall be transmitted to the town-clerk, and that he shall enter them 'in the book or register required to be kept by him . . . as aforesaid.'

"Section 16 provides that if any town-clerk shall deliver a certificate 'contrary to the deliverance in such book or register, or to any person not duly authorised to receive the same, by the Justices or Magistrates assembled at such general or district meeting . . . or shall insert any untrue date in such certificate,' he shall suffer a specified penalty.

"Section 17 relates to the proceedings with the Excise, and provides that the Magistrates and Justices respectively shall transmit to the collector or supervisor of Excise in the district 'a list of all the persons who have obtained such certificates . . . which list shall be made up from the books and registers hereinbefore appointed to be kept by such clerks respectively, and shall contain the same heads and titles, and shall be duly certified by the subscription of such clerks respectively.'

"Then section 18, already noticed, prohibits the granting of a licence without the production of a certificate.

"Section 27 requires the clerk of the Peace and clerk of the royal burgh when lawfully required 'to make out from the books kept by

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[1] Mackintosh v. Macpherson, Dec. 5, 1834, 13 S. 124.

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which ultimately became an Act, during its progress through Parliament, and no machinery was provided for carrying the section into effect. But the Legislature enacted it, intending that it should receive effect, and it is our duty to see that the intention of the Legislature is not defeated if that result can reasonably be avoided. Seventy-two years have elapsed since the Act came into operation, and it does not appear that until now any difficulty has been experienced in carrying it into effect. It is true that at least two modes of doing so have been adopted, but there has been a large and long-continued practice in Edinburgh, Glasgow, and other important cities, of administering section 14, which the Town-clerk of Glasgow now proposes to alter.

Where, as in the present case, we find a statutory enactment providing for an appeal, but not supplying machinery, the Court must necessarily imply or infer such things as are requisite to make the enactment effectual. Section 12 of the Act provides for a book or register being kept by the clerk of the Magistrates containing the names of applicants for certificates

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them as aforesaid a duplicate or counterpart of any certificate issued by them.'

"These are all of the provisions in the Home Drummond Act which seem of consequence; and I do not think there is anything of much consequence or affecting the argument materially in the Act of 1862, in which several of the provisions in the Home Drummond Act are modified or repeated; but I think there is nothing which need be here noticed as throwing light on this question.

"It appears to me that all the sections to which I have referred relate to the magistrates, where the magistrates are the persons who hold the meeting for disposing of applications for certificates, and where Justices of the Peace are referred to, they are the Justices who in the first instance deal with the applications and grant or refuse them. It is they who are to grant the certificates, and authenticate the register, and the duty is thrown on them of transmitting to the proper officers of Excise a list of the applicants who have received certificates.

"There is not the faintest allusion from beginning to end to the Justices sitting in Quarter Sessions. Quarter Sessions are not mentioned except in two sections to be immediately referred to, nor, so far as I have gone, is there the slightest appearance of difficulty. There is no conflict between one clause and another.

"There are however, two sections which refer to Quarter Sessions—section 25, which relates to convictions, and has no bearing on this question; and section 14, which confers a very general right of appeal to Quarter Sessions against any proceeding of any Justices or Magistrates assembled for granting certificates; and having conferred that right of appeal the section says no more. It leaves the Quarter Sessions to their own discretion. It gives no directions whatever, and imposes no limitations. This section makes all the difficulty.

"Without this right of appeal the Act is consistent and complete. But when the right of appeal is given there is no provision at all for what may happen under it. Appeal from the certificating Justices to Quarter Sessions was a novelty in this branch of the law. There was no statutory appeal or statutory double procedure of this kind given in the immediately previous statutes, 44 Geo. III. cap. 55, and 48 Geo. III. cap. 143. There may have been a right of appeal at common law from Petty Sessions to Quarter Sessions in some branches of law, but not, I think, any statutory appeal in regard to certificates. Section 14 has all the appearance of an afterthought

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with various particulars, including the manner in which the application is disposed of. The difficulty here—if there be a difficulty—arises from the fact that there is no provision as to what is to be done in a case like the present, where the Quarter Sessions decide that a certificate which has been refused by the Magistrates is to be granted. It is said that the Justices sitting in Quarter Sessions must do all that is necessary to give effect to their finding, and that although not appointed to do so, they must keep a register or record just as the Magistrates are required to do, and that their clerk should issue the certificate. It appears to me that that is not so reasonable a view, or so consistent with the effective administration of the Act, as that at which the Lord Ordinary has arrived. Although it is not the case of an appeal from one Court to another in the ordinary sense, but rather from one administrative body to another, it seems the most reasonable course that where the inferior or primary body is required to keep a book or register, the Justices in Quarter Sessions should, when they have decided that a licence

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introduced with very little consideration after the details of the Act were adjusted; and I find that in point of fact there was no such clause in the Bill when introduced into Parliament. It must have been added in the course of debate. All the provisions of the Act relate solely to the procedure before the Magistrates or Licensing Justices. They seem to have no reference to procedure on appeal.

"If that be so, I can find no *termini habiles* for deciding this case against the Clerk of the Peace. He might conveniently enough have been directed to issue certificates as in Ireland. But there is no direction of the kind in the Act. There is no duty of that kind thrown by the Act on the Clerk of the Peace, and I do not see how it can be implied. He could not make a certificate in accordance with the statutory schedule, and his certificate would not be such as the Commissioners of Excise would be bound to accept, or would accept. It would not be a statutory certificate. I see no sufficient warrant for imposing on the Clerk of the Peace a duty which the statutes certainly do not impose—and I therefore think that he should be assoilzied.

"Does it follow that the pursuer has no legal remedy? That can hardly be, seeing that the plain and certain intent of the Act would be thereby defeated. For there can be no doubt that it was the intention of the Act that a person in the position of the pursuer should receive a certificate and a licence, so that the statute must be construed so as to carry out that intention if it be at all possible. But I admit that the verbal difficulty which has pressed on the town-clerk is very great, but not, I think, wholly insuperable.

"The chief puzzle, although not the only puzzle, is caused by the last sentence of the 7th section of the Home Drummond Act. I repeat the words,—'Any certificate granted otherwise than at such meeting shall be void and of no effect.' The words are absolute and unambiguous. They do not admit of construction properly so called, but they may possibly admit of limitation. They can only be limited in effect by holding them limited in application. Read strictly, they would strike against all certificates granted after appeal, whether they were issued by Quarter Sessions or by the Magistrates. But it is impossible to hold that the statute conferred a right of appeal, and at the same time declared positively that the appellant should take no benefit from it. I therefore think it legitimate to hold that these words do not apply at all to procedure before the Quarter Sessions on appeal, and that a certificate would not violate the statute, although,

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is to be granted, convey information of this decision to the Magistrates in whatever form may be most expedient—it really does not matter how—and that the Magistrates should note the decision in their book or register, and give effect to it. Apparently no difficulty has arisen in practice in following this course. I understand that the practice has been to add to the statutory book or register kept by the Magistrates a column containing a statement that the application which had been refused by the Magistrates had been granted by the Quarter Sessions. This does not infer any alteration of anything that had been already entered in the register. The original record stands untouched, only an addition is made to it, which is requisite to give effect to the Act. Then when the information has been received from the Quarter Sessions, and the appropriate entry made in the book or register, the town-clerk can issue the certificate, which is the warrant for a licence. This is a short and simple view of the case, and under it the statute can be carried out very easily without the necessity for additional legislation.

LORD ADAM.—Apparently the Home Drummond Act set up two primary

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if issued in respect of a deliverance on appeal it bore the date of that deliverance.

"There are, no doubt, other difficulties. It is true that the town-clerk, as he argues, can only (section 16) deliver a certificate in terms of the book or register kept by him as provided by section 12, and it is said that that book or register can only contain the deliverances of the Licensing Magistrates at their dates; and I rather think, it is true, that the certificate to be delivered by the clerk must be in terms of the entry in the register; and therefore, before the certificate demanded by the pursuer can be issued by the town-clerk, the register must be corrected if it does not already embody the deliverance of Quarter Sessions, so that 'the deliverance' in the register spoken of in section 16 will correspond with the certificate. And I think that to modify the book or register in that manner—that is, by making on it such alteration as will give effect to the rulings of Quarter Sessions on appeal—must be in accordance with the Act. The prohibition in section 12 to alter anything that has been done at a previous meeting means that a resolution finally adopted shall not be altered, but it does not necessarily mean that an entry shall not be altered, that a blunder shall not be corrected, or that the entry of a wrong judgment put right by adequate authority shall not be rectified. For what is the book? I apprehend that it is not meant to be a record of the transactions of the Court, but a list of persons who have applied for certificates, and of those who have received certificates. It, or a copy of it, is to be sent to the officers of the Excise to enable them to know in whose favour licences are to be granted, and not surely in order to mislead them, not, for example, to represent that an applicant had received a certificate whose application had been refused at Quarter Sessions. I think that what the Act contemplates is that the Magistrates shall send reliable information on which the Excise authorities may safely act. No doubt it may often be difficult, and sometimes impossible, to do this within the time fixed by the Act. For (section 17) the list is to be sent within eight days after the date of the Magistrates' meetings, while under section 14 ten days are allowed for appeal, which only shews the curious disconnection which there is between this appeal clause and the other provisions of this bungled Act, and the necessity there is for working it with all the accommodation and freedom which its words will permit.

"Some difficulty has been felt in regard to the form adopted by Quarter Sessions. It is said that there was no power to remit. I do not see the difficulty. It was proper and convenient (possibly not essential) that the

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Courts for licensing purposes—the Justices of the Peace in counties and the Magistrates in burghs—and provided that they should hold meetings at fixed times. Among other provisions for these Courts, it is provided that the clerk shall keep a book, in which shall be entered various particulars regarding applications for licences. It is clear that these particular bodies—the Justices of the Peace in counties and the Magistrates in burghs—are the bodies charged with the duty of keeping this book, in which all essential particulars in granting licences are to be entered. That being so, the Act proceeded, by section 14, to give a right of appeal, whether the licence was refused or granted, and in both counties and burghs the appeal is to Quarter Sessions. It is said by Mr Ure that this is an appeal to a well-known Court, and that that fact has a material effect on this case. But I do not think that is so, because this appeal is an entirely new procedure, and not part of the common law jurisdiction of Quarter Sessions. I demur entirely to the proposition advanced by Mr Ure, that because the Court of Quarter Sessions is a Court with ordinary jurisdiction, it can therefore also exercise powers not conferred by statute in carrying out a special statutory jurisdiction. I question if that Court has any power to keep a book containing a record of licensing appeals, but we do not require to consider that point. Both parties here are agreed that the pursuer must have a certificate, and the only question is, whose official is to grant it. My view on that point corresponds with that of the Lord Ordinary. I think this is a *casus improvisus*, in the sense that there is no provision for it made in the statute. I think originally the decision of the Court of first instance was to have been final, and, assuming that to be so, the whole procedure is to be found in the Act. Then section 14, giving a right of appeal, was added, and there is no provision in the Act as to what is to be done in the event of the appeal being successful. There are as many difficulties in the way of the one view as of the other. The condition of my mind on the question is, that I admit the difficulties on each side, but then it is agreed that the difficulties on one side or the other must be got over. If the case is put so, the question naturally arises, which of these officials is the most appropriate person to grant this certificate. On this account I pointed out that the licensing body was

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Magistrates should be authentically informed that their deliverance had been overruled, and I do not see how that could be done more fitly than by a remit, which may generally be made by a Court of review. Probably, however, it does not signify in this case, because I think the result would have been the same had there been no remit.

"I feel, however, considerable difficulty in directing the Town-clerk of Glasgow to deliver a certificate disconform, if it be so, to the register; while it is not clear that this process affords means for ordering the register to be rectified.

"Perhaps the defender Sir James Marwick may be able to remove that difficulty. But if not, and if he proposes to submit this judgment to the Inner-House, probably the best course will be to sustain the pursuer's first plea, assoilzie the defender George Gray, and find that the defender the Town-clerk of Glasgow is the official whose duty it is as clerk to the Magistrates to deliver a certificate to the pursuer, and allow the defender leave to appeal before pronouncing a decree in terms of the conclusions ordering delivery of the certificate."

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really the Magistrates, because it is obvious that if we were legislating on this point now we would send all cases originally before the Magistrates back to that Court, and all cases originally before the Justices of the Peace back to them. Otherwise, the county authorities would be compelled to keep a register in a matter outside their own jurisdiction, and therefore I think that the Lord Ordinary has exercised a wise discretion in deciding that, of these two officials, it is the duty of the town-clerk to grant the certificate in cases like the present.

LORD M'LAREN.—I am not sure that I should be disposed to go quite so far as the Lord Ordinary has done in treating this as an appeal under an Act of Parliament which is very defective in its provisions. The appeal is not to a special Court constituted for the purpose, but is an appeal to the next Quarter Sessions, that is, to an established and known jurisdiction. The statute itself prescribes all the conditions for granting and renewing certificates, and, of course, those clauses in the beginning which relate to the constitution of the Licensing Court of first instance have no application to the Quarter Sessions. The clause which is important as applicable both to the original hearing and to the appeal is the 7th section, which, dealing with this kind of business partly in the spirit of judicial procedure and partly of administration, provides that the Magistrates may grant a certificate according to their discretion, provided that "all meetings shall be held with open doors, and that it shall not be competent to refuse the renewal of any certificate without hearing the party in support of the application for renewal in open Court if such party shall think fit to attend." This provision, which is really the only provision relating to procedure before the Justices, is, of course, equally applicable to an appeal to the Quarter Sessions. There is no provision for the examination of witnesses. It was not contemplated that anything of the kind would be necessary. If it were necessary, we know that according to the constitution of the Court of Quarter Sessions, as explained by the Lord President in the case of *Wilson*,[1] every appeal to the Quarter Sessions is a rehearing of the case from the beginning, and if evidence has already been taken they are not entitled to proceed upon the evidence taken before the Petty Sessions, but must rehear the witnesses for themselves. Now, there are two things for which the statute fails to make express provision, and these are the registration of the decision of the Quarter Sessions and the person who is to grant the certificate. But we are not left without some light on the subject; because, first, in regard to the register, I see that the Act of Parliament specifies very distinctly what this register may contain. It is to have columns for the designations of the applicants, for the names of the persons who recommend them, for the house or place for which such certificate is applied, and for the manner in which the application is disposed of; and then, what is, perhaps, not altogether to be overlooked, the Act goes on, "for noting a memorandum of convictions under this Act against such parties respectively, and the dates thereof." Now, such a provision shews that the register is not a mere register of decrees, but is a

[1] 5 R. 1097.

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working register which is to guide the Magistrates at future sittings, and in order to their guidance there is to be noted by the proper officer any convictions for offences against the licensing laws which might affect the renewal of the certificate. Therefore, keeping in view that there is to be a column for the manner in which the application is disposed of, I cannot doubt that where an appeal is taken that column must be filled by the proper officer with a statement of what was done in the appeal,—whether the certificate was granted or refused. That being so, who is the person who is to issue the certificate? On that subject what the statute in section 7 says is this,—"Such Justices or Magistrates shall deliver, or cause to be delivered, to every person so authorised or empowered a certificate, a written or printed paper, in such form as hereinafter directed." So that the delivery of the written certificate is to be the act of the Justices, or Magistrates, an act which they are to do or cause to be done. That seems to point very plainly to the certificate being issued by the officer who is under the control of the Justices or the Magistrates to whom the original application was addressed, and certainly militates against the theory that it is to be the act of an officer of the Court of Appeal. I should have thought, if no other arrangement could be made, the statute might be worked out by the clerk of Petty Sessions, or the town-clerk in a case like the present, attending the Quarter Sessions with his register-book, and making the proper entry. He is responsible for the accuracy of the entry, and if he can arrange with the clerk of the Peace, who sits generally as assessor to the Quarter Sessions, to send a note of what was done, and if he corrects his register accordingly, I do not doubt that that would satisfy the requirements of the statute. But there being no provision for a separate register to be kept under the authority of the Quarter Sessions, I think that in some way the register must be completed by a statement of the disposal of the case, and this, together with the general duty imposed upon the Licensing Court to cause a certificate to be delivered, points to the officer of the primary Court being the proper person to issue the certificate under all circumstances. While I, in common with your Lordships, think that is probably the best way of working out what the statute has left incomplete, yet, as this is rather a matter of inference than of express enactment, I should not have been disposed to differ from any decision which the Lord Ordinary might have given as to which of the two clerks of Court is the proper person to issue the certificate. On a balance of considerations, I think there is more to be said in favour of the solution which the Lord Ordinary has proposed. Accordingly, I am of opinion that his Lordship's interlocutor should be adhered to.

LORD KINNEAR was absent.

THE COURT adhered.

JAMES PURVES, S.S.C.—SIMPSON & MARWICK, W.S.—
J. & A. HASTIE, Solicitors—Agents.

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Christison v. Knowles.

ALEXANDER CHRISTISON, Pursuer (Appellant).—*Wilson, K.C.—Lamb.*
KEITH KNOWLES, Defender (Respondent).—*Salvesen, K.C.—Adamson.*

Prescription—Triennial Limitation—Continuity of Account—Change in method of rendering Accounts.—In 1900, a miller raised an action against a horse-hirer for payment of £754 as the balance due on an account for corn and food-stuffs supplied by the pursuer to the defender. The account sued on was stated as a continuous account, beginning 2d May 1887 and ending 30th November 1899, and set forth various payments to account between these dates. The pursuer averred, *inter alia*, that in December 1895, when a large balance was due by the defender to the pursuer on the account, the defender requested the pursuer thereafter to send a note of the items supplied each month, promising to pay these when rendered, and to pay up the old balance by instalments from time to time; that in accordance with this arrangement a note of the supplies was given to the defender each month; that for some time the defender paid instalments approximating to the amount of these monthly notes, but that ultimately he became very irregular in paying the monthly instalments; that in December 1899 the defender's brother offered to pay the balance admittedly due on the monthly instalments, but refused to pay the older items; and that the offer was accepted, and payment made without prejudice to any rights or claims which the pursuer might have for supplies given prior to December 1895.

The defender averred that no balance was due by him to the pursuer. He produced monthly accounts, receipted by the pursuer, for the period subsequent to December 1895, and as regarded the earlier portion of the account he pleaded the triennial limitation.

Held, looking to the pursuer's averments, and to the monthly receipted accounts produced, that the account relating to the period prior to December 1895 had been closed under the arrangement then made, and that the triennial limitation applied to it.

2D DIVISION. Sheriff of Forfarshire.

IN March 1900, Alexander Christison, miller, Denton Mill, near Guthrie, Forfarshire, raised an action in the Sheriff Court at Forfar against Keith Knowles, horse-hirer, Panmure Arms Hotel, Edzell, for payment of £754, 9s. 1d., being the balance of an account for corn and food stuffs supplied by the pursuer to the defender on various dates between 2d May 1887 and 30th November 1899, with legal interest thereon.

The pursuer averred that (Cond. 2) from 1884, when the defender went to the Panmure Arms Hotel, the defender had ordered and obtained supplies of corn, meal, and food stuffs from pursuer for the hotel stables and farm, "and up till the commencement of the account sued for, these were more or less regularly paid for. Since the beginning of this account, however, defender became very irregular in paying, and although he made payments from time to time as indicated in the account, there is a balance still due of £754, 9s. 1d., the amount sued for. A detailed account of the items supplied and payments made is produced herewith. Pursuer is still supplying the defender with food stuffs."

The account produced was stated as a continuous account, extending from 2d May 1887 to 30th November 1899, and shewing on the one side several entries each month for oats, &c., supplied, and on the other side entries of payments to account, the debit balance

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against the defender, on the whole, being brought out at £754, 9s. 1d. —the sum sued for.

The pursuer further averred;—(Cond. 3) "In December 1895, defender, who was then making arrangements to have his hotel taken over by a limited liability company, although there was then a large balance due, requested pursuer thereafter to send a note of the items supplied each month, promising to pay these when rendered, and to pay up the old balance by instalments from time to time as he was able. In accordance with this arrangement a note of these supplies was given to defender each month, or at short intervals, and he paid instalments of what he was due pursuer for some time, approximating to the amounts of these monthly notes, and he also made payments to account of the balances then due on 6th January 1896 and 16th September 1897, and on the latter date promised to pay a further sum of £30, which, however, he did not do. Latterly defender became very irregular in paying instalments also, and on 25th September 1899 this action was threatened. After sundry correspondence, defender's brother, David Christie Knowles, offered to pay the balance admittedly due on these monthly notes, but refused to pay the older items. The payment offered was accepted on 5th December 1899, but only 'without prejudice to any rights or claims the said Mr Christison may have for supplies given prior to December 1895.'"

The pursuer pleaded, *inter alia*;—(1) The account sued for being due and resting owing, decree should be granted therefor as craved.

The defender averred that on a just account being stated, no balance was due by him to the pursuer; referred to and produced the receipted accounts after mentioned; and pleaded, *inter alia*;—(2) The action, in so far as concluding for food supplies prior to December 1895, is barred by the triennial prescription.

The receipted accounts referred to and produced by the defender were a series of approximately monthly accounts for oats, &c., rendered by the pursuer to the defender during the period from April 1896 to August 1899, and receipted by the pursuer on payment by the defender.

The defender also produced the following receipt (being that referred to by the pursuer in cond. 3), which was granted to D. C. Knowles, the defender's brother, and was signed on behalf of the pursuer:—"Brechin, 5th December 1899.—Received from D. C. Knowles, Esq., Market Street, the sum of sixty-nine pounds eleven shillings and sixpence sterling, being balance of monthly accounts due by his brother, Mr Keith Knowles, Edzell, to Mr Alexr. Christison, Denton Mills, for oats, &c., supplied up to 30th November last (and which monthly accounts are hereby discharged, but without prejudice to any rights or claims the said Mr Christison may have for supplies given prior to December 1895)."

It was not disputed by the pursuer that the whole items of the account sued on for the period after December 1895 were discharged by the receipts produced by the defender, and consequently that the sum of £754, 9s. 1d. sued for was the balance brought out by the account sued on for the period prior to January 1896.

On 7th June 1900 the Sheriff-substitute (Lee) pronounced this interlocutor:—"Finds in fact that for many years the pursuer has supplied the defender with corn and other food stuffs; that from 1884 to December 1895 said goods were supplied on current account, and

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the defender from time to time made payments to the pursuer in reduction of the amount due by him; that in December 1895 the account then current between the parties was closed by mutual arrangement, and that thereafter monthly accounts were handed to the defender, who has produced valid receipts in discharge of most thereof: Finds in law that, in the circumstances stated, the account which was closed in December 1895 and the subsequent monthly accounts fall to be dealt with as separate debts, and that the term of prescription in the case of each runs from the last item in each account: Therefore sustains the second plea in law of the defender to the extent of limiting the pursuer's proof of the prescribed accounts to the writ or oath of the defender."

The pursuer appealed to the Sheriff (Johnston), who, on 20th July 1900, adhered.

On 6th December 1900 the Sheriff-substitute pronounced this interlocutor:—"Finds in fact that it is admitted by the pursuer that the whole items in the account No. 4 of process dated subsequent to December 1895 have been paid by the defender; . . . that the defender does not deny the constitution of the debt alleged by the pursuer from May 1887 to December 1895; and that the pursuer has failed to produce any writ of the defender shewing the subsistence of the debt after three years from the close of the account in December 1895: Finds in law that the pursuer has not proved his debt by the writ of the defender, as required by the Act 1579, cap. 83: Before final judgment allows the pursuer, if so advised, to lodge a minute referring his debt, in so far as prescribed, to the oath of the defender, and for this purpose appoints the case to be put to the roll on Thursday, 20th December 1900."

On 20th December 1900 the Sheriff-substitute, in respect that the pursuer had failed to refer the debt sued for to the oath of the defender, assoilzied the defender from the conclusions of the petition.

The pursuer appealed, and argued;—The account sued on was truly continuous. The arrangement made in December 1895 did not import a closing of the account or a change in the course of dealing, but merely a change in the method of payment. The plea of prescription ought therefore to have been repelled.[1] At all events a proof ought to have been allowed.[2]

The argument for the defender sufficiently appears from the opinions of the Court.[3]

LORD YOUNG.—The triennial prescription deals with trading accounts, and requires those who supply goods to see that their accounts are regularly settled, or to take a document from the debtor acknowledging subsistence of the debt, the alternative being that they have no right to have an action established except by reference to their debtor's conscience. In the present case, in December 1895, when there is said to have been a sum approaching £1000 due to the pursuer, he and his customer arranged to change their system of dealing. It is impossible to deny upon the record and the docu-

[1] Ross v. Cowie's Executrix, Dec. 4, 1888, 16 R. 224.

[2] Wotherspoon v. Henderson's Trustees, July 10, 1868, 6 Macph. 1052, 40 Scot. Jur. 584.

[3] *Cited by Defender.*—Beck v. Learmonth, Nov. 30, 1831, 10 S. 81.

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ments before us that there was a change made then; indeed, it is not disputed, but is a matter of averment by the pursuer himself. This change was made in December 1895, and was acted upon for about five years, so that instead of there being a continuous account monthly accounts were rendered, and, generally speaking, were settled. Sometimes there was a small balance at the settlement at the end of the month, which was not paid, but was carried on to the following month, and so on. Now, at the end of five years, after the closing of the old account in December in 1895, this action is brought for the recovery of the balance then undischarged. The question which we have to consider is, whether the triennial prescription applies to this balance. In my opinion it does. If this creditor, who has not been attending to his own interests, by either insisting on payment or taking a document, suffers upon a reference to the conscience of his debtor, he has himself to blame for the consequences. I am of opinion that the judgment of the Sheriffs should be upheld.

LORD TRAYNER.—I concur. The triennial prescription begins to run from the last date in the account. If the account is a continuous account, no matter how long the period over which it extends, it is the last date in that account from which the triennial period must be reckoned, but if the account is stopped at a certain date (although the trading between the parties may continue) from that date the triennial prescription of the account begins to run. The question therefore here is, whether the account sued for is a continuous account. I think it is not. In order to shew this, it is sufficient to refer to the averment of the pursuer in condescendence 3, where he distinctly states that prior to 1895 there was a continuous account between him and the defender, which was then closed, and that thereafter a different arrangement was made, to the effect that instead of adding what was afterwards supplied to the account which had been running, these future supplies should be charged in separate accounts, and separately settled. It is also recognised that the account was closed at December 1895 by a statement that while the defender was thereafter to pay for monthly supplies each month, he was to pay off the amount of the old account by instalments as he could. That this arrangement was made and acted on is abundantly clear from the receipted monthly accounts and other documents produced.

LORD LOW.—I am of the same opinion. I agree with what your Lordships have said. I think it is impossible to get over the receipts which have been produced, and I have no doubt that the Sheriffs have taken a proper view of this case.

The LORD JUSTICE-CLERK and LORD MONCREIFF were absent.

The pursuer having moved to be allowed to lodge a minute referring the resting owing of the debt to the defender's oath,—

THE COURT pronounced the following interlocutor:—"Recall *in hoc statu* the interlocutor of 20th December last, in so far as it assoilzies the defender from the conclusions of the action:

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Allows the pursuer to lodge a minute referring the debt sued for to the defender's oath, reserving meantime all objections to said minute: *Quoad ultra* affirm the interlocutors of 7th June and 20th July 1900, and find in fact and in law in terms of the interlocutor of 6th December 1900."

R. S. SHARPE, Solicitor—BOYD, JAMESON, & KELLY, W.S.—Agents.

No. 81.

Feb. 14, 1901.* Barr v. Lee.

HUGH BARR AND ANOTHER, Petitioners (Appellants).—*Rankine, K.C.—Clyde.*
JAMES LEE, Respondent.—*Jameson, K.C.—Cook.*

Police—Burgh Police (Scotland) Act, 1892 (55 *and* 56 *Vict. c.* 55), *sections* 152, 153—"*New Street*"—*Width—Commissioners—Power to sanction width under* 36 *feet—Dean of Guild—Jurisdiction—Ultra vires.*—The Burgh Police (Scotland) Act, 1892, enacts, sec. 152,—"It shall not be lawful to form or lay out any new street . . . within the burgh, unless the same shall . . . be at least 36 feet wide." Sec. 153,—"Every person who shall, from and after the date when this Act shall come into operation in the burgh, form or lay out . . . any new street . . . or who shall build, raise, or add to any house or premises . . . contrary to the provisions of this Act, unless the same shall have been formally sanctioned by the commissioners on a consideration of the special circumstances of the case, which sanction they are hereby empowered to give, shall forfeit and pay" a penalty.

Held that by sec. 153 the commissioners of a burgh have power, "on a consideration of the special circumstances of the case," to sanction the laying out of a "new street" less than 36 feet wide, and that where they have done so their decision is binding on the Burgh Dean of Guild Court, and it is thereafter *ultra vires* of the latter to refuse a warrant for the erection of buildings on the street so sanctioned, on the ground that it is less than 36 feet wide.

Burgh—Dean of Guild.—Observations on the Dean of Guild's jurisdiction in regard to streets.

2D DIVISION. Dean of Guild Court, Paisley.

HUGH BARR AND JAMES BARR, joiners and builders in Paisley, presented a petition in the Dean of Guild Court of that burgh, in which they prayed the Court to line certain property of theirs at Wellmeadow in Paisley, and to grant warrant to erect thereon certain buildings, conform to plans produced.

The petitioners averred;—(Cond. 2) That they proposed to erect certain buildings on their property facing Wellmeadow Street, "and an improved entrance to be formed from Wellmeadow to Walker Street, all as shewn in, and conform to, plans," &c., prepared by an architect, and produced.

Objections were lodged for James Lee, surveyor and master of works of the burgh of Paisley, who averred;—(Stat. 2) "The said 'improved entrance' from Wellmeadow Street to Walker Street has not yet been formed or laid out as a new street within the meaning of the Burgh Police (Scotland) Act, 1892, sections 146 to 153 inclusive, but the proposed operations of the petitioners, for which they crave the warrant of the Court, will have the effect of forming or laying out a new street, or part thereof, within the meaning of said sections." (Stat. 3) "The proposed operations of the petitioners having the effect of forming or laying out a new street within the

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meaning of said Act, the levels and gradients thereof must be fixed by the Commissioners of the burgh of Paisley as required by section 147 of said Act." *

The objector pleaded;—(1) The proposed operations of the petitioners having the effect of forming or laying out a new street within the meaning of the said Burgh Police Act, the lining craved by the

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* The Burgh Police (Scotland) Act, 1892 (55 and 56 Vict. c. 55), sec. 146, enacts,—"Every person who intends to form or lay out any new street shall give notice thereof to the commissioners, and along with such notice he shall lodge a plan of the proposed street, with longitudinal and cross sections, shewing the proposed levels and means of drainage thereof, in order that the levels of such street may be fixed by the commissioners. . . ."

Section 147 enacts,—"The level and gradient of every such new street shall be fixed by the commissioners within one month after the delivery of such notice . . ."

Section 152 enacts,—"From and after the date when this Act comes into force within the burgh, it shall not be lawful to form or lay out any new street, or parts thereof, or court, within the burgh, unless the same shall . . . be at least 36 feet wide for the carriageway and foot-pavements; and no dwelling-house shall be built in any such street or court which shall exceed in height . . . one and a quarter times the width of such street . . . Provided always, that where any road or street fronts any links or common, or other open area, or in other exceptional circumstances, the commissioners may allow buildings of greater height; and provided also, that for the purposes of this enactment a street shall not include a mews or other lane, which may be made 12½ feet wide, or such other width according to the use to be made thereof, of which the commissioners shall judge, and shall fix the width accordingly. . . ."

Section 153 enacts,—"Every person who shall, from and after the date when this Act shall come into operation in the burgh, form or lay out, or permit or suffer to be formed or laid out, any new street or court, or any part thereof, or who shall build, raise, or add to any house or premises, or permit or suffer the same to be done, contrary to the provisions of this Act, unless the same shall have been formally sanctioned by the commissioners on a consideration of the special circumstances of the case, which sanction they are hereby empowered to give, shall forfeit and pay a sum not exceeding £20 . . . provided always that the provisions of this Act relating to the width and construction of streets or courts shall not extend or apply to any existing streets or courts, which shall be proved to the satisfaction of the commissioners to have been agreed to or to have been formed previous to the application of this Act."

Section 201,—"In burghs where there is a Dean of Guild Court at the commencement of this Act, or where such Court shall be established as hereinafter provided, the Dean of Guild Court shall come in room and place of the commissioners for carrying out the provisions of this Act, in so far as they apply to new buildings or alteration of existing buildings, ventilation, and precautions during the construction, alteration, or repair of buildings and streets, and to old and ruinous tenements, and to the setting up of hoardings; and in that case all the powers and duties of the commissioners in reference to these provisions, and also in reference to the inspection of buildings in process of construction or alteration, or any work connected therewith, and the surveying and certifying of buildings before occupation, shall devolve on and be carried out by the Dean of Guild Court and the officers thereof, as herein provided for, but nothing herein contained shall be taken to restrict or prejudice the jurisdiction, or to alter the constitution of any Dean of Guild Court as existing at the commencement of this Act."

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petitioners should not be granted until the levels and gradients of said new street have been fixed by the said Commissioners. (2) The said new street not being at least 36 feet wide, as required by said Act, and it not having been proved to the satisfaction of the Commissioners that it was an existing street or court agreed to or formed previous to the application of said Act, the application for a lining should be refused.

In answer to the objector's averments, the petitioners denied that the said "improved entrance" involved the formation of a "new street" under section 152 of the Act, and explained that the entrance referred to, which it was wished to improve, was an existing street formed previous to the date of the Act; and in respect thereof pleaded that the lining requested by them should be granted as craved.

On 26th May 1900 the Dean of Guild Court found that before the lining could be granted it would be necessary to have it determined that the proposed improved entrance was an existing street previous to the date at which the Burgh Police Act came into operation, and that it was outwith their jurisdiction to entertain that question. They therefore sisted the action until that question should have been determined in a competent manner.

The petitioners thereupon made application to the Commissioners of the burgh of Paisley, who, on 10th September 1900, found that it had not been proved to their satisfaction that the said improved entrance was an existing street previous to the operation of the Burgh Police Act; but "on a consideration of the special circumstances of the case" sanctioned "said improved entrance to be formed and laid out as a new street," according to the proposal submitted by the petitioners. That proposal involved a modification of the original plan, but fixed the width of the entrance at 30 feet, widening gradually towards one end to 32 feet 3 inches.

The petitioners thereupon lodged a minute, with the amended plan, in the Dean of Guild Court, along with an excerpt from the minutes of the meeting of the Commissioners on 10th September 1900, and a letter from the Clerk of the Commissioners intimating that the Commissioners had fixed the levels and gradients of the proposed entrance as laid down in the amended plan.

On 2d November 1900 the Dean of Guild Court pronounced an interlocutor refusing to grant the warrant craved.*

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* "NOTE.—When this case was previously before us, we sisted it to enable the petitioners to have it determined whether the proposed entrance running from Wellmeadow to Walker Street was an existing street or court agreed to or formed previous to the application of the Burgh Police (Scotland) Act, 1892. This, we indicated, could be done in two ways—(1) by proving to the satisfaction of the Commissioners that it was a street prior to the application of the Police Act, as provided for in section 153 of that Act, or (2) by procuring a declarator in any competent Court. The petitioners evidently chose the former method, and from the excerpt minute of meeting of the Commissioners lodged in process, it appears that they have failed to prove to the satisfaction of the Commissioners that the said improved entrance was an existing street prior to the application of the Police Act. The Commissioners, however, have accepted a compromise, whereby they agree to the said improved entrance being formed 30 feet wide at Wellmeadow Street and 32 feet 3 inches wide at Walker Street; and it also appears that they have fixed the levels and gradients of

The petitioners appealed to the Court of Session. No. 81.

The nature of the arguments sufficiently appears from the opinions of the Court. Feb. 14, 1901. Barr v. Lee.

LORD JUSTICE-CLERK.—I do not think this case is attended with any serious difficulty. It comes from the Dean of Guild Court at Paisley. That Court sits solely under the authority of the Burgh Police Act, 1892, and therefore whatever jurisdiction or rights that Court has are to be found by reference to that Act. The question before us turns upon whether clause 153 of that Act is to be interpreted as has been maintained by the respondent, namely, that it is merely a clause following upon, but not affecting the rights of the Commissioners under clause 152. I am quite unable so to read it. I read section 153 as authorising a party, who desires to form a new street, to apply to the Commissioners to allow that street to be formed in the special circumstances, without the restrictions which are imposed by the Act. It was absolutely essential for Mr Cook's argument that he should maintain that the words "unless the same shall have been formally sanctioned by the Commissioners on a consideration of the special circumstances of the case" do not apply to both the cases previously stated, and if his argument is not sound by which he maintains that they only apply to the latter part of the previous part of the clause, then plainly he has no case. Now, the clause itself speaks of two things,—"Every person who shall . . . form or lay out . . . any new street or court"—that is one thing—or, "who shall build, raise, or add to any house or premises," that is another thing. Surely it is not to be maintained that both of these cases are not covered by the words "contrary to the provisions of this Act." The person who is to be punished is to be punished because he has done

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said improved entrance on that basis. This compromise seems to have been made by the Commissioners in virtue of section 153 of the Police Act. It appears to us to be very doubtful whether the Commissioners have power to make such a compromise, but, in any case, we do not think that it is in any way binding on this Court. It is the peculiar jurisdiction of this Court to line the streets, and for that purpose to carry out the provisions of any Acts of Parliament relating to the width thereof. The compromise made by the Commissioners can, we think, only bind themselves, and put it out of their power to exact the penalties provided in the foresaid section of the Police Act.

"If that view of the law is the correct one, it is incumbent upon us as a Dean of Guild Court, to consider this application for a lining (as modified by the amended plan) on its merits, leaving out of account the fact that the street, as shewn in the amended plan, has been approved by the Commissioners. If we do so, we are at once met by the fact that the proposed improved entrance from Wellmeadow to Walker Street, is a new street within the meaning of the Police Act. This seems to follow from the findings of the Commissioners, and also from the fact that the petitioners, by entering into the compromise with the Commissioners, have apparently abandoned their original contention that it was a street prior to the Police Act, and now found their case on the fact that, though it is a new street, we are bound to line the buildings, because it has been approved of by the Commissioners, and the levels and gradients have been fixed by them. We cannot, however, agree with this contention. Being a new street, and being less than 36 feet wide, as required by the Police Act, we feel we have no option but to refuse the lining."

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something in the laying out of a new street, or because he has done something in the way of building, raising, or adding to any house or premises contrary to the Act. Does not the exception which follows apply to both just as the contravention applies to both—"unless the same"—that is, the thing done which was contrary to the Act—"shall have been formally sanctioned by the Commissioners on a consideration of the special circumstances of the case"? It seems to me impossible to attach any other meaning to these words. An endeavour was made to shew that the Commissioners with respect to the laying out of streets have no power except as regards levels and drainage. I cannot so read the Act. Section 146 says that a person who intends to form or lay out a new street must apply to the Commissioners, and must supply them first with a plan of the street, which necessarily shews the width and position, and further he must lodge with the plan longitudinal and cross sections, shewing the proposed levels and means of drainage. That is to say, his plan is to be a complete plan which the Commissioners can consider, and in this he is to shew not merely where the street is to be, what part of the ground is covered—its width and direction, — but also the longitudinal and cross sections, that they may judge of the proposed levels both as regards the surface and the drainage beneath the surface. But that the clause is intended to provide, and in express terms does provide, that the plans are to be laid before the Commissioners in order that they may judge of the proposed street, not merely as regards levels and drainage, but also as regards the forming and laying out of the street, I have not the slightest doubt. For confirmation of that it is only necessary to refer to subsequent clauses. Take, for example, clause 150:—"It shall be lawful for the Commissioners to agree with any person for the making of new streets for the public use through the lands, and at the expense of such person, and to agree that such streets shall become, and the same shall accordingly become on completion, streets to be maintained and repaired at the public expense." Now, that shews that the Commissioners have a title to agree that streets shall be laid out and formed according to plans laid before them which the Dean of Guild has never seen. And then clause 151, speaking of opening up and paving, flagging, or otherwise making good to the satisfaction of the Commissioners, says,—"It shall be lawful for the Commissioners to open up and make any such street in whole or in part according to its approved lines and levels." Approved by whom? Plainly approved by the Commissioners. Therefore I think all those arguments which are based upon clause 146 and the following clauses have no weight whatever. A person who wishes to lay out and get causewayed and paved a new street, thereby inducing people to take feus upon it, has to go to the Commissioners to get the lines of the road as well as the levels, as regards traffic and drainage, approved by the Commissioners, whose right and duty it is to see that roads are so laid down. It would be very extraordinary, indeed, if after a street has been formed or otherwise laid down and completed, another Court were to be entitled to say,—"No, that shall not be the line of the street, because the line of the street must give 36 feet of width, and the Commissioners have no power to lay it down at less." The Commissioners have the power to sanction things to be done contrary to the Act in the laying out and

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forming of new streets, and to sanction these things so that there shall be no penalty exigible from the person who has done them; and plainly, if they have the power to sanction them, they have the power to insist that they shall be carried out—at least, the party who gets their sanction has a right to insist on the use of his property in the ordinary way. In this particular case the Dean of Guild has no other jurisdiction than this—namely, to insist that the party who is going to build shall not encroach upon the line of the street. Beyond that I think he has no power to insist that the owner of property abutting on that street shall not build up to the edge of his property, and up to the edge of the street, as long as he does not contravene any of those conditions which the Dean of Guild has to enforce as to the buildings being properly executed and the work properly done. On the whole matter, I have come to the conclusion that the judgment of the Dean of Guild Court is wrong, and ought to be set aside.

LORD TRAYNER.—I am of the same opinion. Before dealing with sections 152 and 153 of the Burgh Police Act of 1892, upon which the argument generally turned, I should like to make a single observation as to the course the Dean of Guild took in disposing of this case. In May 1900 he sisted the process in order that the applicant should go to the Commissioners to have it decided whether this was a new street or not, or otherwise to go to a competent Court to have the matter determined by declarator. I think the Dean of Guild need not have sisted the process or referred the appellant to either of these remedies. The record sets forth that the plans shewed that the petitioners "intend to erect certain tenements facing another street or passage, called in the petition an 'improved entrance,' leading from Wellmeadow Street to Walker Street." Now, the answer was that one of these was not a new street but an old street, and I think the Dean of Guild might have ascertained the fact for himself. It was a matter of fact which could have been established, yea or nay, by probation. However, the appellants seem to have acquiesced so far in the view of the Dean of Guild, and went to the Commissioners, with the result that they dealt with this place as a new street, and authorised it to be formed of a width of less than 36 feet. The question comes to be, whether that was in their power. Now, it was argued by Mr Cook that section 153 must be regarded as surplusage or repetition of section 152. I think a consideration of the clauses shews that there is no surplusage, that there is no repetition, but that the two sections are the complement of each other. Section 152 provides that streets in burghs shall be at least 36 feet wide, and that no building shall be over a certain height. With regard to the height of these houses, the Commissioners may in exceptional circumstances authorise buildings of greater height. It then provides that a mews lane shall not be regarded as a street, because it is otherwise dealt with in the statute. Section 153, with regard to new streets, goes on to say that if any person shall lay out a new street which is "less than 36 feet wide"—I am using these words for the words "contrary to this Act"—he shall be liable in a penalty unless the limitation has been specially "sanctioned by the Commissioners on a consideration of the special circumstances of the case, which sanction they are hereby empowered to give." I have no difficulty, reading these two sections together,

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in coming to the conclusion that it is left to the Commissioners to say whether in special circumstances, of which they are the sole judges, there should be a new street authorised of less width than 36 feet. What is the attitude of the Dean of Guild towards that? He says that what the Commissioners have determined may bind themselves, but does not bind him, and he will take no notice of it. That is to say, that he will not give effect to what the Commissioners have done under statutory authority—which is in effect disobedience to the statute itself. I think the Dean of Guild is wrong in saying that the Commissioners' determination only binds themselves and is not binding upon him. I think everything they do in the exercise of their statutory powers is binding upon him, as well as upon every citizen, whether in office or not. Therefore, I have come to the conclusion that the Dean of Guild was quite wrong in refusing this lining on the grounds stated.

I should like to add, in conclusion, a few words about the Dean of Guild's jurisdiction. I think he has mistaken altogether what his jurisdiction is. He is quite entitled and bound to see that proposed buildings do not encroach upon the street which has been fixed, whether it is an old street of 20 feet or a new street of 50 feet wide. He is bound to see that buildings line the street in proper order of height. He is not entitled to say this is not a proper street. It is buildings in which he is primarily concerned, and he has no right and no authority to fix or establish the width of either a new street or an old street. This street having been approved by the Commissioners, his duty is to line the buildings so that they shall be in conformity with the lines laid down by the proper authority, namely, the Commissioners of Police. I think the appeal should be sustained and the case remitted back to the Dean of Guild.

LORD MONCREIFF.—I agree in the construction and analysis of the clauses which have been referred to by your Lordships. The contention on the part of the respondent in this appeal is, that the enactment at the beginning of the 152d section, to the effect that it shall not be lawful to form or lay out any new street in any burgh unless the same shall be at least 36 feet wide, is an imperative and inflexible enactment, and one which it is not within the power of the Commissioners or the Dean of Guild Court to relax. That would be a sound proposition if the enactment was not modified by a subsequent section. But I think it has been modified by the following words in the 153d section:—"Unless the same shall have been formally sanctioned by the Commissioners on a consideration of the special circumstances of the case." It is said that these words do not apply to the width of streets, but only to the building, raising, or adding to buildings contrary to the Act. I think the section will not bear that limited construction. If these words, "unless the same shall have been formally sanctioned" had come before the words "contrary to this Act," there might have been some ground for the argument; but they do not, and the fact that the words "contrary to the provisions of this Act" occur between the provisions about the width of streets and the building or raising of houses, and the proviso "unless the same shall be sanctioned by the Commissioners," shews that the latter proviso overrides all that precedes it. I only further

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add, that it is quite plain that this 153d section applies to the whole of the previous sections of this group of clauses from 142 down to 153. That is well illustrated by the words with which it concludes,—"Provided always that the provisions of this Act relating to the width and construction of streets or courts shall not extend or apply to any existing streets or courts which shall be proved to the satisfaction of the Commissioners to have been agreed to or to have been formed previous to the application of this Act." That is a proviso which qualifies all the preceding sections in the group. I am satisfied that the Commissioners' sanction to a departure from the statutory width of the street was lawfully given by them under the powers conferred upon them by the 153d section.

LORD YOUNG was absent.

THE COURT recalled the interlocutor appealed against, repelled the pleas in law for the objector, and remitted to the Dean of Guild Court to proceed.

JAMES CAMPBELL IRONS, S.S.C.—F. J. MARTIN, W.S.—Agents.

No. 82.
Feb. 15, 1901.
The "Ben Alder" v. The "Acacia."

THE NORTH BRITISH STEAM FISHING COMPANY, LIMITED (Owners of the "Ben Alder"), Pursuers (Reclaimers).—*Sol.-Gen. Dickson—Ure, K.C.—W. Brown.*
NORTH-EASTERN SHIPPING COMPANY, LIMITED (Owners of the "Acacia") AND OTHERS, Defenders.—*Salvesen, K.C.—Aitken.*

Ship—Salvage—Amount.—The "Acacia," a screw-steamship of the value, with her cargo and freight, of about £4000, whose pumps had been choked, and whose fires had been drowned out in a heavy gale, was rescued by a steam-trawler from a position of grave but not of imminent danger off the rocky coast near Aberdeen. Evidence on a consideration of which the Court *declined* to interfere with the judgment of the Lord Ordinary awarding £300 to the trawler for salvage services to the "Acacia."

2D DIVISION.
LdStormonth-Darling.

IN April 1900 the North British Steam Fishing Company, Limited, Aberdeen, registered owners of the steam-trawler "Ben Alder," of Aberdeen, brought an action against the North-Eastern Shipping Company, Limited, Elgin, registered owners of the steamship "Acacia," of Aberdeen, and also against Macdonald & Morrison, coal merchants, Inverness, owners of the cargo on board the "Acacia" on 17th February 1900, concluding for decree for £1500 against the first-named defenders and for decree for £150 against the second-named defenders, both as compensation for salvage services rendered by the "Ben Alder" to the "Acacia" on 16th and 17th February 1900.

The defenders admitted that the "Ben Alder" had rendered salvage services to the "Acacia" on the occasion in question, but pleaded that the sums sued for were excessive.

A proof was led. The following was the import of the evidence and the admissions of the parties:—

The "Acacia" was a screw-steamer of 415 tons gross register, and the "Ben Alder" a screw-steamer of 150 tons gross register, with engines of 50 horse-power.

At the time of the salvage the value of the "Acacia" and her freight and cargo was about £4000, and the value of the "Ben Alder," with her fishing-gear and catch of fish, was about £5000.

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The "Acacia" left Sunderland for Inverness at 2.45 A.M. on Thursday, 15th February 1900, with a cargo of coal and a crew of eleven. The wind was rising, and by about 3 P.M. a gale was blowing, with a very heavy sea. The wind continued to increase till about midnight, and the vessel's boats were stove in or carried away, and damage was done to her deck. After midnight the wind began to go down, but the sea continued very heavy. At 2 A.M. on Friday the 16th the engineer reported the pipes to be choked, and water to be gaining in the stoke-hole. The "Acacia" then made for Aberdeen. She reached Aberdeen Bay about 11 A.M. on Friday. The wind had then gone down, but as the sea was still very heavy she did not attempt to enter the harbour. About 2 P.M. the engines were reported stopped and the fires drowned out. There were at the time about a dozen vessels moving about the bay waiting for the sea to go down in order to enter the harbour. The master of the "Acacia" wished her to be towed to Fraserburgh, and after two of the other vessels had declined the service, the master of the "Ben Alder" agreed. The "Acacia" was then not more than a mile off the rocks at Girdleness, on the south of Aberdeen Bay. According to the evidence of the master of the "Ben Alder," the "Acacia" was "about half a mile from the rocks at Girdleness, and was drifting on to them with the tide, which was coming up from the north. . . . She was shipping heavy seas, and she was apparently helpless. If we had not picked up the 'Acacia,' I think she would have been on the rocks in about three-quarters of an hour or an hour."*

* William Crombie, harbour-master at Aberdeen, examined by the pursuers, deponed,—"I recollect the storm in February last. It was an exceptionally severe one, and a large number of vessels perished in it. . . . The storm was at its height from eleven o'clock on Thursday night to three o'clock of Friday morning. It moderated gradually on Friday, coming to a calm almost, but the sea was still very heavy. . . . I recollect seeing the steamship 'Acacia' flying signals of distress early in the afternoon of the Friday. I was then at the flaghouse at the north pier. The 'Acacia' was to the southward from where I was standing. She was in a very dangerous position. She was off a very rough part of the coast. There was no good anchorage there. At that time there was a heavy sea coming in from the south-east, and the current was then flowing southward. It was full tide that afternoon at half-past two. (Q.) And does the current flow south after high water off Girdleness? (A.) For fully two hours, and it sets off there as well. (Q.) So that the effect of the wind and sea from the south-east and the current flowing south would be to take the 'Acacia' in on the rocks? (A.) It is my opinion that she would have cleared the Girdleness, and would have gone to the Cove, three or four miles south of Girdleness. That would have been owing to the strength and the offset of the tide. . . . I saw the 'Ben Alder' going to pick up the 'Acacia,' and then I saw her get the 'Acacia' in tow. . . . At that time it was quite impossible to get into Aberdeen Harbour. . . . At first the 'Ben Alder' towed the 'Acacia' out to sea and then northwards. There was still a very heavy sea running. (Q.) In your judgment, was it a difficult and dangerous operation? (A.) It is always a difficult operation to take a vessel with a screw in tow and with a sea running like that. (Q.) It was on account of the heavy sea and the fact that they were screws, and not paddle-steamers? (A.) Yes. There was a danger of fouling the propeller. It was not till about half-past eleven on the Saturday forenoon that I first put up signals intimating that it was safe to come into the harbour. There was still a good bit of sea on, but nothing to what it was on the Friday. I saw the 'Ben Alder' bringing the 'Acacia' in. (Q.) Was it a difficult

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The "Acacia" was flying a signal of distress. In passing the tow-lines on board the "Acacia" the "Ben Alder" came within four feet of the "Acacia." The tow-lines broke twice before they were finally made fast, with the risk of fouling the propeller of the "Ben Alder," and thus rendering her helpless. A screw-steamer, on account of the risk of the tow-lines fouling her propeller, is less suitable than a paddle-steamer for salvage or towage services. After towing the "Acacia" northwards to Fraserburgh for some time the "Ben Alder" abandoned the attempt on account of the heavy seas, and took the "Acacia" back to Aberdeen Bay, where the "Ben Alder" remained attached to the "Acacia" all night, "dodging about" (as the master of the "Ben Alder" expressed it). About 2 A.M. the "Acacia" heeled over, and all her boats being lost or useless, and the "Ben Alder" having none available, the "Acacia" sent up rockets for a boat. The trawler "North Coast" sent a boat alongside, which was kept astern of the "Acacia" in case she should sink. Ultimately this boat was swamped when the "Acacia" in tow of the "Ben Alder" was entering Aberdeen Harbour. The two vessels got safely into the harbour about 2 P.M. on Saturday the 17th. The total time occupied by the salvage services was about twenty-four hours. It appeared that the "Ben Alder" lost no time, as it would have been very hazardous for her to attempt to enter Aberdeen Harbour sooner than she did even had she not had the "Acacia" in tow. No damage was done to the "Ben Alder" beyond the straining to her hawsers.

On 5th December 1900 the Lord Ordinary (Stormonth-Darling) pronounced this interlocutor:—"Decerns against the defenders the North-Eastern Shipping Company, Limited, for payment to the pursuers of the sum of £279, 5s. 6d. sterling, with interest thereon at the rate concluded for, from this date till payment: Decerns against the defenders Macdonald & Morrison for payment to the pursuers of the sum of £20, 14s. 6d. sterling, with interest thereon at the said rate, from this date till payment: Finds" as to expenses.*

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operation? (A.) It was difficult the way he came in with her. (Q.) And dangerous? (A.) Yes, dangerous for the 'Acacia.' (Q.) Was that because of the sea that was running and the fact that the 'Ben Alder' was a smaller vessel than the 'Acacia' and a screw? (A.) No. It was because they did not allow for the flood tide running across the harbour; and with the great length of rope they had out, they had enough to do to keep clear of the breakwater. One of the 'Ben Alder's' ropes parted when the vessels were in between the pier and the breakwater. After getting inside the pier end, she came up pretty well. There was danger of the 'Acacia' not clearing the south breakwater. She was scarcely clear of it at one time. (Q.) It was necessary to have a long stretch of rope out in order to make quite sure that the rope would not break? (A.) They are bound to have a long stretch out when it is wild weather. (Q.) Did the 'Ben Alder,' in your judgment, run a serious risk in carrying out the salvage? (A.) Her greatest risk would have been at the time of taking the 'Acacia' in tow. The 'Acacia' seemed to us to be helpless."

* "OPINION.—The services rendered by the 'Ben Alder' to the 'Acacia' on 16th and 17th February 1900 are admitted to have been salvage services, and therefore the question which I have to decide is simply one of amount. The 'Acacia' when picked up shortly after 2 P.M., on the 16th, was undoubtedly in a position of danger, not, I think, of extreme or imminent, but certainly of grave danger. She had been knocked about so badly in the

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The pursuers reclaimed, and argued;—The amount to be awarded for the salvage services here in question ought to be at least twice the amount awarded by the Lord Ordinary. The pursuers did not dispute the accuracy of the Lord Ordinary's estimate of the evidence except in one important particular, viz., they maintained that the Lord Ordinary had seriously under-estimated the "Acacia's" danger. It was certain that from 2 P.M. on Friday, when her fires were drowned out, she was absolutely helpless in so far as her own motive power was concerned. She was then close to the rocks at Girdleness, upon which she was apparently drifting. She, no doubt, might have let down her anchors, but these might have dragged. No doubt, also, the harbour-master was of opinion that the tide would have overcome the influence of the wind, and brought her clear of the rocks into a position of comparative safety. But an opinion on a question of that sort—even the opinion of a man, like the harbour-master, experienced in the locality—ought not to be allowed to weigh much in estimating the danger to a vessel in such a position. The danger to the salved vessel and to the salvor, the time occupied in salving, the value of the salved vessel and cargo, warranted a much larger award than the Lord Ordinary had given. That was the result of the authorities, especially

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heavy gale of the night before that her fires were drowned out, and her motive power gone. She was lying a mile or so off Girdleness, near Aberdeen, and had hoisted signals of distress. The wind had by that time gone down, but a heavy sea was running in, and though the tide might possibly have carried her southward and clear of the rocky coast which stretches from Aberdeen to Stonehaven, it is also quite possible that she might have drifted on the rocks. It was high time, therefore, that some vessel should come to her assistance, as the 'Ben Alder' did. There were a good many others about waiting to get over the bar at Aberdeen, but one of them refused to take her in tow, on the ground that she had no lights. Probably that was a sufficient reason, but there certainly seems to have been no competition for the work of salvage.

"Next, I think it is impossible to say that there was no risk to the 'Ben Alder.' The work of picking up a disabled vessel in a heavy sea must always involve a certain amount of risk. The tow-line broke twice, and this required the 'Ben Alder' to come within a few feet of the 'Acacia.' There was no fouling of the propeller when the ropes broke, but there might have been, and the two vessels might have collided.

"The services occupied about twenty-four hours. At first there was an attempt to tow the 'Acacia' towards Fraserburgh, in accordance with her master's desire, but the force of the sea was found to be too strong, and ultimately she was taken into Aberdeen. During the night the crew of the 'Acacia' became afraid that she might go down, and, their own boats having been rendered useless, they sent up rockets, in answer to which a boat came from the trawler 'North Coast,' and was towed in their wake, ready for any emergency, till they reached Aberdeen. An attempt was made by the pursuers to shew that the 'Ben Alder' ran some risk in taking the 'Acacia' into port. But the risk, I think, was to the 'Acacia,' and not to the 'Ben Alder.' No actual damage was sustained by the 'Ben Alder' except that her hawsers were strained, and new hawsers had to be got a few months sooner than would otherwise have been the case.

"As regards the 'Acacia,' the parties are agreed in stating the value of ship, freight, and cargo at £4000, and the value of the 'Ben Alder' at a little over £5000. Taking all the circumstances into account, I come to the conclusion that £300 is a reasonable award."

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some decisions in England which in their general circumstances were close to the present.[1]

Argued for the defenders;—There was no ground for interfering with the judgment of the Lord Ordinary. The Court would not interfere with the judgment of the Lord Ordinary on a question as to the amount to be awarded for salvage services unless the Court were satisfied that the Lord Ordinary's award was unreasonably too large or unreasonably too small.[2] No such case had been made out here. The pursuers admitted that the Lord Ordinary's estimate of the evidence was correct, except in the matter of the danger to the "Acacia." Upon that matter the Lord Ordinary had correctly expressed the result of the evidence when he said the danger was grave, but not imminent. Upon the assumption of the Lord Ordinary's view of the facts the award was ample, looking to the authorities in Scotland[3] and also in England.[4]

LORD JUSTICE-CLERK.—We have had an able debate in this case, and having given it the best consideration I can, I do not think it is a case in which the Court should interfere with the discretion which the Lord Ordinary has exercised. It is certainly a small award which the Lord Ordinary has given, and it is quite possible that if we had been considering the case for the first time we might have been inclined to think that something a little more liberal might be given, but I feel myself unable to say that the Lord Ordinary is wrong in what he has done, or that it would be justifiable to hold that this is a case in which a much larger amount ought to be given than the Lord Ordinary has awarded. The case is in some respects peculiar, because when the services were first offered to this vessel, which was in a broken-down state, the services which were asked for and

[1] The "Albion," 1837, 3 Hagg. 254; The "Lord Grey," 1837, 3 Hagg. 363; The "Paris," 1854, 1 Spink, 289; The "M'Morran Castle," Dec. 16, 1898 (reported only in the *Shipping Gazette*), where a ship of the value of £4500 was salved by a trawler off the coast at Aberdeen: award £1500; The "Sea Eagle," Aug. 8, 1900 (unreported), where the salved ship was of the value of £4500, and the award was £1500.

[2] Liverpool Steam Tug Co., Limited, v. Cornfoot, June 19, 1900, 2 F. 1060; Duncan v. Dundee, Perth, and London Shipping Co., March 8, 1878, 5 R. 742; The "Vulcan" v. The "Berlin," July 6, 1882, 9 R. 1057.

[3] Liverpool Steam Tug Co., Limited, v. Cornfoot, 2 F. 1060.

The defenders also referred to the following unreported Outer-House cases:—

Scott v. Wighton, Feb. 4, 1898 (Lord M'Laren), where one steamship had salved another (of the value of £1800), whose engines had broken down, and which was in imminent peril of drifting on the coast of Fife: award £180.

The Cargill Steam-Trawling Co., Limited, v. The Fraserburgh and North of Scotland Trawling Co., Limited, May 26, 1900 (Lord Stormonth-Darling), where a steam-trawler, which had salved a disabled trawler of the value of about £6150, was awarded £250, although she had lost two days' fishing in performing the services.

The Peterhead Steam Fishery Co., Limited, v. George M'Gown, Nov. 17, 1900 (Lord Low), where a lifeboat and a steam-trawler had, three miles to the north of Peterhead, salved a ship of the value of between £14,000 and £15,000, which was being towed to Sunderland to be fitted up with boilers, and had become unmanageable in a heavy storm: award £600.

[4] The "Werra," 1886, L. R., 12 P. D. 52.

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which were accepted were towage services simply, not as regards towing out of immediate and imminent danger, but towing to another port altogether, namely, Fraserburgh, the damaged vessel being on her voyage to Inverness. It turned out after the trouble they had with the hawsers, and so on, that it was thought more advisable, as the wind had abated and the sea was gradually falling, and the signal was taken down at Aberdeen Harbour, that the vessel should be taken in there. Now, I am not satisfied that at any time she was in what may be called imminent danger. The harbourmaster, who was probably a very good judge on such matters, was of opinion that the wind having fallen, even if she had not received assistance, she might have cleared the head and got into what would be good anchor-holding ground in the diminishing sea within the cove behind. But whether that is so or not, I am satisfied that at the time she was taken up she was taken up for towage service in the ordinary way, and only later on it was thought advisable, owing to some difficulties they had owing to the heaviness of the sea, to take her to Aberdeen.

Now, a number of the cases quoted to us indicate very plainly that without forming a very close and accurate estimate of the circumstances—which can always be best done by the Judge who hears the case—it is not easy to fix the compensation in such cases, because if we take the cases which have been decided, we find in some of them what appears to be a very large salvage given, and in others what appears to be a small salvage given, although, on the general view of the services rendered, it is difficult to see that there is much difference between them. But there have been cases quoted to us where the award has been fixed upon a percentage of the value of the property, the subject of the salvage, and the proportion given by the Lord Ordinary is quite reasonable in view of these cases. In the circumstances I do not think that it would be advisable for us to interfere with the judgment at which the Lord Ordinary has arrived.

LORD TRAYNER.—I am of the same opinion. In this case, as in every case of a claim for salvage, one must deal with the special circumstances which the case presents, because you cannot find, or almost never can find, any one case precisely on all fours with others where the very same considerations come into force and with the same weight. But there are one or two general considerations always observed in dealing with cases of the present kind. We must consider what was the risk the salved vessel was in; we must consider what was her value; we must consider what was the risk, if any, that the salvor undertook and underwent; and we must consider also the risk, if any, to the salvor's property. In dealing with this case in these views, I am of opinion that it would be contrary to the principles already laid down in this Court to interfere with the judgment reclaimed against. I agree with the Lord Ordinary in thinking that there was here salvage service. I am not prepared to say that there was salvage service of a highly meritorious order. I do not think the salvors' risk was very great, and while the "Acacia" was, as the Lord Ordinary says, in grave danger, I cannot say that she was in imminent peril of loss. There was a grave risk of loss and peril, but not so imminent as the pursuer has suggested. Looking to the amount of peril in which the "Acacia" was,

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and taking a liberal view of the service rendered to her by the "Ben Alder," I am not prepared to say that the Lord Ordinary's award is unreasonably inadequate. Now, I am of opinion that we should not interfere with the judgment fixing the amount of award or remuneration for salvage services—the award given by the Judge of first instance—unless we are prepared to affirm that the amount is either unreasonably inadequate or unreasonably extravagant. I do not think that this is a case in which I can come to the conclusion that a really substantial difference ought to be made on what the Lord Ordinary has done, and though I might—I do not say that I would—if I had been Judge of first instance, have pronounced an award in excess of what the Lord Ordinary has given, I am not disposed to interfere with what the Lord Ordinary has done. I am therefore for affirming the interlocutor of the Lord Ordinary.

LORD KINCAIRNEY.—I am of the same opinion. No question of law has been raised, and the view which the Lord Ordinary has taken about the facts has not been challenged except in one particular. Mr Ure maintained that his Lordship had underrated the danger in which the salved vessel was placed, and I was much impressed with his argument on that point. But on considering the passages in the proof quoted by Mr Aitken I have come to think that the Lord Ordinary has taken the right view on that matter also, and that he has justly characterised the danger as grave, but not more than that. The question therefore is reduced to this, whether the Lord Ordinary, being right in fact and in law, has gone wrong on the assessment of the damage—on that point I am not without the impression that the defenders have been let off somewhat easily. Still, having regard to the recent judgment cited as the "*Pathfinder*,"[1] I cannot suggest that this judgment should be altered. I am by no means prepared to characterise this assessment as unreasonable, although I should have been ready to agree had it been somewhat greater. It is supported by the cases decided in the Outer-House which were quoted, and also by the important case of the "*Werra*,"[2] in which the principles of assessment in such cases are discussed more fully than in the other cases cited. I think the cases of the "*Sea Eagle*"[3] and "*M'Morran*"[3] must be regarded as exceptional.

LORD YOUNG and LORD MONCREIFF were absent.

THE COURT adhered.

ALEX. MORISON & CO., W.S.—BOYD, JAMESON, & KELLY, W.S.—Agents.

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JAMES JOHNSTONE, Pursuer (Respondent).—*Johnston, K.C.*—*W. Thomson.*
ROBERT THORBURN, Defender (Reclaimer).—*Sol.-Gen. Dickson*—*Clyde.*

Agent and Client—Reparation—Liability for imprudent investment—Trust.—A, one of two testamentary trustees, and factor for the trust, applied to the law-agent of the trust for information as to investments available at Martinmas 1880. The trust-deed gave power to the trustees to

[1] Liverpool Steam Tug Co., Limited, v. Cornfoot, 2 F. 1060.
[2] L. R., 12 P. D. 52.
[3] See *supra*, p. 495, note 1.

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invest in railway debentures or on debenture bonds of any Parliamentary trust. The law-agent wrote to A mentioning debenture bonds by the Caledonian Railway Company for four years at 3¾ per cent, and debenture bonds of the Greenock Harbour Trust for seven years at 4 per cent, and added,—"Looking to the undoubted security of the Caledonian Railway, I feel disposed to recommend the trustees to lend the money to them, notwithstanding that they are ¼ per cent below the Greenock Harbour Trust. The Greenock Harbour Trust I deem perfectly safe, and have a large sum lent to them for various clients, but the Caledonian Railway Company is exceptionally good, and hence my recommending it in preference to the other, the difference in rate being so small. Will you kindly consult with your co-trustee and advise me of the decision you arrive at."

The trustees, after inquiry, resolved to invest on Greenock Harbour debenture bonds. The investment resulted in a loss to the trust-estate for which the trustees were held liable to the beneficiaries on the ground that the investment was imprudent.

In an action by A against the law-agent for relief on the ground that he had failed in his duty to advise the trustees as to the expediency of the investment, particularly in not calling their attention to an Act passed in August 1880 which gave prior bonds a preference, *held* (after a proof, and *rev.* the judgment of Lord Kyllachy) that in making the investment the trustees had not relied on the agent's recommendation, but on their own independent inquiries, and that accordingly the agent was not liable in relief.

Opinion (*per curiam*) that it was not the duty of the defender, merely in respect of his appointment as law-agent of the trust, and without any express employment or instructions, to make inquiries in regard to the financial sufficiency of the Greenock Harbour Trust.

1ST DIVISION.

THE late Charles Alexander, farmer, Easter Knowe, parish of Stobo, died on 3d September 1879, leaving a trust-disposition and settlement by which he conveyed his whole estate, heritable and moveable, for the benefit of his widow and children, to James Johnstone, farmer, Hunterheck, Moffat, and Peter Inglis, farmer, East Pilton, as trustees. The trustees accepted office, and Mr Thorburn, solicitor, Peebles, became agent of the trust, while Mr Johnstone was appointed factor and manager, with power to open a bank account.

After inventories had been made up, and the greater part of the trust-estate realised, the following correspondence took place as to its investment:—On 28th May 1880 Mr Johnstone wrote to Mr Thorburn,—"Mr Inglis and I will be glad to come through as soon as you have matters ready for us, as we would like the money invested as soon as possible."

On 13th September Mr Thorburn wrote in reply to this communication,—"I have been making inquiries regarding a suitable investment for £2000 of this trust's funds, and the best terms I can get for money at Martinmas are as follows, viz.—On debenture bond by the Caledonian Railway Co. for 4 years 3¾ per cent. On debenture bond of the Greenock Harbour Trust for 7 years at 4 per cent. I made inquiry at the other leading railway companies and at several first-class Parliamentary trusts, but found they were not open to borrow at Martinmas. Looking to the undoubted security of the Caledonian Railway, I feel disposed to recommend the trustees to lend the money to them, notwithstanding that they are ¼ per cent below the Greenock Harbour Trust. The Greenock Harbour Trust I deem perfectly safe, and have a large sum lent to them for various clients, but the Caledonian Railway Co. is exceptionally good, and hence my recommend-

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ing it in preference to the other, the difference in rate being so small. Will you kindly consult with your co-trustee and advise me of the decision you arrive at." To this letter Mr Johnstone replied on 30th September 1880,—"I had your letter anent the investing of the E. Knowe trust funds. Of course we have every wish to do the thing safely, but at the same time are anxious, if it were possible, that an investment could be got to give 4 p. c. in return. . . ." Mr Thorburn replied on 1st October 1880,—"I have your favour of the 30th ulto. . . . It is no doubt very desirable to get a return of 4 per cent, and I think you might do worse than take the Greenock Harbour Trust bonds, which yield that rate. Of course I cannot guarantee that we will now get these bonds or the Caledonian Railway ones, as some time has elapsed since I wrote you, but I have little doubt but that we could if the matter is settled without delay. One recommendation I may mention which the Caledonian Railway bonds have is, that the company will take the money for a shorter period, viz., four years, at the end of which time we may get very much better terms, and probably you will keep that circumstance in view in deciding the question."

On 12th October 1880 the trustees met and passed a resolution in the following terms:—"The trustees having taken into consideration the propriety of investing £2000 of the funds under their management, and being thoroughly satisfied from inquiries made by them of the sufficiency of the Greenock Harbour Trust, resolved to lend that sum to them on debenture bond for seven years, from Martinmas first, at 4 per cent, or for such shorter period as the agent may be able to arrange with the trust."

The investment was made in pursuance of this resolution on 11th November 1880, by Mr Thorburn, who received a commission of ½ per cent from the Greenock Harbour Trust upon the sum invested. Interest at 4 per cent was regularly paid down to 1887, when the Harbour Trust became insolvent.

Mr Inglis died in 1896, and his estate proved insolvent.

In 1897 the widow and children of the truster raised an action against Mr Johnstone, the surviving trustee, and against the representatives of Mr Inglis to recover the loss to the trust-estate resulting from the investment.[1] In this action the defenders were found liable, on the ground that the investment, although *intra vires*, was an imprudent exercise of the trustees' powers, the new dock at Greenock Harbour, for the construction of which the money was borrowed, being a mere commercial enterprise, untried at the date of the investment, and depending for its success upon various contingencies connected with the shipping trade.

Mr Johnstone having paid the sum decerned for in that action raised the present action in May 1899 against Mr Thorburn as agent of the trust, in which he claimed relief by way of damages in respect of the sums for which he had been found liable. The pursuers averred that the defender had acted in regard to the investment not merely as a conveyancer, but as a financial adviser, and further, that as regards the order of priority of the Greenock Harbour bonds he had failed in his duty as law-agent by not informing the trustees that under the statutory powers of the harbour, and, in particular, under the Harbour Act of 12th August 1880, bonds granted prior to that

[1] Alexander v. Johnstone, March 3, 1899, 1 F. 639.

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date, amounting to £873,000, would form a prior charge upon the rates, duties, and other revenues of the harbour, and that the bond which he obtained for the trustees, in pursuance of the resolution of 12th October 1880, was a postponed bond.

In answer to these averments, the defender stated that the investment in question was selected by the trustees as the result of inquiries made by themselves, and, in particular, by the deceased Mr Inglis; that the defender was not asked or employed by the trustees to make any inquiries regarding the bonds, or to report upon them as securities, and was in no way responsible for the decision at which the trustees arrived.

The pursuer pleaded;—(1) The pursuer having suffered loss through the fault, negligence, and breach of duty of the defender, as his agent and adviser, to the extent sued for in the conclusions of the summons, the defender is liable to repay these sums to the pursuer as concluded for.

On 25th November 1899 the Lord Ordinary (Kyllachy) allowed a proof. The proof shewed that no special instructions had been given to the defender in regard to the investment in question beyond what appeared in the correspondence and minute quoted above. Owing to the death of Mr Inglis, there was not much evidence as to what inquiries, if any, were made by him as to the Greenock Harbour bonds. The Lord Ordinary held that the result of the evidence, oral and documentary, was to shew that the investment was made in reliance on the representation of the defender that the bonds were safe, and not in consequence of independent inquiries by the trustees, while the Inner-House were of opinion that the trustees had relied upon their own inquiries and judgment, and not on the initial statement of the defender. The reasons for these respective views appear from the opinions.

On 30th April 1900 the Lord Ordinary pronounced the following interlocutor:—"Decerns against the defender to make payment to the pursuer of (1) the sum of £2000, and (2) the sum of £198, 16s. 6d., making together the sum of £2198, 16s. 6d., in full of the conclusions of the summons, the said defender on making payment of said sum receiving in exchange at his own expense an assignation or transfer of the £2000 B Debenture Stock of the Greenock Harbour Trust at present held by the pursuer, with all right, title, and interest which the pursuer at present has in the said Debenture Stock, and with any interest due and to become due thereon." *

* "OPINION.—This case is the sequel of an action which was lately before the Court, and in which certain trustees were held liable to make good to their beneficiaries the loss arising upon an investment in the bonds of the Greenock Harbour. The pursuer—the survivor of the trustees, who as it happens has had to bear the whole loss—now brings the present action to obtain relief by way of damages from the solicitor to the trust, on whose advice the investment was, it is said, made, and who carried through the transaction; and the ground of the demand is that the solicitor failed in his duty, and is liable to his employers on the head of professional negligence.

"It must be assumed in this action that the trustees were responsible to the beneficiaries, notwithstanding the advice which they obtained. It was not pleaded in the former action that the matter was one which they were entitled to delegate, and accordingly that point was not decided. But whether they could or could not have successfully defended themselves on

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The defender reclaimed, and argued;—In the previous action [1] the present pursuer had been found liable on the ground that the investment in the Greenock Harbour bonds was an imprudent exercise of the trustees' powers. Here the question was whether there had been such want of professional skill on the part of the law-agent of the trust as to justify a claim of damages measured by the liability which had been incurred by the present pursuer. It was thus an action of relief, and as such was incompetent, because the ground of liability put forward in the action of relief was different from and inconsistent with the grounds of liability in the principal action.[2] It was not proved that the defender received from the trustees instructions to inquire or advise as to the sufficiency of the security, and no charge in respect of this investment was made against the trust. The commission received from the borrower (the Harbour Trust) for introducing the lender had no reference to work done in relation to the investment, and could not extend the scope of the agent's employment by the other party. Without special employment an agent had no duty in regard to the selection of securities.[3] It might be conceded that if

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that ground, it is not, I apprehend, doubtful that if they prove as against their solicitor a case of professional negligence of which the bad investment was the result, they (or the pursuer as now sole surviving trustee) have a good action against the solicitor on the contract of employment.

"There can be no doubt that the investment was an improper investment of trust funds. It has been decided finally, in this Court, that it was grossly imprudent; and it is, I think, important to notice wherein its imprudence was held to consist. Speaking generally, it came to this, that the investment was a speculative investment, depending as it appeared on the success or failure of a certain commercial enterprise—an enterprise which was in course of being initiated, and which had not been in any degree tested by results. It therefore belonged to a class which (whether prudent or imprudent for a man risking his own money, and setting the chance of gain against the chance of loss) was, as established by repeated decisions of the Courts, grossly imprudent for a trustee; as indeed it would in general be for any person who, although dealing with his own funds, was making a provision for the future of others.

"It has also, I think, to be kept in view that the vice of the investment arose by virtue substantially of the operation of certain Acts of Parliament, by which the affairs of the Greenock Harbour Trust were regulated, and particularly of an Act passed in the month of August 1880, shortly before the date when the investment was made. That Act—the Bill for which was before Parliament when the trustees and the defender had first occasion to consider the matter—provided (upon its just construction) that all bonds issued after its date should be postponed in priority to all bonds previously issued. It also provided for the application of the money borrowed to the construction of a new dock—known as the James Watt Dock—which it was hoped would divert a certain class of traffic from Glasgow to Greenock, and thereby augment largely the revenue of the Greenock Harbour. The result of course was that to anyone proposing after August 1880 to invest in the bonds of that harbour, the question of safety or risk

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[1] Alexander v. Johnstone, 1 F. 639.

[2] Ovington v. M'Vicar, May 12, 1864, 2 Macph. 1066, 36 Scot. Jur. 553.

[3] Rae v. Meek, July 19, 1888, 15 R. 1033, at 1055, and Aug. 8, 1889, 16 R. (H. L.) 31; Stirling v. Mackenzie, Gardner, & Alexander, Dec. 7, 1886, 14 R. 170, *per* Lord Fraser, p. 177; Cleland v. Brownlie, Watson, & Beckett, Nov. 30, 1892, 20 R. 152, at 164; Learoyd v. Whiteley, 1887, L. R., 12 App. Cas. 727, *per* Lord Watson.

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there were such special employment the agent would be liable for failure to exercise due care.[1] The Lord Ordinary was wrong in saying that the defender "accepted the duty of making inquiries." Such a statement was not justified by the evidence in the case. The pursuer maintained, secondly, that the defender as law-agent, and without special instruction, was bound to have kept the trustees right as regards the question of the priority of the bonds, but it was clear that if the undertaking of the trust had been sound financially the fact that the bond obtained by the trustees was a postponed bond would have been immaterial.[2] The *onus* of proving a failure of duty unequivocally causing the loss was in any event upon the pursuer in an action of damages, and it was not proved, and was not the case, that the loss was due to error in regard to the priority of the bond, and not to error as regarded the financial position and prospects of the undertaking. All the cases cited as to heritable bonds referred to matters falling properly within the scope of a law-agent's duty. The reversal in the case of *Campbell* v. *Clason*[3] left nothing standing for which the case could be regarded as an authority. The question of postponement of a bond such as this was not *in pari casu* with the case of a heritable bond. The preference was only on revenue, and

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was one of considerable complexity, involving for its proper appreciation points of construction of Acts of Parliament, as well as points of accounting arising on the published accounts of the Harbour Trust.

"In these circumstances, the questions now for decision appear to be these: (1) Did the defender bring the investment in question before the trustees as a safe and proper investment of trust funds; (2) did he do so after due inquiry and in the exercise of a due and careful judgment; (3) did he act in the matter on his professional responsibility; and (4) did the pursuer and his co-trustee act on his (the defender's) advice, and did they make the investment relying upon and induced by it.

"On the first two of these questions, controversy is hardly possible. The facts sufficiently appear from the correspondence, and from the quite candid testimony of the defender himself. There was it appears in the summer of 1880 a sum of £2000, forming the bulk of the trust-estate, for the investment of which the defender was asked to arrange. He wrote in reply that it would be somewhat difficult at the time to get a satisfactory security, but that he would do his best to get the money put up with as little delay as possible. After some months he again wrote stating that he had been making inquiries regarding a suitable investment and had found two, viz., debentures of the Caledonian Railway and bonds of the Greenock Harbour, and that while disposed to recommend the first of these as preferable, he deemed both investments perfectly safe. He went on to ask the pursuer to consult with his co-trustee and to advise him as to their decision and in a subsequent letter, in reply to one from the pursuer pointing out that the trustees while wishing to do the thing safely, desired, if possible, a 4 per cent return, he finally stated that it was no doubt very desirable to get a return of 4 per cent; and that he thought that the trustees might do worse than take the Greenock Harbour bonds, which yielded that rate. Such was his advice, given as the result of inquiries which he had made.

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[1] Raes v. Meek, 15 R. p. 1055; Blyth v. Fladgate, &c., L. R. [1891] 1 Ch. 337, at p. 360.

[2] Machan v. Soady's Trustee, July 19, 1888, 15 R. 966, at 979.

[3] Dec. 20, 1838, 1 D. 270, 11 Scot. Jur. 196; June 16, 1840, 2 D. 1113, 12 Scot. Jur. 526; May 30, 1843, 5 D. 1081, 15 Scot. Jur. 434, reversed May 30, 1845, 17 Scot. Jur. 500.

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the question of margin of revenue was a practical question, and not one of legal skill.

Argued for the respondent;—It was not necessary to contest the doctrine that it was the client, and not the agent, who had to determine as to the sufficiency of any proposed security, nor the distinction between the duties of trustees, and of the law-agent of a trust. But the rule was modified where there was special employment, and such employment might be proved by facts and circumstances, and the law-agent might take upon himself the duty of advising.[1] Lord President Robertson correctly stated the rule in regard to this matter in the case of *Cleland*.[2] This was not a mere case of introducing an investment, there was a recommendation of the bonds as "perfectly safe," without adequate inquiry. Safety was the crucial matter in regard to the investment of trust funds, and the condition of the proposed investment being considered at all. In representing the investment as perfectly safe the agent thus took upon himself a duty to the trustees, and led them to omit inquiries they might otherwise

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There can be no doubt as to its import. It was an unequivocal recommendation of the Greenock Harbour bonds as perfectly safe.

"Neither is there any doubt that, as it now appears, the advice was bad advice, and also, I am afraid, advice given rashly, upon mere general repute, and without investigation such as might have been easily made into the actual merits of the security. That is really implied in the recent judgment by which the pursuer has been held liable to the beneficiaries; and the only point specially to be noted is that the defender quite frankly states that although he knew when he was first consulted that the Bill for the Act of 1880 was before Parliament, and knew when his recommendation was made that it had passed in the interval, he did not refer to the Act or take any steps to ascertain the bearing of its provisions.

"The controversy therefore is really limited to the last two questions, which, as I have said, are involved; and the first of these is whether and how far the defender in this matter acted in his professional character, and on his professional responsibility.

"Now it is not, I understand, disputed that the defender was the solicitor to the trust, and as such occupied a perfectly understood position, combining the functions of law-agent and clerk or factor. Accordingly, it is not, I suppose, doubtful that if the investment had been beyond the trustees' powers, or if the bond had been granted outwith the Harbour Trustees' powers, the defender would have been responsible as for a failure of professional duty. For he was not, it will be observed, acting gratuitously or otherwise than in ordinary course—it being a mere accident that his remuneration was in the shape of an *ad valorem* fee or commission, which, as generally happens, was paid by the borrowers. So far, I apprehend, there can be little doubt. But the contention which the defender makes is of this kind: He says that the vice of the security being simply in its insufficiency, he was no more an expert in that matter than the trustees themselves—that he was therefore acting, and necessarily acting, outside the scope of his professional employment—and that his advice (unfortunate perhaps, but quite honest) was given really on the same footing as if he had been merely the trustees' banker, or some friendly adviser. He puts the case of an ordinary heritable security, where the solicitor, having investigated the title and put before his client the rental of the estate, and a note of the prior bonds and public burdens, may or may not express

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[1] Raes v. Meek, 15 R. 1033, *per* Lord Shand, 1051, and *per* Lord Young, 1055.

[2] Cleland v. Brownlie, Watson, & Beckett, 20 R. 152, at p. 162.

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have made. Even if no duty attached to the law-agent at an earlier stage it was clearly within his employment to complete the investment. This duty he had failed to discharge properly, by taking a postponed bond.[1] The case of *Campbell* v. *Clason*[2] was reversed on a ground of fact which left the principle of the Court of Session judgment untouched.[3] The distinction drawn between heritable bonds and the bonds of a Parliamentary trust, such as the Greenock Harbour Trust, was unsound. In the case of the former it was the law-agent's duty to inquire as to the rental, the prior burdens and disabilities affecting the owner of the lands, and in the case of company bonds there was no reason why similar duties should not attach. In this case, therefore, the defender ought to have informed the trustees when the investment came to be completed that the only bonds obtainable were postponed bonds. The commission received by the defender from the Harbour Commissioners was in lieu of the payment he would have got from his own client under the Table of Fees. It was only a little less than the commission for obtaining a heritable security, and this also was paid by the borrower. The consideration for this pay-

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an opinion on the sufficiency of the margin, but if he does so, incurs no responsibility—at all events if the opinion is honest.

"Now, I am not prepared to admit that even on mere questions of value—questions of the sufficiency of margin—it can at all be affirmed generally that the responsibility of the solicitor is thus limited. He may of course decline to say anything except on matters of law; although I should think that course would be unusual; or he may express an opinion incidentally, or in such a way as to make it plain that he is speaking merely from general knowledge, and all that may not count. But if being consulted as to the sufficiency of a security, or if, on his own motion, or by request, he submits a security or a choice of securities for the consideration of his clients, it is, I apprehend, his professional duty (to use the words of Lord Rutherfurd Clark in the case of *Stirling* v. *Mackenzie, Gardner, & Alexander*, 14 R. 170) 'to take all reasonable care in seeing to the sufficiency of the security which he recommends.' As put by Lord President Robertson in the case of *Cleland* v. *Brownlie, Watson, & Beckett*, 20 R. 152, 'If besides introducing an investment as worthy of consideration an agent expresses a favourable opinion of it, he will be liable if the opinion was either not honest or given when he had no adequate information entitling him to give an opinion at all.' It may be that no case has yet occurred in which this kind of liability has been enforced. But there is no case in which it has been negatived; and I doubt much whether if the question arose purely, the solicitor's responsibility could well be put much lower than I have now put it.

"It is not, however, in my opinion necessary to the decision of the present case to lay down any general doctrine. There are at least two elements in the present case which make it, in my opinion, special. In the first place, the sufficiency of the security offered by the Harbour Greenock bonds depended, and necessarily so, upon the provisions of the Harbour Acts, read

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[1] Struthers v. Lang, Feb. 2, 1826, 4 S. 418 (N. E. 421); Graham v. Hunter's Trustees, March 4, 1831, 9 S. 543; Haldane v. Donaldson, March 3, 1836, 14 S. 610, *per* Lord Gillies, 619, aff. Aug. 3, 1840, 1 Rob. 236; Campbell v. Clason, 1 D. 270, 2 D. 1113, 5 D. 1081, 15 Scot. Jur. 434, *per* Lord Fullerton, reversed 17 Scot. Jur. 500; Fearn v. Gordon & Craig, Feb. 2, 1893, 20 R. 352.

[2] 1 D. 270, 2 D. 1113, 5 D. 1081.

[3] 1845, 17 Scot. Jur. 500, 506.

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ment was the same in both cases, viz., that the agent should see that the materials for forming a judgment—so far at anyrate as falling within a lawyer's province—were placed before his client. If the defender was charged with liability the mere fact of the trustees themselves making inquiries would not exonerate him. The decision in the previous action had no bearing on the present question. Trustees would be directly liable to the beneficiaries even if the error were one clearly on the part of the law-agent. Hence the form of the present action was the only possible form by which liability could be transferred to the proper party.

At advising,—

LORD PRESIDENT.—In this action the pursuer seeks to obtain decree against the defender for the amount of certain moneys which he (the pursuer) has had to pay into the estate of the late Charles Alexander, farmer at Easterknowe, in the parish of Stobo, on which he is now the sole surviving trustee, to replace money lost upon an investment of a portion of the trust funds upon a bond of the Greenock Harbour Trust; and his claim is founded

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of course in connection with the harbour accounts. Now, that was, I think, a matter much more in the province of the solicitor to the trust than of the trustees themselves. If they had formally remitted to the defender to examine the Harbour Acts and to inquire into the position of the Harbour Trust, there could not, I should think, be much doubt that, if he had reported favourably, he would have failed in his professional duty. But if that be so, I do not at present see why it should make any difference that, without being specially asked to inquire and report, he accepted the duty of making inquiries, and as the result of those inquiries, recommended this security as perfectly safe.

"In the next place, however, it does not seem quite correct to describe the vice of the present investment as arising merely on the question of sufficiency,—that is to say, the question of value. The vice mainly was that it belonged to a class which on the principles of trust law, as laid down by the Courts, was an improper investment of trust funds. That is to say, it was—whatever its merits otherwise—a speculative investment, an investment depending on the success of an enterprise which, however promising, was as yet untried. Now, it seems to me that, in the lowest view of the solicitor's duty, he should have warned his clients against such an investment.

"It remains, however, to consider the defender's second point, viz., that whatever was his original responsibility, he was relieved of it by the trustees undertaking to make inquiries for themselves, and by their (as he says) making the investment really as the result of their own inquiries. And it is here, as it seems to me, that the difficulty of the case—if there be difficulty—really lies. For, however bad the advice given was, the pursuer requires to shew that he and his co-trustee acted on it. And it is undoubtedly true (1) that the deceased trustee, Mr Inglis, did himself make inquiries of some sort, although there is no evidence as to what they were; and (2) that the minute of the trustees of 12th October 1880 is thus expressed:—'The trustees having taken into consideration the propriety of investing £2000 of the funds under their management, and being thoroughly satisfied from inquiries made by them of the sufficiency of the Greenock Harbour Trust, resolved to lend that sum to them on debenture bond for seven years from Martinmas first at 4 per cent, or for such shorter period as the agent may be able to arrange with the trust.'

"I had at first, I own, an impression that these facts formed a serious obstacle to the pursuer's claim. But further consideration has led me to a

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upon the allegation that it was the duty of the defender, as law-agent of the trust, to advise, or at all events that the defender took upon himself the duty of advising, the pursuer and his co-trustee, Mr Inglis, now deceased, as to the sufficiency of the investment in point of security and value, and that he failed to perform this duty. The important questions therefore are (1) whether it was the duty of the defender, as the law-agent of the trust, to advise; or (2) whether the defender took upon himself the duty of advising, the trustees as to the sufficiency of that investment in point of security and value; and (3) whether the trustees acted upon the advice of the defender in regard to these matters, in making the investment.

The following are the circumstances under which these questions arise:—

Charles Alexander, the truster, died on 3d September 1879, leaving a trust-disposition and settlement, under which the pursuer and the now deceased Peter Inglis, East Pilton, near Edinburgh, were appointed trustees and executors. After Mr Alexander's death the pursuer and Mr Inglis accepted these offices.

The trust was for family purposes, substantially providing a liferent of the estate to Mr Alexander's widow, and the fee to his children.

The defender had prepared Mr Alexander's trust-disposition and settle-

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different conclusion. The important point is, I think, this: It cannot, as it seems to me, be assumed that the inquiries made by Mr Inglis, the deceased trustee, whatever they were, were made otherwise than on the footing that the proposed investment was at all events 'safe'—safe, that is to say, according to the standard of safety applicable to trust investments. He had certainly been so advised, and there is no proof and no presumption that he ignored that advice, and did not rely on it. The likelihood, I should think, is that, having two investments put before him as both perfectly safe, he did really no more than decide between the two. But apart from that, one thing at least seems certain, viz., that Mr Inglis did not have his attention directed, nor is there any reason to think that he applied his mind, to the really salient question, viz., whether the Greenock Harbour bonds were as matters stood a proper investment for trust funds. As it happens, we do not know what inquiries he made, or what elements he considered. But assuming even that he made the most thorough examination, and ascertained all the facts as we now know them, it may yet well be that having in view the defender's advice, and taking from his own inquiries a hopeful view of the prospects of the James Watt Dock, he so reached a conclusion favourable to the security. Now, as against that he should, in my opinion, have been warned. He should have been told that investments of that character—investments depending on the success or failure of commercial enterprises—were not open to trustees. In point of fact, however, he was not so warned. On the contrary he was told by the solicitor to the trust that the proposed investment was perfectly safe. I cannot in these circumstances hold that for the vice of the investment he was alone responsible.

"The pursuer is therefore, in my opinion, entitled to recover from the defender the sums concluded for in the summons, other than the two sums of expenses of process. As to these I do not see my way to holding that they were the direct and natural result of the defender's negligence, more especially as no formal intimation of the former action and the proposed claim of relief was made to the defender. The pursuer will, however, have the expenses of this action, and he will of course be bound, as offered in the summons, to transfer to the defender the Harbour bond for what it is worth."

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ment, and at a meeting held at his, (Mr Alexander's), house on 8th September 1879, at which the pursuer, Peter Inglis, and the defender were present, the defender read the trust-disposition and settlement, and the pursuer and Peter Inglis accepted the offices of trustees and executors under it. The minute of meeting bears that the defender was instructed to have the deceased's personal effects valued forthwith for Government duty, to advertise for claims, to have the trust-disposition and settlement recorded, and to have a title to the deceased's estate made up forthwith. The minute further bears that the pursuer was appointed factor and manager to the trust, with power to open an account with the Bank of Scotland, Peebles, and to overdraw it, if necessary, to the extent of £300. The minute, while it bears that the defender was instructed to do certain specified things, does not contain any general appointment of him as law-agent to the trust, but from his subsequent actings it may be taken that it was understood to do so in effect. It is, however, to be observed that the defender was not employed to perform some of the duties usually discharged by the law-agent to a trust, these duties being confided to the pursuer, and in particular that he (the pursuer) was charged with the duty of managing the practical and monetary business of the trust.

The trustees gave up an inventory of the trust-estate and obtained confirmation thereto; they also arranged with the landlord for the renunciation of the lease of the farm of Easterknowe, and sold the whole stock, crop, and instruments of husbandry on the farm. The trust-estate was practically ingathered and ready for investment on 8th June 1880, the net amount of it, after deducting debts, sickbed and funeral expenses, Government duties, and executry expenses, being £2718, 15s. 8d. It appears from a letter from the defender to the pursuer, dated 9th June 1880, that he on the previous day paid in to the pursuer's credit with the Bank of Scotland at Peebles the sum of £1625, 18s., being the proceeds of the displenishing sale of the truster's farm.

On 28th May 1880, in anticipation of the proceeds of the trust-estate, in so far as realised, being immediately ready for investment, the pursuer wrote to the defender that Mr Inglis and he would be glad to come through as soon as the defender had matters ready for them, as they would like the money invested as soon as possible; and on the following day the defender's clerk replied that as the Whitsunday term was past it would be somewhat difficult to obtain a satisfactory security, but that the defender would do his best to get the money put up with as little delay as possible; and on 13th September the defender wrote to the pursuer mentioning that he had been making inquiries regarding a suitable investment for the £2000, and that the best terms he could get for money at Martinmas were on debenture bond by the Caledonian Railway Company for four years at 3¾ per cent, or on debenture bond by the Greenock Harbour Trust for seven years at 4 per cent. He then stated that, for reasons given, he felt disposed to recommend the trustees to lend the money to the Caledonian Railway Company, although he deemed the Greenock Harbour Trust perfectly safe, and that he had a large sum lent to that trust for various clients, but that the Caledonian Railway Company was exceptionally good, and hence his recommending it in preference to the other. He added,—"Will

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you kindly consult your co-trustee, and advise me of the decision you arrive at." Thus far it is clear that the defender merely submitted information and suggestions to the pursuer and Mr Inglis for their consideration, but that he left the decision as to the investment upon which the money should be placed entirely to them. The pursuer replied on 30th September indicating his desire for an investment which would give a return of 4 per cent, and the defender wrote on 1st October 1880 a letter in which he said, "It is no doubt very desirable to get a return of 4 per cent, and I think you might do worse than take the Greenock Harbour bonds, which yield that rate." In the result, the trustees, exercising, as I think, their own judgment, decided to place the money on the Greenock Harbour bond, although, as between the two investments, the defender had recommended a loan to the Caledonian Railway Company as preferable.

A minute of meeting of the trustees, dated 12th October 1880, dictated by the defender and signed by the pursuer and Mr Inglis, bears that "The trustees having taken into consideration the propriety of investing £2000 of the funds under their management, and being thoroughly satisfied from inquiries made by them of the sufficiency of the Greenock Harbour Trust, resolved to lend that sum to them on debenture bond for seven years, from Martinmas first, at 4 per cent, or for any such shorter period as the agent may be able to arrange with the trust." It will be observed that this minute bears that the resolution of the trustees to invest the £2000 upon a bond of the Greenock Harbour Trust proceeded, not upon the advice of the defender, but upon their being thoroughly satisfied of the sufficiency of the trust "from inquiries made by them," and it is very material, in view of the position taken up by the pursuer in this action, to ascertain whether this statement under his own hand, and which is entirely at variance with his present contention, is or is not correct in point of fact. *Prima facie* the minute is strong evidence against him.

The defender was examined by the pursuer as his first witness in this case, and he stated in evidence that his ground for saying that he deemed the Greenock Harbour Trust perfectly safe was from public repute and from his knowledge, resulting from having dealt so long with it, of its financial position, and he added that by public repute he meant the general repute amongst agents. He also mentioned that he had made general inquiry at friends in Greenock who knew the Trust well, and that he occasionally saw the Trust accounts, but he said that the trustees never instructed him to make inquiries with regard to the sufficiency of the Trust, being themselves thoroughly satisfied in regard to that matter. He also stated that Mr Inglis said that he had made careful special inquiry in regard to the Trust both in Glasgow and Edinburgh, and was satisfied that it was a safe investment to take.

The pursuer, when asked at the proof in this case whether, prior to the meeting of 12th October 1880, Mr Inglis had been making any inquiries on the subject of the investment, said that perhaps he might, but that he forgot what passed, and that his memory was a blank upon the subject. He afterwards stated that he relied entirely upon the defender, but he subsequently admitted that Mr Inglis was to make inquiries both in Edinburgh and Glasgow, because he was more in the way of getting information. In this connection, however, it is to be kept in view that in the action at

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the instance of Mrs Alexander and others against the present pursuer, which resulted in his being ordained to restore the portion of the trust-estate which was lost by the investment, he said in evidence that by arrangement with him Mr Inglis made inquiries in Edinburgh and Glasgow with regard to the Greenock Harbour Trust, and communicated the result of his inquiries to him, and that as the result of these inquiries and the defender's recommendation, he was satisfied that they were making an investment in a safe concern. He also said, "It was on account of my co-trustee Mr Inglis being anxious to get 4 per cent that the investment with the Harbour Trust was agreed on." In so important a question as whether the investment was in fact made upon the recommendation of the defender, or as the result of inquiries made by the trustees, or by Mr Inglis on their behalf, I think that it is safer to rely upon the pursuer's recollection when he was examined in the previous case than upon his forgetfulness when he was examined in this case, as to whether such independent inquiries had or had not been made, and if they were made, whether the money was not invested on the Greenock Harbour bond in reliance upon the information obtained in answer to these inquiries.

Upon the question of fact, whether the investment was made on the recommendation or advice of the defender, or as the result of the independent inquiries made by Mr Inglis, I think the proper conclusion is that it was made upon the latter, and not, if at all, to any material extent upon the circumstance of the Greenock Harbour bonds having been one of the two investments submitted by the defender for the consideration of the trustees; and if this view is correct, it would of itself afford a sufficient ground for a decision in favour of the defender. I may add that if this conclusion was more doubtful than it appears to me to be, I should consider that the lapse of time which has occurred since the investment was made, and the loss of evidence (especially the evidence of Mr Inglis), which has resulted from the delay in raising the action, should militate rather against the pursuer than against the defender. The action was not raised until nearly nineteen years after the investment was made, until fifteen years after the Greenock Harbour Trust had ceased to pay interest on the bond, until eleven years after the decision determining the priorities of the bonds, and until three years after the death of Mr Inglis.

But as the questions of law arising upon what the defender did in the matter, (assuming it not to be proved that the trustees in making the investment proceeded upon their own independent inquiries, or upon the inquiries of Mr Inglis), were fully argued before us, I shall express my opinion upon them.

As already stated, I think that it may be taken that the defender was appointed law-agent to the trust, that is, agent to perform the duties for which the services of a law-agent are required in realising the estate of a deceased person and placing the funds upon permanent investments, although, as I have already pointed out, the pursuer was appointed factor and manager to the trust, offices in which he was succeeded by Mr Inglis in 1882. The question thus arises, Whether it became the duty of the defender merely in respect of his appointment as law-agent to the trust, and without any express employment or instructions, to make inquiries in regard to the financial

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sufficiency of the Greenock Harbour Trust? and I think that this question should be answered in the negative. If the question had been whether an investment on a bond of the Greenock Harbour Trust was within the powers of the trustees, the case would have been different, and I think it would have been the duty of the defender, as law-agent of the trust, to advise the trustees as to whether the investment which he submitted for their consideration was or was not one of a kind or class upon which they had power to place the trust funds. It appears to me that the law-agent of a trust by submitting an investment for the consideration of trustees would in effect represent to them that it was one which they had power to make either by the general law of trusts, or by an investment clause in the trust-deed, and that if loss arose in consequence of the trustees having acted upon this implied representation, the agent would be liable to make good the loss. But in the present case no such question arises, because by the investment clause of the truster's testamentary settlement the trustees are authorised to invest "on debenture bonds" of, *inter alia*, any "Parliamentary trust in Scotland," and it is not disputed that the bonds of the Greenock Harbour Trust fall under this definition. But it is a wholly different question whether the law-agent for a trust is, by virtue of his appointment as such, and without any express employment or instructions by the trustees, bound to inquire into the sufficiency in point of security or value of an investment upon which it is suggested that the trust funds might be placed. In the present case the defender in his letter of 13th September 1880 mentioned that the best terms he could get for the money at Martinmas would be either upon debenture bond of the Caledonian Railway Company or on debenture bond of the Greenock Harbour Trust; but it appears to me that in so doing he merely placed these debenture bonds before the trustees for their consideration as well-known and favourite investments, and that it was for them to obtain, in such manner as they thought fit, information as to the financial soundness or value of the investments. I think that a law-agent by so submitting an investment to trustees, unless he does something more than the defender did, only puts forward the investment as one which the trustees may properly consider, and that it is for them to make such inquiries and obtain such information as they think fit before arriving at a decision as to whether they should place the trust funds upon it or not. The defender only stated his honest opinion and belief in regard to the investments, but he did not warrant the opinion and belief, or state that they were founded upon any examination or inquiry, and he was not instructed by the trustees to act in the second stage of the duty which the trustees had to perform, *videlicet*, that of making inquiries and obtaining information as to the financial sufficiency of the Greenock Harbour Trust. The defender gave to the trustees such information as he possessed, but that information was of quite a general kind, and did not purport to proceed upon personal knowledge or upon facts or figures obtained as the result of particular inquiry. I am therefore of opinion that the defender was not charged by the trustees with the duty of making inquiries as to the financial sufficiency of the Trust, and that he has consequently not incurred liability upon the ground of his having failed to make such inquiries.

The present case affords a good illustration of the kind of duty which

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the pursuer maintains the defender undertook by merely submitting an investment on a bond of the Greenock Harbour Trust for the consideration of the trustees. The staple trades of Greenock at the time when the investment required to be made were sugar and timber. The sugar trade became bad owing to the bounties granted by certain foreign countries to their sugar growers; and an unexpected change occurred in the timber trade, in respect that instead of the timber being unloaded in logs at Greenock, where it was sawn, the sawn timber being afterwards sent to Glasgow or elsewhere, the practice was introduced of sawing the timber in Canada, or the other places abroad from which it was brought, and taking it in steamers directly to Glasgow and other places where it was to be used. The James Watt Dock was thus little required for these trades, and it failed to attract the Atlantic Liners (with one exception) as it was expected to do. It was not, in my view, the duty of a law-agent (without express employment or instructions), to embark upon an inquiry as to the prospects of the harbour and the condition of the trade of Greenock, although this may have been a very fit matter for the trustees themselves to investigate, as I think it is proved that Mr Inglis did on their behalf.

It was, however, maintained by the pursuer that even assuming that the defender was not employed by the trustees to make inquiries on their behalf in regard to the financial sufficiency of the Greenock Harbour Trust, "he took upon himself" the duty of doing so. I am not quite sure what legal conception it is intended to express by this phrase, unless it means that although the defender was not employed as an agent to make the inquiries in question, he charged himself with the duty of doing so as a volunteer. It is only necessary to say with reference to this suggestion, in itself antecedently improbable, that it does not appear to me to be supported by any evidence.

But on this part of the case I think, *separatim*, that it is proved that the trustees themselves undertook to perform the duty of inquiry which rested upon them from their position as trustees, that in point of fact Mr Inglis, on behalf of the pursuer as well as for himself, did make inquiry, and that upon the results of the inquiry so made their resolution to invest the money on the Greenock Harbour bond was arrived at. The evidence bearing on this point has already been referred to. I may add that the fact of Mr Inglis having undertaken to make inquiries, and of his having done so both in Glasgow and Edinburgh, affords strong confirmation of the view that the trustees never employed or instructed the defender to obtain information as to the financial position and prospects of the Greenock Harbour Trust, and that he never undertook to do so.

Before passing from this part of the case I may point out that the judgment in the action at the instance of Mrs Alexander and others against the pursuer, in which he was held liable to replace the funds in question,[1] proceeded upon the view, not that the present defender, but that the present pursuer, had failed in the duty of inquiry; in other words, the pursuer was found liable for his own personal fault. Lord Kyllachy, in the note to his interlocutor in that case, said,—"The deceased co-

[1] 1 F. 639.

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trustee, who was a near relative of the pursuer's, undertook to make inquiries, and reported that he had done so, and the investment was made by the two trustees with the assent of the law-agent, beyond doubt in the best of faith, and in the honest belief that the security was sound and sufficient." His Lordship further said that "it would have been a different matter if he (the present pursuer) and his co-trustee had remitted, say to the agent of the trust, to inquire into the merits of the investment, and to report on his professional responsibility. In that case if the law-agent had failed to ascertain the facts, or to appreciate their significance, it may very well be that the trustees would be held to have done their duty, and that the law-agent would be alone responsible. But no case of that sort was presented upon the evidence, nor was it argued to me that the trustees were entitled to rely, or did rely, upon the initial statement by the law-agent that although he preferred a certain other investment he deemed the Greenock Harbour bond 'perfectly safe.'" And Lord Adam said,—"Mr Inglis, the defender's co-trustee, undertook the duty of inquiring into the matter. The transaction took place nearly twenty years ago, Mr Inglis is dead, and all we know is that he reported, as the result of his inquiries, that he was perfectly satisfied as to the soundness of the investment." It thus appears that the pursuer is now seeking to fix responsibility upon the defender upon a view of the essential facts, not only different from, but wholly inconsistent with, that upon which he was himself held liable in the previous case. This is a singular position to take up in a case which the Lord Ordinary describes as an "action to obtain relief by way of damages," and it brings the case very nearly, if not quite, within the rule laid down in the case of *Colt* v. *Caledonian Railway Company*,[1] that the original claim and the claim of relief must be, to a certain extent at least, commensurate, and founded on the same kind of liability—*Vide* also *Ovington & Company* v. *M'Vicar*.[2]

It was, however, argued by the pursuer, that when the matter reached the second stage, *videlicet*, that of completing the investment after the trustees had decided to make it, a duty rested upon the defender as law-agent which he failed to perform. It was contended that he was bound to have seen to the sufficiency of the title or security offered in respect of the loan, and that he would, upon inquiry, have found that it was not a first charge upon the funds of the Trust, but that all the bonds granted by the Trust prior to the passing of the Greenock Harbour Act, 1880, would have priority over it. It appears to me, however, that this argument is not well founded. There was no defect or informality in the title which led to any eviction or failure of the charge which it purported to create. The assignment was in statutory form, and it was and is entitled to receive effect according to its terms. It is true that bonds or assignments had been granted for loans under previous Acts, and that they gave priority of claim to bonds or assignments under subsequent Acts, as is usual, or, at all events, not uncommon in the case of great public undertakings, such as harbour trusts, borrowing money. But the fact that earlier lenders would have prior recourse upon the funds was not a defect of title, although it was a circumstance which affected the value or sufficiency of the security. This, however, was, in my

[1] 21 D. 1108, 3 Macq. 833.

[2] 2 Macph. 1066.

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view, for the reasons already given, a matter for the trustees to judge of, not for the agent, unless he was specially instructed to inquire, or specially undertook to inquire, into that matter, and to form a judgment upon it, for the guidance of the trustees.

The authorities relied upon by the pursuer in this part of the case were —*Struthers*,[1] *Campbell* v. *Clason*,[2] *Graham*,[3] *Haldane*,[4] *Fearn*.[5] The ground of claim in the first of these cases was that an agent, who had been employed to obtain and complete a heritable security, had failed to do so, inasmuch as he did not get the infeftment confirmed by the superior. This was not a question of value or sufficiency, but of conveyancing, as to which the agent pledged his professional skill. The first point decided in *Campbell* v. *Clason* [2] was that where a law-agent employed by a lender to effect a heritable security for a loan had failed to ascertain the existence of inhibitions affecting the estate, he was liable to the lender for the loss which he thereby sustained; and the second point was, that where the law-agent had failed to communicate to his employer that arrears of interest had accumulated on prior heritable securities, he was responsible for the resulting loss. In the case of *Graham*,[3] a law-agent employed to complete a heritable security, who had omitted to search the record for prior burdens which prejudiced the security, was held liable to make good the loss thereby caused. In the case of *Haldane* [4] it was held that where a law-agent was employed to effect a security over a distillery belonging to another client, on which there were large prior burdens, and he failed to communicate these to the lending client, he was liable to make good the sum lent. And in the case of *Fearn*,[5] where a law-agent, employed to prepare a conveyance of heritage in his client's favour, had failed to make a search for encumbrances, and his client was evicted, he was held bound to make good the loss. All these cases thus relate to failures of law-agents rightly to perform the duties of conveyancers in matters of heritable title, to which there is nothing analogous in the present case.

The pursuer further maintained that as the defender had been instructed to complete a title, he should have told the trustees that they had no power to invest on second bonds. If he had so advised the trustees, it appears to me that his advice would not have been correct, because a bond is not, according to the law of Scotland, inadmissible as a security for a loan merely because it is a second bond, provided there is sufficient margin of value over the sum secured by a first bond to make it a good security; and if this be so in regard to a security charged upon heritable estate, it appears to me that it would be still more the case in regard to a bond or bonds of a Parliamentary trust, where the sole question is whether the funds of the trust are or are not adequate to secure payment of the principal and interest. In such a case the security is not over a definite and limited heritable subject, but over the whole property and assets of the Trust, which may be much enlarged by the expenditure of the money borrowed.

Upon the general question of the character and extent of a law-agent's

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[1] 4 S. 418, 421.
[2] 1 D. 270, 2 D. 1113, 5 D. 1081, 15 Scot. Jur. 434, and 17 Scot. Jur. 500.
[3] 9 S. 543. [4] 14 S. 610. [5] 20 R. 352.

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trustee, who was a near relative of the pursuer's, undertook to make inquiries, and reported that he had done so, and the investment was made by the two trustees with the assent of the law-agent, beyond doubt in the best of faith, and in the honest belief that the security was sound and sufficient." His Lordship further said that "it would have been a different matter if he (the present pursuer) and his co-trustee had remitted, say to the agent of the trust, to inquire into the merits of the investment, and to report on his professional responsibility. In that case if the law-agent had failed to ascertain the facts, or to appreciate their significance, it may very well be that the trustees would be held to have done their duty, and that the law-agent would be alone responsible. But no case of that sort was presented upon the evidence, nor was it argued to me that the trustees were entitled to rely, or did rely, upon the initial statement by the law-agent that although he preferred a certain other investment he deemed the Greenock Harbour bond 'perfectly safe.'" And Lord Adam said,—"Mr Inglis, the defender's co-trustee, undertook the duty of inquiring into the matter. The transaction took place nearly twenty years ago, Mr Inglis is dead, and all we know is that he reported, as the result of his inquiries, that he was perfectly satisfied as to the soundness of the investment." It thus appears that the pursuer is now seeking to fix responsibility upon the defender upon a view of the essential facts, not only different from, but wholly inconsistent with, that upon which he was himself held liable in the previous case. This is a singular position to take up in a case which the Lord Ordinary describes as an "action to obtain relief by way of damages," and it brings the case very nearly, if not quite, within the rule laid down in the case of *Colt* v. *Caledonian Railway Company*,[1] that the original claim and the claim of relief must be, to a certain extent at least, commensurate, and founded on the same kind of liability—*Vide* also *Ovington & Company* v. *M'Vicar*.[2]

It was, however, argued by the pursuer, that when the matter reached the second stage, *videlicet*, that of completing the investment after the trustees had decided to make it, a duty rested upon the defender as law-agent which he failed to perform. It was contended that he was bound to have seen to the sufficiency of the title or security offered in respect of the loan, and that he would, upon inquiry, have found that it was not a first charge upon the funds of the Trust, but that all the bonds granted by the Trust prior to the passing of the Greenock Harbour Act, 1880, would have priority over it. It appears to me, however, that this argument is not well founded. There was no defect or informality in the title which led to any eviction or failure of the charge which it purported to create. The assignment was in statutory form, and it was and is entitled to receive effect according to its terms. It is true that bonds or assignments had been granted for loans under previous Acts, and that they gave priority of claim to bonds or assignments under subsequent Acts, as is usual, or, at all events, not uncommon in the case of great public undertakings, such as harbour trusts, borrowing money. But the fact that earlier lenders would have prior recourse upon the funds was not a defect of title, although it was a circumstance which affected the value or sufficiency of the security. This, however, was, in my

[1] 21 D. 1108, 3 Macq. 833.

[2] 2 Macph. 1066.

view, for the reasons already given, a matter for the trustees to judge of, not for the agent, unless he was specially instructed to inquire, or specially undertook to inquire, into that matter, and to form a judgment upon it, for the guidance of the trustees.

The authorities relied upon by the pursuer in this part of the case were —*Struthers*,[1] *Campbell* v. *Clason*,[2] *Graham*,[3] *Haldane*,[4] *Fearn*.[5] The ground of claim in the first of these cases was that an agent, who had been employed to obtain and complete a heritable security, had failed to do so, inasmuch as he did not get the infeftment confirmed by the superior. This was not a question of value or sufficiency, but of conveyancing, as to which the agent pledged his professional skill. The first point decided in *Campbell* v. *Clason* [2] was that where a law-agent employed by a lender to effect a heritable security for a loan had failed to ascertain the existence of inhibitions affecting the estate, he was liable to the lender for the loss which he thereby sustained; and the second point was, that where the law-agent had failed to communicate to his employer that arrears of interest had accumulated on prior heritable securities, he was responsible for the resulting loss. In the case of *Graham*,[3] a law-agent employed to complete a heritable security, who had omitted to search the record for prior burdens which prejudiced the security, was held liable to make good the loss thereby caused. In the case of *Haldane* [4] it was held that where a law-agent was employed to effect a security over a distillery belonging to another client, on which there were large prior burdens, and he failed to communicate these to the lending client, he was liable to make good the sum lent. And in the case of *Fearn*,[5] where a law-agent, employed to prepare a conveyance of heritage in his client's favour, had failed to make a search for encumbrances, and his client was evicted, he was held bound to make good the loss. All these cases thus relate to failures of law-agents rightly to perform the duties of conveyancers in matters of heritable title, to which there is nothing analogous in the present case.

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Upon the general question of the character and extent of a law-agent's

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[1] 4 S. 418, 421.
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[3] 9 S. 543. [4] 14 S. 610. [5] 20 R. 352.

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duty in making an investment, I concur in the views expressed by Lord Mure and Lord Shand in *Raes* v. *Meek*,[1] and the conclusion at which Lord Herschell[2] (whose opinion was concurred in by Lord Watson and Lord Fitzgerald) arrived in that case—that it was not proved "that the law-agents were employed to advise the trustees as to the sufficiency of the security, or that the trustees acted on such advice"—appears to me to be also the proper conclusion in the present case.

I have only to add that I do not think that the commission which the defender received was paid to any extent as remuneration for inquiries supposed to have been made by him with respect to the sufficiency in value of the investment now in question.

For these reasons I am of opinion that the Lord Ordinary's interlocutor should be recalled, and that the defender should be assoilzied from the conclusions of the summons.

LORD ADAM.—I have had the opportunity of reading your Lordship's opinion, with which I concur.

LORD KINNEAR.—I also have read your Lordship's opinion, and concur in the view your Lordship has expressed.

LORD M'LAREN was absent.

THE COURT recalled the judgment of the Lord Ordinary, and assoilzied the defender from the conclusions of the action.

STEELE & JOHNSTONE, W.S.—DAVIDSON & SYME, W.S.—Agents.

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WILLIAM PYPER, Pursuer (Respondent).—*Guthrie, K.C.—W. Brown.*
JAMES INGRAM, Defender (Reclaimer).—*Sol.-Gen. Dickson—C. N. Johnston.*

Fishings—Herring Fishery Acts—Trawling—Seizure of nets before conviction—Attempt to set nets—Herring Fishery (Scotland) Act, 1889 (52 *and* 53 *Vict. cap.* 23), *sec.* 6 (1) (3)—*Herring Fishery (Scotland) Act Amendment Act*, 1890 (53 *Vict. cap.* 10), *sec.* 3.—The Herring Fishery (Scotland) Act Amendment Act, 1890, sec. 3, enacts that "any person who uses any method of fishing in contravention of" sec. 6 of the Herring Fishery Act, 1889, "or of any bye-law of the Fishery Board duly confirmed, shall be liable on conviction to a fine not exceeding £100 . . . and every net set, or attempted to be set, in contravention of this section shall be forfeited and may be seized and destroyed or otherwise disposed of by any superintendent of the herring fishery or other officer employed in the execution of the Herring Fishery (Scotland) Act."

Held (1) that the attempt to set a trawl net within the prohibited area is using a mode of fishing in contravention of the Acts, and (2) that seizure of the net is authorised before conviction.

Reparation—Public Officer—Privilege—Malice and want of probable cause—Seizure of trawler's nets by Fishery Officers.—Held (*rev.* judgment of Lord Low) that a fishery officer, who on the instructions of the Fishery Board seized the nets of a trawler which they had reason to suspect of having been engaged in trawling within the three-mile limit, was not liable in damages, although the trawler had not been trawling within the prohibited area.

Bell v. *Black and Morrison*, 3 Macph. 1076, *distinguished.*

[1] 15 R. 1049 and 1051. [2] 16 R. (H. L.) 31.

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On 23d November 1898, the commander of the cruiser "Brenda," employed by the Fishery Board for Scotland in the detection of illegal trawling, intimated to the Fishery Board that he had detected the trawler "North Star" trawling within the three-mile limit.* On 25th November the following telegram was received from the Board by James Ingram, fishery officer, 7 Crown Terrace, Aberdeen:—"'North Star,' A 393, detected trawling in territorial waters by 'Brenda.' Please take steps to seize and store port trawling gear on arrival of trawler." In obedience to this telegram Ingram took possession of the nets and gear on the arrival of the trawler at Aberdeen.

On 2d December, John Lyon, captain of the "North Star," was served with a complaint under the Herring Fishery Acts, charging him with illegal trawling on the occasion in question. This charge was ultimately withdrawn.

William Pyper, owner of the "North Star," thereafter brought this action against Ingram, concluding for payment of £48, 19s. 10s., as damages for injury done to the nets in consequence of the seizure, and for the loss of a day's trawling owing to the want of them. He averred that the "North Star" had not been fishing within the three-mile limit, and that the seizure was wrongfully, illegally, and unwarrantably made, and that the nets were spoiled and rendered useless. He further averred that he had been detained in Aberdeen for one day until new gear was obtained, and thereby lost one day's fishing, a loss which he estimated at the sum of £10, 15s. He did not aver that Ingram had acted maliciously or without probable cause.

Ingram lodged defences, in which he averred that the "North Star," had been engaged in illegal trawling on the occasion when she was sighted by the "Brenda."

He pleaded, *inter alia*;—(1) The action is irrelevant. (2) The seizure complained of having been made by the defender in virtue of the statutory powers referred to on record, pursuer's claim for damages is unfounded. (3) The defender having acted in good faith and on reasonable information and without malice in the execution of the duties of his office, he is entitled to absolvitor, with expenses. (4) The seizure complained of having been lawfully made, the defender should be assoilzied.

On 23d November 1899 the Lord Ordinary (Low) allowed a proof before answer.†

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* The Herring Fishery (Scotland) Act, 1889 (52 and 53 Vict. cap. 23), enacts (section 6 (1)),—"It shall not be lawful to use the method of fishing known as beam-trawling or otter-trawling within three miles of low water-mark of any part of the coast of Scotland."

† "Opinion.—The first question which was argued is, whether a fishery officer is justified in seizing a net under the third section of the Herring Fishery (Scotland) Act, 1890, unless the owner of the net had been convicted of contravening the sixth section of the Herring Fisheries (Scotland) Act, 1889, which prohibits trawling within the three-miles limit.

"The third section of the Act of 1890 provides that any person who contravenes the sixth section of the Act of the previous year 'shall be liable, on conviction under the Summary Jurisdiction (Scotland) Acts, to a fine not exceeding one hundred pounds . . . and every net set, or attempted to be set, in contravention of the said section, shall be forfeited, and may be seized and destroyed, or otherwise disposed of, by any superin-

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The proof did not shew that the "North Star" had been trawling within the three-mile limit on the occasion in question.

On 17th April 1900 the Lord Ordinary (Low) pronounced the following interlocutor:—"The Lord Ordinary, having considered the cause, decerns against the defender for payment to the pursuer of the sum of £38, 4s. 10d. sterling, in full of the conclusion of the

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tendent of the herring fishery, or other officer employed in the execution of the Herring Fishery (Scotland) Acts.'

"I am not prepared to say that a net can never be lawfully seized under that enactment unless there has been a previous conviction. I think that a contravention of the sixth section of the Act of 1889 could not be established unless it was proved that the accused had actually fished, or (to use the words of the enactment which I have quoted) set his net, within the prohibited area. A net, however, may be seized if it has been 'attempted to be set,' although something may have happened to prevent its actually being set.

"Whether, however, that view is sound or not, it is plain that the Act gives no warrant for the seizure of a net unless it has been either set or attempted to be set within the prohibited area, and if the pursuer's averments are true, as they must be assumed to be at this stage, his net was seized without any warrant.

"The defender, however, pleads that the pursuer's averments are irrelevant, because malice is not averred. The plea is founded upon the general rule, that an action against a public officer for something which he has done in the execution of his duty will not be sustained unless malice is sufficiently averred. But that rule does not apply to the case of a public officer acting altogether outside the scope of his duty, or, while ostensibly acting in the execution of his duty, doing that for which he has plainly no warrant. In such cases it is not necessary to aver malice.—*Bell* v. *Black and Morrison*, 3 Macph. 1026; *Pringle* v. *Bremner and Stirling*, 5 Macph. (H. L.) 55.

"In this case I am of opinion that it was not necessary for the pursuer to aver malice. The defender is an officer acting under certain statutes, and with no powers except those which are conferred by the statutes; and, as I have already pointed out, if the pursuer did not set, or attempt to set, his net within the three-miles limit, there was absolutely no warrant for seizing it.

"The defender also appealed to a statutory protection which he says is applicable to his case, that, namely, contained in the fifty-ninth section of the Herring Fishery Act, 1808. It is there provided that no officer 'acting in the execution of the provisions of this Act . . . shall be liable to any action, suit, or prosecution for or by reason of any act, matter, or thing done in the execution of his office, and for the carrying of the provisions of this Act into execution, . . . and not done by him maliciously.' Assuming that the defender is entitled to claim the benefit of that protection, I do not think that it aids him, because it seems to me that an act for which there was no statutory warrant could not be regarded as 'a thing done for the carrying of the provisions of the Act into execution.'

"It was also argued for the defender that, as he only acted in obedience to orders which he received from his superiors, he cannot be held liable. Now, the orders which the defender alleges that he received are not admitted, and in any view they would require to be proved; but as at present advised, I do not think that the pursuer has any concern with the instructions under which the defender acted, but is entitled to sue the defender as the person by whom the wrong was committed.

"I am therefore of opinion that there must be inquiry in this case, but I think that it is safer to make the proof before answer."

summons, with interest thereon as concluded for: Finds the defender liable in expenses." *

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* "OPINION.—The proof which was allowed in this case was before answer, and accordingly certain questions which were previously discussed in the Procedure-roll have again been very fully argued, and, as the case is of some importance, it is right that I should state the opinion which I have formed, although it is the same as that which I indicated when allowing a proof.

"The first question is, whether seizure of a net is competent unless there has been a conviction? The question is one of difficulty, owing to the want of precision in the statutory provisions.

"By section 6, subsection (1), of the Herring Fishery (Scotland) Act, 1889, it is provided that it shall not be lawful to use the method of fishing known as beam-trawling or otter-trawling within three miles of low water-mark of any part of the coast.

"By subsection (3) of the section it is provided that: 'Any person who uses any method of fishing in contravention of this enactment shall be liable, on conviction under the Summary Jurisdiction (Scotland) Acts, to a fine not exceeding five pounds for the first offence, and not exceeding twenty pounds for the second or any subsequent offence; and every net set, or attempted to be set, in contravention of this section, shall be forfeited, and may be seized and destroyed or otherwise disposed of by any superintendent of the herring fishery or other officer employed in the execution of the Herring Fishery (Scotland) Acts.'

"That subsection was repealed by the 3d section of the Herring Fishery (Scotland) Act Amendment Act, 1890, and another section substituted. The new clause only altered the provisions of the repealed clause to the effect of substituting for the fines of £5 and £20 a fine not exceeding £100, and failing immediate payment of the fine, imprisonment for a period not exceeding sixty days. The new clause was in other respects (including the provision in regard to seizure of nets) just a repetition of the repealed clause.

"Now, I should have thought that forfeiture of the net was one of the penalties to follow upon conviction, if it had not been for the words 'or attempted to be set.' The only charge which could be made under the section would be of using the method of fishing known as beam-trawling or otter-trawling within the prohibited area; and it is plain that, in order to justify a conviction under such a charge, it would be necessary to prove that such method of fishing had actually been used, or, in other words, that the trawl net had been set. If it turned out that the accused had attempted to set the net, but had been prevented from actually setting it, there could be no conviction, because, however evil his intention, he could not in that case be said actually to have used any method of fishing whatever.

"The statute might have made an attempt to set a net within the prohibited area an offence, for which, upon conviction, the penalty was to be forfeiture of the net attempted to be set. But that course has not been adopted. The statute does not declare that it shall not be lawful to attempt to set a net within the prohibited area, and it seems to me that a complaint libelling a mere attempt to set a net would be irrelevant.

"I therefore think that the clause forfeiting the net and giving authority to seize it must be regarded as conferring a power separate from, and independent of, a prosecution for, and conviction of, a contravention of the Act, and as being a statutory declaration that a net either set or attempted to be set within the prohibited area shall be thereby forfeited and liable to seizure.

"Reference was also made to the provisions of the Sea Fisheries Regulation (Scotland) Act, 1895. By section 10, subsection (1), of that Act, it is enacted that the Fishery Board may, by by-laws, 'direct that the method

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The defender reclaimed. At the hearing it was intimated that the defender did not challenge the Lord Ordinary's finding in fact that it was not proved that the "North Star" was within the three-mile limit.

Argued for the reclaimer;—(1) Assuming that the captain of the "North Star" had not, in fact, been guilty of illegal trawling, the questions in the case were (1) was the seizure of the net authorised by the statute, and (2) was the defender liable in damages. On the first question, the Lord Ordinary had come to the right conclusion, though he was wrong in holding that attempting to set a net was not an offence. The Herring Fishery Acts, in authorising the seizure of the net, must be read as impliedly, though not expressly, authorising the seizure at the time of apprehension. Otherwise the Act would be a dead letter, because it would be impossible to seize the nets after the trawler had left the port to which she was brought on apprehension. *Separatim*, the defender, as an officer engaged in the execution of the law, was entitled to seize the nets, just as a constable was entitled to seize stolen goods. The nets must necessarily be produced at the trial.

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of fishing known as beam-trawling and otter-trawling shall not be used in any area or areas' within thirteen miles of the coast. By subsection (4) it is provided that any person who uses any method of fishing in contravention of such by-laws shall be liable in a fine not exceeding £100, and, failing payment, to imprisonment for a period not exceeding sixty days, 'and every net set, or attempted to be set, in contravention of any such by-law may be seized and destroyed, or otherwise disposed of, by any superintendent of herring fishery or other officer employed in the execution of the Herring Fishery (Scotland) Acts: Provided always that, if no conviction shall follow, any net so seized shall be forthwith returned, and due compensation made for any loss or damage occasioned thereto by such seizure.'

"I think that it is competent to consider that Act, because the 10th section of it, the 6th and 7th sections of the Act of 1889, and the amending Act of 1890, deal with beam and otter-trawling, and form the statutory code on that subject.

"It is plain that one object of section 10 of the Act of 1895 was to make the penalty the same in all cases in which trawling was carried on within a prohibited area. There are four separate prohibited areas contemplated in the Acts of 1889 and 1895. Section 6 of the Act of 1889 deals with the three-miles limit, and also with certain sea lochs and bays; section 7 of the same Act deals with the area within a line drawn from Duncansbay Head to Rattray Point; and the Act of 1895 contemplates (I understand it has never been put into force) the defining of certain areas within thirteen miles of the coast.

"Now, the penalty for contravening the provisions of the 7th section of the Act of 1889 (which was dealt with by subsection (2) of that section) was the same as that provided by section 6, and the same power to seize nets was given. The Act of 1890 increased the penalty for a contravention of section 6 of the Act of 1889, but did not alter the penalty under section 7 of that Act. By subsection (5) of section 10 of the Act of 1895, however, subsection (2) of section 7 of the Act of 1889 was repealed, and it was provided that the provisions of subsection (4) of section 10 of the Act of 1895 should be substituted therefor. I have already pointed out that the penalty in the latter subsection is the same as that provided in the Act of 1890. The result, therefore, was to make the penalty for illegal trawling the same, whether the contravention was of the 6th section or of the 7th section of the Act of 1889, or of the 10th section of the Act of 1895.

"The penalties for contravention being thus made the same in all cases, I know of no reason why there should be a difference in regard to the

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(2) There was no relevant case against the defender, whether he was entitled to seize the nets or not, without averments of malice and want of probable cause. He was a public officer, acting in the course of his duty and on the instructions of his superiors, and was, therefore, privileged.[1] A fishery officer was really a police-constable of the sea, and entitled to the same protection, in his actings in the course of his duty, as a police-constable on land. An issue had been refused, in a recent case, in an action against a police-constable in respect of acts done in the course of his duty, even although malice and want of probable cause were averred.[2] The cases relied on by the respondent, *Bell* v. *Black and Morrison*[3] and *Pringle* v. *Bremner and Stirling*,[4] were cases where an officer acted without a warrant in matters in which a warrant was necessary. Here the defender had the only warrant he required in the orders from the Fishery Board.

Argued for the respondent;—There was no warrant in the Herring Fishery Acts for seizure of a trawler's nets before he had been convicted of illegal trawling. Had seizure at the time of apprehension been intended there would have been a provision for compensation in

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power of seizing nets; and if I am right in the view which I have expressed as to the construction of section 6, subsection (3), of the Act of 1889, there is no difference in this respect, that in every case power is given to seize a net which has been illegally used or attempted to be used, although there has been no conviction.

"It is true that there is still this distinction, that, in a case under the 7th section of the Act of 1889, or under the Act of 1895, there is no declaration of forfeiture; and it is provided that, if no conviction shall follow, 'the net so seized shall be forthwith returned' (although apparently it may be destroyed in the meantime), and compensation made for any loss occasioned; while, under section 6 of the Act of 1889, the net is declared to be forfeited, and nothing is said about returning the net or making compensation. I do not know whether any distinction was intended or not. I see no reason, however, for any distinction, and my impression is that none was intended, and that the distinction which remains is the result of an oversight. But however that may be, I am of opinion, for the reasons which I have given, that there is not the distinction contended for by the pursuer, but that, in all cases, a net may be seized although there has been no conviction.

"It was further argued, most strenuously, for the defender, that, being a public officer, acting in the execution of his duty, he could not be found liable in damages unless malice was established. If malice is necessary, it is plain that the pursuer cannot succeed. The Fishery Board received a letter from the commander of the Government boat 'Brenda' that he had found the 'North Star' trawling within the three-mile limit, and the Fishery Board thereupon instructed the defender to seize her net. The defender accordingly carried out these instructions, as he was bound to do, and, in doing so, he appears to have endeavoured to study the convenience of the owners of the trawler as much as it was in his power to do. There was therefore clearly no malice.

"I remain, however, of the opinion, which I previously indicated, that

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[1] Rae v. Linton, March 20, 1875, 2 R. 669; Beaton v. Ivory, July 19, 1887, 14 R. 1057; Macaulay v. School Board of North Uist, Nov. 26 1887, 15 R. 99; Goschen v. Raleigh [1898], 1 Chanc. 73; Poll v. Lord Advocate, March 16, 1899, 1 F. 823.

[2] Malcolm v. Duncan, March 17, 1897, 24 R. 747.

[3] June 28, 1865, 3 Macph. 1026, 37 Scot. Jur. 543.

[4] May 6, 1867, 5 Macph. (H. L.) 55, 39 Scot. Jur. 414.

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the event of the offence not being proved. If the statute gave no warrant for the seizure, Ingram, in effecting the seizure, acted illegally, and must be liable in damages, whether he acted on the instructions of the Fishery Board or not. The cases relating to police-constables or Sheriffs had no application, because such officers had, at common law, large discretionary powers, and were accordingly accorded a large measure of protection in the *bona fide* exercise of their duties. A fishery officer, on the other hand, had no powers at common law, and only those powers which the Fishery Statutes gave him. If he did anything which was not authorised by these statutes, he was acting outwith his powers, and was entitled to no more protection than any private individual so acting would have. In the most favourable view for the defender, he was in the position of an officer of law acting without a warrant in matters in which a warrant was necessary, and as such was liable in damages, even although no malice was averred.[1] Even if it were to be held that the Herring Fishery Acts authorised the seizure of the trawler's nets before conviction, the defender was liable in damages, if it turned out, as it had in the present case, that the trawler had not been fishing within the three-mile limit. It might be hard on the defender to be made liable

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it is not necessary in this case that the pursuer should prove malice. The power conferred by the statute upon a fishery officer to seize a net (if I have interpreted aright) is a very large power, and one which, from considerations of public interest, authorises what would otherwise be a serious encroachment upon the rights of private property. The condition upon which the power is given is that the net shall have been 'set or attempted to be set,' within the prohibited area. If that condition is not in fact fulfilled, a fishery officer has no more right to seize a net than anyone else. The statutory warrant depends upon the existence of the fact, and if the fact does not exist there is no warrant. The distinctions which have been drawn in actions against public officers between cases in which it is necessary to prove malice and want of probable cause and cases in which it is not necessary to do so are somewhat subtle. The cases in which difficulty has been felt have, however, mostly been in regard to officers—like constables of police—who have duties of a general and continuing character to perform, and who, in the execution of their duty, have made a mistake. In such cases the officer is not, in the general case, liable unless he has acted maliciously. But where that which is complained of consists of one act, not done as part of a routine of general duty, but requiring a special warrant, it seems to me that the only question is, Had the officer that warrant? If he had not the warrant, then he has done that which he had no right to do, and he is in no way privileged.

"I may refer to the case of *Bell* v. *Black and Morrison*, 3 Macph. 1026. In that case a procurator-fiscal had obtained and put in force a warrant from the Sheriff to search the house of John Bell, farmer, for documents and all other articles tending to establish's Bell's participation in a crime with which he was not charged. There seems to have been no reason to suppose that the procurator-fiscal had not acted in good faith, but in an action of damages against him at the instance of Bell, it was held that it was not necessary to allege and put in issue malice and want of probable cause. It was held that the warrant was one which the Sheriff had no power to grant, and the Lord Justice-Clerk (Inglis) said,—'Whenever that is the case, the party putting such warrant into execution is liable for the consequences.

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[1] Bell v. Black and Morrison, 3 Macph. 1026; Pringle v. Bremner and Stirling, 5 Macph. (H. L.) 55.

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in damages for an act which the statute authorised, but the difficulty was one which could only be put right by the Legislature.

At advising,—

LORD PRESIDENT.—On the night of 22d November 1898 the "North Star," a steam-trawler belonging to the pursuer, was trawling off the Aberdeenshire coast, and shortly after midnight she was sighted by the Fishery Board cruiser "Brenda." The persons on board the "Brenda" alleged that the "North Star" was trawling within three miles from the coast, but this was denied by the persons on board the "North Star," and after a proof of considerable length, the Lord Ordinary held that it had not been proved that at the time in question the "North Star" was trawling within the prohibited area.

The defender did not impugn this conclusion before us, but took the case upon the assumption that illegal trawling had not been established. So taking the case, two questions arise, both of which were fully argued:—(First) whether it is lawful, under the Scottish Sea Fishery Acts, to seize trawl-nets prior to conviction of illegal trawling; and (second) whether, assuming seizure prior to conviction to be authorised by the Acts, a fishery officer, who, in obedience to orders from the Fishery Board, has, prior to conviction, seized a net belonging to a trawler, is liable in damages to the owner of the net for doing so, where no conviction is afterwards obtained, or it is not proved in some other action or proceeding that the trawler was trawling within the prohibited area. The Lord Ordinary has answered both of these questions in the affirmative.

The first question depends upon certain statutory provisions, to which I shall now advert.

By the Herring Fishery (Scotland) Act, 1889 (52 and 53 Vict. cap. 23), section 6, subsection 1, it is declared that "it shall not be lawful to use the method of fishing known as beam-trawling or otter-trawling within three miles of low water-mark of any part of the coast of Scotland." Subject to certain provisos not material to the present question, it is by subsection 3 of section 6 declared that fishing in contravention of that enactment shall infer certain penalties. I do not read that subsection, because it was repealed by the Herring Fishery (Scotland) Amendment Act, 1890, and a new subsection in the following terms was substituted for it:—"Any person who uses any method of fishing in contravention of the Herring Fishery (Scotland) Act, 1889, or of any bye-law of the Fishery Board duly confirmed, shall be liable, on conviction under the Summary Jurisdiction (Scotland) Acts, to a fine not exceeding £100, and failing immediate payment of the fine, to imprisonment for a period not exceeding sixty days, without prejudice to diligence by poinding or arrestment, if no imprison-

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In this a procurator-fiscal is no more privileged than any private person.' It seems to me that the principle there laid down is applicable here.

"I now come to the question of fact upon the answer to which it seems to me that the pursuer's case depends—the question, namely, whether the 'North Star' was or was not found trawling within the three-miles limit?" (His Lordship then dealt with the evidence, finding that it had not been proved that the 'North Star' had been at work within the three-mile limit.)

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ment has followed on the conviction; and every net set, or attempted to be set, in contravention of this section, shall be forfeited, and may be seized and destroyed, or otherwise disposed of, by any superintendent of the Herring Fishery, or other officer employed in the execution of the Herring Fishery (Scotland) Acts." The question under this section is whether, as the pursuer maintains, a net can be seized only after conviction, or whether, as the defender contends, it can be seized prior to conviction.

While I agree in the conclusion at which the Lord Ordinary has arrived on this part of the case, I am unable to concur in the reasons for which he has reached that conclusion. He says that he would have thought that forfeiture of the net was one of the penalties to follow upon conviction, if it had not been for the words "attempted to be set,"—that the only charge which could have been made under the section was of using the method of fishing known as beam-trawling or otter-trawling, within the prohibited area, and that it is plain that in order to justify a conviction under such a charge it would be necessary to prove that such method of fishing had actually been used, or, in other words, that the trawl net had been set. Differing from the Lord Ordinary, I think that the statutory offence might be committed not only by the net being actually set, but by its being attempted to be set. The offence is, as already stated, created by section 6 (1) of the Act of 1889, which declares that "it shall not be lawful to use the method of fishing known as beam or otter-trawling within three miles of low water-mark of any part of the coast of Scotland,"—it is not declared that the offence shall consist in setting the net, and "the method of fishing known as beam or otter-trawling" might, in my view, be "used" by throwing the trawl overboard and attempting to set the net, although it might not actually have reached the bottom of the sea, or got into a proper fishing position there. To require a prosecutor to prove the latter proposition would be to ask him to discharge an *onus* which it would be almost impossible to satisfy unless the net was hauled up and found to contain fish. The words of section 3 of the Act of 1890, already referred to, are, "any person who uses any method of fishing in contravention of the 6th section of the Herring Fishery (Scotland) Act, 1889," shall be liable to the penalty therein mentioned—and attempting to set a net appears to me to be "using" a method of fishing in contravention of that enactment. This view is confirmed by the declaration in the same section that "every net set, or attempted to be set, in contravention of this section, shall be forfeited," &c. This seems to me to shew that an attempt to set a net would be a contravention of the section.

Taking this to be so, I think that by force of section 3 of the Act of 1890 the net is forfeited *vi statuti* when the offence is committed, and that it may be seized prior to trial or conviction. It is true that the forfeiture is only effective if the commission of the offence is established, but the effect of the failure to prove the offence when it was believed, upon probable grounds, that it had been committed, will be afterwards considered.

I may add that any other construction of the Act would lead to its becoming almost a dead letter, seeing that if the net could not be seized at the time of the illegal fishing, it could not in many, probably in most, cases ever be seized at all. The trawler might go away, never returning to the locality,

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or, if found there on a subsequent occasion, it might deny that it had the same trawl on board which it had at the time of the illegal fishing, and might decline to say where the trawl then in use was. It seems to me that the Act should be so construed as to make it effective for its declared purpose, if the language employed in it will reasonably bear a construction which will accomplish this object.

The pursuer maintained that, even assuming that the defender was entitled to seize the net, he was not entitled to seize the warp, which, the pursuer contends, is not a part of the net. It appears to me, however, that this contention is not well founded, as the warp is an essential part or adjunct of the net when it is in fishing condition. Further, the defender was specially ordered by his official superiors to take the warp.

I arrive at these conclusions upon a consideration of section 3 of the Act of 1890, taken along with the provisions of the Act of 1889, independently of any inferences arising from section 10, subsection 1, of the Sea Fisheries Regulation (Scotland) Act, 1895, upon which the Lord Ordinary's opinion on this part of the case is to some extent based. In that subsection there is no provision for the statutory forfeiture of the net, although it may be seized, destroyed, or otherwise disposed of, by the superintendent of fisheries, and it is also provided that, if no conviction shall follow, the net so seized shall forthwith be returned, and due compensation made for any loss or damage occasioned thereto by the seizure. This section does not apply to the present case, as it is directed against fishing in contravention of bye-laws, which, by subsection 1 of section 10 of the Act of 1895, the Fishery Board is authorised in certain events to make, but which have not as yet been made. The provision for paying compensation for damage caused by seizure must necessarily refer to seizure prior to trial, as it is in the event of no conviction following that the net seized is directed to be returned and due compensation made for the loss or damage occasioned to it by the seizure. While I doubt the competency of referring to this section for the present purpose, it would, if it could be competently referred to, support the conclusion at which I have arrived, upon the independent grounds already stated, that a net may be seized prior to conviction.

The second question is whether, assuming the seizure of a trawl net prior to conviction to be lawful, the defender is liable for the damage alleged to have been done to the port trawl net of the "North Star," which was seized by him, and for the loss of a day's fishing; and in considering this question it is necessary to advert to the official position held by the defender, and to what he did with reference to the seizure of the net.

When the commander of the "Brenda" saw the "North Star" trawling, as he believed, within the three-mile limit, it was his duty to report, and he did report, to the Fishery Board for Scotland what he had thus seen, and that Board, on 25th November 1898, sent to the defender a telegram in the following terms:—"'North Star,' A. 393, detected trawling in territorial waters by 'Brenda.' Please take steps to seize and store port trawling gear on arrival of trawler." The defender is senior Fishery Officer at Aberdeen, he is, I understand, a British Sea Fishery officer, acting under section 11 of the Sea Fisheries Act, 1883, appointed by the Board of Trade, and he is a fishery officer under the Fishery Board, having all the powers and privi-

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leges of a superintendent of the herring fishery. Acting upon the instructions conveyed by the telegram, with which, as an officer under the Board, he was bound to comply, the defender took possession of the port trawling gear, including the trawl-warp, of the "North Star" on her arrival in Aberdeen on 1st December 1898. The trawling gear was put by the defender into a store on 2d December 1898. The master of the "North Star" was served with a complaint at the instance of the procurator-fiscal, charging him with trawling within the prohibited area, but he was not actually brought to trial.

From what has been already stated, it is clear that the defender had nothing to do with reporting the alleged illegal trawling to the Fishery Board, or with the decision of that Board that the trawling gear should be seized. He simply acted in obedience to the orders of the Board, which he was bound to obey, without having the power to exercise any judgment with regard to whether the trawling gear should be seized or whether it should be kept; but the Lord Ordinary is nevertheless of opinion that the pursuer is entitled to claim damages from him without proving malice or want of probable cause, neither of which things is alleged by the pursuer. His Lordship says that the condition of the power of seizure is that the net shall have been "set, or attempted to be set," within the prohibited area, and that if that condition is not fulfilled, a fishery official has no more power to seize the net than anyone else. It is not easy to reconcile this view with the opinion of the Lord Ordinary that it was lawful to seize the net prior to trial. If it was lawful to do so, (and I think for the reasons already given that it was), the action of the Fishery Board and their officer must have been determined by the information possessed prior to the trial, and if that information made the seizure reasonable—in other words, if there was probable cause for it—the propriety of what the officer did by direction of the Board could not be affected by the prosecution either being abandoned or failing. Further, it is to be observed that the defender had neither the duty nor the right to inquire into the facts; he was bound to obey the orders of the Fishery Board. I am not aware of any case in which it has been held that a person so situated was liable to an action of damages unless malice and want of probable cause were alleged and proved. His Lordship refers to the case of *Bell* v. *Black and Morrison*,[1] but in that case the joint procurators-fiscal (defenders) applied for, obtained, and put in force an illegal warrant. It was held that the Sheriff had no power to grant the warrant, but the procurators-fiscal had asked and obtained it, and in these circumstances the responsibility for its being obtained and put in force rested upon them. It seems to me that that case, and all the others in which public officials have been held liable, are essentially different from the present, where the defender had nothing to do either with initiating the proceedings or deciding to seize the net. It would be a singular result if such an officer, in order that he might safely perform his duties, was bound to require evidence first of the fact that the trawling had been within the prohibited area, and second, that it was proper that the net should be seized; but there is no indication in any of the statutes that a fishery officer is either entitled or bound to enter upon any such inquiries

[1] 3 Macph. 1026.

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before he obeys the order of his official superiors, who, he was entitled and bound to assume, had satisfied themselves that the circumstances requisite to justify the act could be proved, before they gave him the order. There was not in this case any departure by the defender from the duties of his office, or any mistake in performing these duties. The decision in the case of *Macaulay* v. *North Uist School Board*,[1] appears to me to have a very direct bearing upon the present case. A father had been convicted of failure to educate his children, upon a complaint by the compulsory officer of a school board, and in default of payment of a fine, was sentenced to three days' imprisonment, and was imprisoned accordingly. The conviction was quashed by the High Court of Justiciary on the ground that neither a certificate under the Act of 1872, nor a sufficient attendance order under the Act of 1883, had been produced to the Sheriff-substitute. The father then brought an action of damages against the school board, but did not set forth specific averments of malice. It was held that the error having been committed by a public board in the performance of its duty, it was necessary for the pursuer to set forth malice, and as he had not done so, the action was dismissed as irrelevant. This case seems to shew that an action could not have been maintained against the Fishery Board for giving the instructions which they gave to the defender, seeing that they were (in the words of Lord Rutherfurd Clark in that case), "acting in the exercise of what they believe to be their statutory powers." The Lord Ordinary says in this case: "The condition upon which the power" (to seize a net) "is given is, that the net shall have been 'set, or attempted to be set,' within the prohibited area. If that condition is not in fact fulfilled, a fishery officer has no more right to seize a net than anyone else." The first part of this statement is quite true, but it is no more true than it is that the production of a certificate, or an attendance order, is a condition precedent to a prosecution under the Education Acts. Still, because the School Board of North Uist acted in good faith, though without the statutory condition precedent, they were held not liable in damages, in the absence of a proper averment of malice, and from this judgment it seems to me to follow that the defender is not liable, when neither malice nor want of probable cause is either alleged or proved against him. If the action of the Fishery Board in giving the order was privileged, I think that it follows *a fortiori* that the action of the defender in obeying it must also be privileged. The case of *M'Pherson* v. *M'Lennan*[2] may also be referred to, and the case of *Malcolm* v. *Duncan*[3] affords an illustration of the privilege possessed by a police officer acting under the instructions of his superior officer. I am therefore of opinion that there is nothing in the present case to displace the general rule that although a public officer may have committed an error in the discharge of his duty, he cannot be made responsible without an allegation and proof of malice and want of probable cause, especially when the error, (if there was an error), was not his, but that of some other person whom he was bound to obey.

In this connection I may refer to 48 Geo. III. c. 110, 23 and 24 Vict. c. 92, sec. 3, 46 and 47 Vict. c. 22, sec. 14, and 58 and 59 Vict. c. 42,

[1] 15 R. 99. [2] 14 R. 1063. [3] 24 R. 747.

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sec. 19 (4), which seem to shew that such officers as the defender were intended to have the powers and immunities of constables. With reference to section 14 of the Act of 46 and 47 Vict. c. 22, it is proper to point out that sections 268 to 272 of the Customs Consolidation Act, 1876 (39 and 40 Vict. c. 36), were repealed by the Public Authorities Protection Act, 1893 (56 and 57 Vict. c. 61).

For these reasons I am of opinion that the Lord Ordinary's interlocutor should be recalled, and that the defender should be assoilzied.

LORD ADAM and LORD KINNEAR concurred.

LORD M'LAREN, not having been present at the hearing, gave no opinion.

THE COURT recalled the interlocutor of the Lord Ordinary, and assoilzied the defender from the conclusions of the action.

ALEX. MORISON & Co., W.S.—CARMICHAEL & MILLER, W.S.—Agents.

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Feb. 20, 1901. Caledonian Railway Co. v. Corporation of Glasgow.

THE CALEDONIAN RAILWAY COMPANY, Complainers (Respondents).—*Dundas, K.C.—Cooper.*

THE CORPORATION OF GLASGOW, Respondents (Reclaimers).—*Ure, K.C.—Younger.*

Road—Public Road—Water-pipe—Compulsory Powers—Ultra vires—Statute—Construction—Water-Works Clauses Act, 1847 (10 *and* 11 *Vict. cap.* 17), *sec.* 28.—The Water-Works Clauses Act, 1847, sec. 28, enacts,—"The undertakers . . . may open and break up the soil and pavement of the several streets and bridges within the limits of the Special Act, and may open and break up any sewers, drains, or tunnels within or under such streets or bridges, and lay down and place within the same limits pipes," &c., "and from time to time repair, alter, or remove the same. . . ."

Public water commissioners had statutory authority to lay a line of water-pipes in a street underneath which, for a distance of 575 feet, a line of railway passed. *Held* that it was *ultra vires* of the commissioners to break open the brickwork forming the arch of the bridge or roof of the railway tunnel, and to lay therein an iron trough carrying their water-pipe.

Magistrates of Glasgow v. *Glasgow and South-Western Railway Co.*, May 13, 1895, 22 R. (H. L.) 29, *applied.*

Held further that the word "tunnels" means tunnels similar in character to sewers and drains, and does not apply to a railway tunnel, and that in any event the right to interfere with sewers, drains, and tunnels did not warrant the permanent displacement or removal of any of these.

Road—Public Road—Land dedicated to public use—Water-pipe—Railway under road—Roof of tunnel—Statute—Construction—Water-Works Clauses Act, 1847 (10 *and* 11 *Vict. cap.* 17), *sec.* 29.—Sec. 29 of the Water-Works Clauses Act, 1847, enacts,—"Provided always that nothing herein contained shall authorise or empower the undertakers to lay down or place any pipe, conduit, service-pipe, or other work in any land not dedicated to public use, without the consent of the owners and occupiers thereof. . . ."

Public water commissioners had statutory authority to lay a line of water-pipes in a street under which, for a distance of 575 feet, a line of railway passed, the roof of the railway tunnel being only about 2½ feet below the surface of the street. At the date when the railway was constructed the street was a turnpike road. The commissioners were unable to lay their pipe without displacing a portion of the brickwork forming the roof of the railway tunnel. They maintained their right to do this under

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sec. 29—(1) on the ground that the brickwork was devoted to public use, having from the first been necessary for the support of the road; and (2) that it was in ground dedicated to public use, being within the area vested, with the streets of the city, in the magistrates for public purposes.

Held that, whether the ground occupied by the roof of the railway tunnel might, in different circumstances, be held to be dedicated to public use or not, sec. 29 did not entitle the commissioners to interfere in any way with a structure placed where it was under statutory authority.

1st Division. Lord Low.

In this action the Caledonian Railway Company sought to interdict the Corporation of the City of Glasgow "from interfering in any way with the structure of the bridge carrying the street or road known as Eglinton Street, Glasgow, over the complainers' line of railway, known as the Pollok and Govan Railway, and from laying in or through the said bridge, or any part of the structure thereof, a trough and water-pipe."

The complainers averred that they were "the owners of a railway originally authorised by the Act 11 Geo. IV. cap. 62, 1 and 2 Will. IV. cap. 58, and 1 Vict. cap. 118, which branches from their main line of railway at or near to Gushetfaulds in the city of Glasgow, and runs westwards towards Govan. This railway is crossed by the street or road known as Eglinton Street, Glasgow. The said street or road is carried over the said railway by a bridge, the arch of which is formed of five courses of brick. In the centre of the arch the uppermost part of the brickwork is about 2 feet 1 inch below the surface of the road. The said bridge is built on land belonging to the complainers; the bridge itself belongs to the complainers, and is under their control and management, and is repaired and maintained by them. In particular, the arch is part of the property of the complainers, who are liable for the maintenance thereof."

The Corporation answered;—"Explained that the said railway is carried under Eglinton Street in a tunnel, the roof of which is formed of a brick arch, the crown of which is 2 feet below the surface of the street. The said tunnel is 570 feet in length. . . . Explained that Eglinton Street was, at the time when the said tunnel was constructed, a turnpike-road dedicated to the public use, and is now vested in the defenders as one of the public streets of the city, and that the said tunnel was constructed in and occupies part of the subsoil of the said street."

The complainers further averred that the Corporation had sent them a plan of the work they proposed to execute. "The said plan shewed that the respondents proposed to lay underneath the roadway passing over the said bridge a trough 3 feet 9 inches broad and 2 feet 6 inches high, in which was to be laid an iron water-pipe about 27 inches in diameter. In order to lay this trough, the respondents proposed to cut away the three upper courses of brick, forming the archway of the said bridge, for a considerable distance in the centre of the archway, and to cut away the second and first courses of brickwork for a further distance.

The complainers also stated that they had offered to enter into an agreement with regard to the laying of the pipe, but that the Corporation had refused to entertain their offer, maintaining that the work which they proposed to execute was within their powers under their special Acts, and the Water-Works Clauses Act, 1847.*

* The Water-Works Clauses Act, 1847 (10 and 11 Vict. cap. 17), sec. 28,

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The complainers thereafter lodged a supplementary note, in which they stated that the Corporation had proceeded with the works sought to be interdicted, and craved the Court to ordain the Corporation to restore the arching of the bridge to its former condition.

The complainers pleaded;—The respondents having carried out the operations complained of without the consent of the complainers, an order should be granted ordaining the respondents to restore the said bridge and arch, in respect that (*a*) the operations of the respondents are an encroachment on the complainers' property without the complainers' consent; (*b*) the respondents' operations have been carried on without the consent of the complainers on lands not dedicated to public use, of which the complainers are the owners; (*c*) the operations of the respondents are dangerous to the public and to the complainers' railway; and (*d*) the respondents' operations are not within their statutory powers.

The Corporation pleaded;—(3) The operations complained of being within the respondents' statutory powers, the note should be refused with expenses.

On 27th February 1900 the Lord Ordinary (Low) pronounced the following interlocutor:—"Sustains head (*d*) of the complainers' plea in law: Interdicts, prohibits, and discharges the respondents in terms of the prayer of the note of suspension and interdict, and decerns. Farther, in regard to the supplementary note for the complainers, No. 9 of process, in respect that the operations of the respondents complained of have been completed, ordains them to remove the water-pipes and troughs placed by them in or through the structure of the bridge carrying the street or road known as Eglinton Street, Glasgow, over the complainers' line of railway known as the Pollok and Govan Railway, and to restore completely the structure of the said bridge to the condition in which it was before the respondents placed their said pipes and troughs therein, all at their own expense, and at the sight and under the direction of Mr Donald Matheson, civil engineer, Glasgow; reserves all questions of expenses, and continues the cause."*

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enacts,—"The undertakers, under such superintendence as is hereinafter specified, may open and break up the soil and pavement of the several streets and bridges within the limits of the special Acts, and may open and break up any sewers, drains, or tunnels within or under such streets and bridges, and lay down and place within the same limits pipes, conduits, service-pipes, and other works and engines, and from time to time repair, alter, or remove the same, and, for the purposes aforesaid, remove and use all earth and materials in and under such streets and bridges, and do all other acts which the undertakers shall from time to time deem necessary for supplying water to the inhabitants of the district included within the said limits, doing as little damage as can be in the execution of the powers hereby, or by special Act, granted, and making compensation for any damage which may be done in the execution of such powers."

Sec. 29,—"Provided always that nothing herein contained shall authorise or empower the undertakers to lay down or place any pipe, conduit, service-pipe, or other work, in any land not dedicated to public use without the consent of the owners and occupiers thereof, except that the undertakers, at any time, may enter upon and lay or place any new pipe in the place of an existing pipe in any land wherein any pipe hath been already lawfully laid down or placed in pursuance of this, or the special Act, or any other Act of Parliament, and may repair or alter any pipe so laid down."

* "OPINION.—One of the complainers' lines of railway passes underneath Eglinton Street, Glasgow. The respondents aver, and for the purpose of

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The Corporation reclaimed.

The arguments sufficiently appear from the opinions of the Lord Ordinary and the Court.[1]

At advising,—

LORD PRESIDENT.—The question raised for decision in this case is whether the respondents were entitled to remove the three upper courses of five courses of brick forming the crown of the arch of a bridge belonging to the complainers, and to place therein a metal trough for the purpose of carrying an iron water-pipe, without the permission of the complainers.

The railway, of which the bridge in question forms part, was originally authorised by the Act of 11 George IV. chap. 62, 1 and 2 William IV. chap. 68, and 1 Victoria, chap. 118; and it branches from the complainers' main line at or near to Gushetfaulds in the city of Glasgow, and runs westwards towards Govan. This railway is crossed by the street or road now known as Eglinton Street, Glasgow, that street or road being carried over the railway by the bridge in question. In the centre of the arch, the

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this case I accept the statement, that the railway at the part where it passes under Eglinton Street is constructed in tunnel, the tunnel being 570 feet in length.

"The respondents have laid a water-pipe along Eglinton Street, and for the purpose of taking it over the railway they have removed the three upper courses of brick forming the archway of the tunnel. The upper surface of the brick archway is 2 feet or 2 feet 1 inch below the surface of the roadway, and apparently that space was not sufficient for the water pipes, and it was therefore necessary to encroach upon and permanently remove part of the structure of the arch of the tunnel.

"The complainers were willing to consent to the operation upon certain conditions, but the respondents would not agree to these conditions, and ultimately they laid the pipe without the complainers' consent.

"The question raised in this case is whether the respondents' operations were warranted by the 28th section of the Water-Works Clauses Act, 1847, which is quoted at length in article 8 of the complainers' statement.

"That clause received judicial interpretation in the House of Lords in the *Magistrates of Glasgow* v. *The Glasgow and South-Western Railway Company*, 22 R. (H. L.) 29. In that case a bridge crossed a railway belonging to the railway company. The bridge was constructed of iron and the roadway was laid upon metal plates supported by girders. The Magistrates, for the purpose of taking a water-pipe over the bridge, bored holes through the stone abutments, carried the water-pipe through these holes, and fastened it to the girders of the bridge. It was held that that was an operation which was not warranted by the 28th section of the Act.

"The leading power in the section was regarded as being that whereby authority was given 'to open and break up the soil and pavement of the several streets and bridges,' for the purpose of forming a trench in which to lay the water-pipe. All the other powers which followed the first power were regarded as auxiliary to it, and it was held that nothing in the section warranted the Magistrates in going beyond the soil and pavement of the bridge and interfering with the structure.

"That judgment appears to me to have a very direct bearing upon the present case. The question here is in regard to two subjects—first, the

[1] The Corporation cited Wandsworth Board of Works v. United Telephone Co., 1884, L. R., 13 Q. B. D. 902. The Railway Company cited Magistrates of Glasgow v. Glasgow and South-Western Railway Co., May 13, 1895, 22 R. (H. L.) 29.

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uppermost part of the brickwork was, prior to the operations of the respondents, about 2 feet 1 inch below the surface of the road. The metal trough which the respondents have placed in the crown of the arch is about 3 feet 9 inches broad and 3 feet 6 inches high, and the water-pipe is 27 inches in diameter.

The railway was constructed in or about the year 1836, when Eglinton Street was a turnpike-road under the management of turnpike-road trustees; and I understood the parties to be agreed that the bridge was formed by the method known as "cut and cover"; that is removing the earth from the surface downwards, then building the bridge, and subsequently replacing the earth above the arch when completed—not by tunnelling. It was stated at the bar that the management of the road was subsequently transferred to the Magistrates of Glasgow, as also that it was vested in them, and became one of the streets of the city of Glasgow, by force of section 289 of the Glasgow Police Act, 1866.

The respondents maintain that they were warranted in removing the bricks from the crown of the arch, placing the metal trough for carrying their water-pipe there, and laying the water-pipe in that trough, by section 28 of the Water-Works Clauses Act, 1847 (10 and 11 Victoria, chap. 17), which provides that the undertakers "may open and break up the soil and pavement of the several streets and bridges within the limits of the special Act, and may open or break up any sewers, drains, or tunnels within or under such streets or bridges, and lay down and place within the same limits pipes, conduits, service-pipes, and other works and engines, and from time to time repair, alter, or remove the same, and, for the purposes aforesaid, remove and use all earth and materials in and under such streets and bridges." It is to be observed that the leading power here conferred is to "open and break up the soil and pavement" of the streets and bridges, and that all the powers subsequently conferred are ancillary to this, the leading

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street or road; and second, the railway. I say the railway, because I assume that the tunnel was constructed by the railway company as part of their undertaking, and that the tunnel, including the brick arch which forms its roof, is one of the railway works. The respondents have not only opened and broken up the pavement and soil of the street, but they have broken and opened up and laid their pipe in that which forms part of the railway. I do not think that there is any warrant in the leading provision of the Act, as interpreted by the House of Lords, for such an operation.

"The respondents, however, relied upon the subsidiary power given in the section to 'open and break up any sewers, drains, or tunnels within or under such streets and bridges.' I am of opinion that these words do not include a tunnel by which a railway is brought through a town and underneath its streets. It seems to me that the tunnels referred to in the section are tunnels similar in character to a sewer or drain, and that a railway tunnel does not fall within the scope of the section at all. That view appears to me to obtain some confirmation from the provisions of sections 31 and 32, which do not seem to me to be appropriate to the case of a railway tunnel being opened or broken up. I may also observe that by the 32d section it is provided that if a sewer, drain, or tunnel is opened or broken up, it must be reinstated or made good. There is no possibility here of reinstating the portion of the railway tunnel which has been broken up, because the object of breaking it up was to make a permanent bed for the pipe.

"I am therefore of opinion that the complainers are entitled to decree."

power. In the case of *The Magistrates of Glasgow* v. *The Glasgow and South-Western Railway Company*,[1] which related to the construction and effect of this section, Lord Watson said:—"I think the first power given affords the keynote to all the rest, or, in other words, all the powers that follow the first power conferred by the clause are ancillary to it." It could not, however, in my judgment, be reasonably maintained that the brick arch forming part of the complainers' undertaking is "soil or pavement" of Eglinton Street, and accordingly the respondents require to rely upon the subsequent power to "open and break up any sewers, drains, or tunnels within or under such streets or bridges." Upon this point again, the opinion of Lord Watson in the case referred to is a direct authority. He said—"That is not a general power to roam over the streets and break open sewers, drains, and tunnels. It is a power meant to be exercised in cases where the promoters of an undertaking, having opened or broken up a street under the first power given by the clause, meet with an obstruction to their work in the shape of tunnels, drains, or sewers which have been previously constructed. But from beginning to end of the clause there is no power given to go beyond the soil and pavement of the bridge." I do not think that the complainers' arch at the place in question forms any part of the soil or pavement of Eglinton Street, or of the soil or pavement of the complainers' bridge, the highest part of which, as already stated, is about 2 feet 1 inch below the surface of the street. It further appears to me that the bridge in question is not a "tunnel" within the meaning of section 28. I think that the "tunnels" there referred to must be *ejusdem generis* with "sewers or drains," and that the meaning of the section is that if, in exercising the power of opening the "soil or pavement," the Magistrates come upon tunnels *ejusdem generis* with sewers or drains, they may remove these in so far as this is necessary to enable them to place their pipes *in situ*; but I consider that this power would not warrant them in interfering with a work of such a character as the bridge in question, even if it had not been made under statutory authority, and that still less could they interfere with it when it formed part of a railway undertaking authorised by Act of Parliament. It would not in either case be in any reasonable sense a tunnel met with in the "soil or pavement" of the street.

The respondents, however, refer to section 29 of the Act of 1847, which provides "that nothing herein contained shall authorise or empower the undertakers to lay down and place any pipe, conduit, service-pipe, or other work, in land not dedicated to public use, without the consent of the owners and occupiers thereof,"—with an exception not material to the present question. They contend upon this provision that it contains an implication that where land is dedicated to public use, the undertakers may lay down or place any pipe, conduit, service-pipe, or other work in it, without the consent of the owners and occupiers; and they further maintain that the arch of the complainers' bridge, where it was interfered with by them, was "dedicated to public use" in the sense of this section. I understood their argument to be, that at the time when the bridge was constructed, the

[1] 22 R. (H. L.) p. 29.

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existence of a turnpike-road over it inferred a dedication of it to public use, and this may be true in so far as it was requisite to give support to a turnpike-road. It appears to me, however, that so long as it gave support to the turnpike-road, the Road Trustees would have had no power to interfere with it, still less to invade its structure by removing any part of it, and substituting work of their own in its place. Any excavations by the trustees of a rural or suburban turnpike-road would not require to go below the metalling of the road, or its side drains, and such excavations would not reach the bottom of the 2 feet 1 inch of cover between the top of the bridge and the surface of the road. But even if the existence of the bridge had placed any impediment in the way of the trustees making any excavations incidental to the maintenance of a turnpike-road, I consider that this would not have warranted them in interfering with a bridge placed there by statutory authority. If they had thought that the promoters of the railway were asking powers to construct their bridge too near the surface, they (the Road Trustees) should have opposed the Bill in Parliament, and endeavoured to get a clause introduced requiring the promoters to construct their bridge at a greater distance below the road.

The respondents, however, maintain that the public requirements, and the resulting public right of use and dedication to public use expanded when the turnpike-road became one of the streets of Glasgow, and that these streets are subject to the uses of a great city, *e.g.*, placing large water mains, such as that which has been carried across the complainers' bridge. This may possibly be so to a certain extent, but it seems to me that where a statutory right has been conferred on a railway company to make and maintain such a bridge under a turnpike-road as part of their undertaking, the mere fact of the incorporation of the turnpike-road in the city of Glasgow could not be held so to increase the dedication of the soil to the public as to entitle the municipal authorities to invade any rights which the complainers had acquired by the exercise of their Parliamentary powers, or to interfere with any works which they had constructed in virtue of these powers.

The provisions of section 32 of the Act of 1847 appear to me to have a material bearing upon the construction of section 28. By section 32 it is provided that "when the undertakers open or break up the road or pavement of any street or bridge, or any sewer, drain, or tunnel, they shall, with all convenient speed, complete the work for which the same shall be broken up, and fill in the ground and reinstate and make good the road, or pavement, or the sewer, drain, or tunnel so opened or broken up." This provision affords strong confirmation of the view which I have already expressed as to the right to interfere with sewers, drains, and tunnels, videlicet,—that it was only a temporary interference to enable the undertakers to construct their works in the soil and pavement of the streets, and was not intended to sanction any permanent invasion or displacement of any other works already lawfully there. If the complainers' bridge was a "tunnel" within the meaning of the Act of 1847, it would, by section 32, be the duty of the respondents to reinstate it, and this would of course infer the removal of their trough and water-pipe.

For these reasons, I am of opinion that the Lord Ordinary's interlocutor should be adhered to.

LORD ADAM and LORD M'LAREN concurred.

LORD KINNEAR was absent.

THE COURT adhered.

HOPE, TODD, & KIRK, W.S.—SIMPSON & MARWICK, W.S.—Agents.

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MRS JANE HART HOTCHKIS OR MATTHEWS DUNCAN AND OTHERS (Matthews Duncan's Marriage-Contract Trustees), First Parties.—*Campbell, K.C.—Grainger Stewart.*

MRS JANE HART HOTCHKIS OR MATTHEWS DUNCAN AND OTHERS (Matthews Duncan's Testamentary Trustees), Second Parties.—*Guthrie, K.C.—Crole.*

MRS JANE HART HOTCHKIS OR MATTHEWS DUNCAN, Third Party.—*Campbell, K.C.—Grainger Stewart.*

MISS MATTHEWS DUNCAN AND OTHERS, Fourth Parties.—*Campbell, K.C.—Grainger Stewart.*

WILLIAM MATTHEWS DUNCAN AND OTHERS, Fifth Parties.—*Guthrie, K.C.—Crole.*

Succession — Power of Appointment — Election. — By an antenuptial marriage-contract, a fund was provided to the children of the marriage "in such proportions" as the spouses might "direct and appoint." The settlement of the husband, which was also signed by the wife, contained this joint appointment,—"We hereby apportion amongst our children equally, share and share alike, the fund falling to them under our marriage-contract, the issue of any of them predeceasing taking their parent's share, the share of any such child or his or her issue being held, managed, and dealt with as hereafter provided for my children's shares of my estate."

The father's settlement contained directions to the trustees in regard to the children's shares (including their shares of the marriage-contract fund as well as their shares of his own estate), which in the case of sons might, and in the case of daughters would, have the effect of reducing their right in a share to a liferent, and in both cases without the right to dispose of it by will or otherwise.

In a special case brought after the father's death, this appointment was challenged on the grounds (1) that issue of predeceasing children who were included in the appointment were not objects of the power, and (2) that the restrictions created by the settlement, so far as attaching to the children's shares of the marriage-contract fund, were invalid, and invalidated the whole appointment. When the appointment took effect there were no issue of predeceasing children in existence.

Held (1) that the appointment was not invalid on the first of these grounds, as issue were not included in the appointment in the event which happened, (2) that the appointment was valid as a division of the fund among the children, but that the restrictions imposed were invalid, (3) that the children were entitled (without being put to an election) to their share of the marriage-contract fund free of the restrictions imposed, as well as to their share of their father's own estate bequeathed by his settlement.

BY antenuptial contract of marriage, dated 20th August 1860, the late James Matthews Duncan, M.D., and Miss Jane Hart Hotchkis, afterwards his wife, conveyed certain funds to trustees for payment, *inter alia*, of £4000, "when the same shall be set free by the deaths of the said Jane Hart Hotchkis and James Matthews Duncan respectively, to the child or children to be procreated of the marriage." It was provided "that the provisions in favour of the children

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shall be paid in such proportions as the said James Matthews Duncan and Jane Hart Hotchkis, by any joint writing under their hands, failing which, as the survivor by any writing under his or her hand, may direct and appoint; and failing any such directions, by both or either of the said James Matthews Duncan and Jane Hart Hotchkis, then to the said child or children, if more than one, share and share alike, the issue of those who may predecease their parents leaving issue drawing the share which would have fallen to their parent had he or she survived, and the share of each child being hereby specially declared to vest if sons on their respectively attaining majority, and if daughters on marriage, with consent of her father or mother, during their respective lives, or majority, but such vesting being always subject to the liferent interests previously expressed in favour of the said James Matthews Duncan and Jane Hart Hotchkis respectively."

Dr Matthews Duncan's trust-disposition and settlement, dated 8th November 1860, and signed both by himself and his wife, contained this clause:—"And we, the said James Matthews Duncan and Mrs Jane Hart Hotchkis or Matthews Duncan, hereby apportion amongst our children equally, share and share alike, the fund falling to them under our marriage-contract, the issue of any of them predeceasing taking their parent's share, the share of any such child or his or her issue being held, managed, and dealt with as hereafter provided for my children's shares of my estate."

Among the provisions thus referred to were the following:—"*In the eighth place:* The portions of the remainder of my estate so allocated to each of my surviving children, and to the family of each of my children predeceasing, leaving lawful issue, shall be held and applied as follows:—*First*, The portions allocated to my sons shall be held and invested by my trustees during the lifetime of my said sons, and the income of each son's share shall be paid to him by my said trustees as he may desire, but it shall be in the power of my said trustees, notwithstanding the terms of this provision, after any of my sons shall reach the age of twenty-five years, if they think it prudent, to pay over the share of such son to him absolutely, in which case the discharge of such son shall be a complete discharge to my trustees for the portion of my estate so paid over to him, and shall free my said trustees of all responsibility thereanent. *Second*, The portions allocated to my daughters respectively shall be held and invested by my said trustees during the lifetime of the daughter to whom the same has been allocated, and the income thereof paid over to her by my said trustees as she may desire. *Third*, In the case of the families of those of my children who may have predeceased my said wife, leaving lawful issue, and of my children who survive my said wife, and thereafter die, leaving issue, and whose portions are held by my said trustees at their death, I provide that my trustees shall apportion the share of such child so predeceasing my said wife, or dying having survived her, among the children of such child equally, and shall hold the share of each of such children during his or her minority, paying the income thereof to or for the behoof of such child, and shall pay over the principal apportioned to each child on his or her attaining majority. *Fourth*, In the case of any of my children who shall survive my said wife, and shall thereafter die without leaving issue, surviving him or her, and whose portion of my estate is held by my said trustees at the time of such

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child's death, I provide that the portion allocated to such child, and so held by my said trustees, shall be allocated equally *per stirpes* among my children then surviving and the families of such of my children as shall have predeceased leaving lawful issue, and the same, with the income thereof, shall be held and applied by my said trustees in the same manner as is above provided for the portions of my free estate and with the same powers, . . . and I provide and declare that the acceptance of the foresaid provisions in favour of my said children shall be deemed and taken to be in satisfaction to them of legitim and executry, and of all claims legally competent to them upon my decease."

By a codicil Dr Duncan authorised his trustees, with consent of his wife, to pay to sons above twenty-five part of their shares during her life.

Dr Matthews Duncan died on 1st September 1890, survived by his wife and by nine children of the marriage, five sons and four daughters. Certain questions having arisen as to the effect of the appointment of the marriage-contract fund, a special case was presented to the Court on 8th March 1900 by the following parties:—

1, The trustees under Dr and Mrs Matthews Duncan's marriage-contract; 2, The trustees under Dr Matthews Duncan's will; 3, Mrs Matthews Duncan; 4, Miss Isabella Matthews Duncan and others, the four daughters; and 5, William Matthews Duncan and others, the five sons of Dr and Mrs Matthews Duncan.

At the date of the hearing all of the fourth and fifth parties had attained majority, and one of the daughters, Mrs Isabel Matthews Duncan or Willett, was married. The other sons and daughters were unmarried. None of the children had predeceased their father leaving issue.

Among the questions in the case were the following:—"(1) Is the apportionment of the marriage-contract funds contained in the said trust-settlement and codicil void *in toto*, or is it effectual to any, and, if so, to what, extent? (7) if the apportionment in the trust-settlement is void in whole or in part, are the children of the marriage entitled to take (*a*) the shares apportioned to them by Dr and Mrs Duncan of the marriage-contract funds free of the trust created by the settlement, or (*b*) the shares of the said funds that may be apportioned to them by Mrs Duncan as the survivor of the spouses, as well as (*c*) their shares of residue under the settlement; or are they bound to elect between the said provisions or any of them?"

Argued for the fourth parties;—1. The apportionment was *ultra vires* in respect (1) that it restricted the shares of daughters to a liferent, and (2) that it included persons, viz., issue of children, who were not objects of the power.[1] In this case the power was simply to divide, and this circumstance distinguished it from cases where the power was to divide subject to conditions.[2] The next question was, whether what was *ultra vires* could be rejected, and the appointment sustained in part as a division of the capital. That depended upon whether there was an original unqualified gift which could be separated from the conditions.[3] The terms of the will taken by itself were

[1] Baikie's Trustees v. Oxley & Cowan, Feb. 25, 1862, 24 D. 589, 34 Scot. Jur. 338; Gillon's Trustees v. Gillon, Feb. 8, 1890, 17 R. 435.

[2] Lennock's Trustees v. Lennock, Oct. 16, 1880, 8 R. 14; Carver v. Bowles, Jan. 20, 1831, 2 Russell & Mylne, 304; Wallace's Trustees v. Wallace, June 12, 1891, 18 R. 921; Wright's Trustees v. Wright, Feb. 20, 1894, 21 R. 568, at 573.

[3] M'Donald v. M'Donald's Trustees, June 17, 1875, 2 R. (H. L.) 125, at 132, *per* Lord Chancellor Cairns; Jarman on Wills, 5th ed. 265.

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practically identical with that considered by the Court in the case of *Muir's Trustees*.[1] That case was distinguished from the cases of which *Lindsay's Trustees*[2] and *Dalgleish's Trustees*[3] were the type, on the ground that in the former there was no unqualified gift of fee, while in the latter there was such a gift, restricted to a liferent only in the event of the donees having issue. In this case there was no possibility of so reading the will. The daughters' right was a mere liferent, whether they left issue or not. The power conferred by the marriage-contract was to divide or apportion the fee, and as nothing was conferred by the will but a limited interest in liferent, the will was altogether invalid as an exercise of the power.[4] 2. On the assumption that there was no valid appointment, there was no question of election. The will stood as if the attempted appointment had not been made. If, again, the appointment was held valid as an equal division of the capital, while the annexed conditions were invalid, the will stood as if these conditions had not been contained in it, and again there was no question of election.[5] The present case was distinguished from the case of *Bonhotes* v. *Mitchell's Trustees*,[6] relied upon by the fifth parties, because here the testator did not expressly or impliedly put the donees to their election.[7] There was nothing to shew that the testator intended that the refusal by any of his children to accept the conditions attached to the division of the marriage-contract fund should involve forfeiture of other provisions in his or her favour.

Argued for the second and fifth parties;—1. The attempt to include issue, there being none, did not invalidate the appointment.[8] Nor did the restriction of the daughters' interest to a liferent, even if *ultra vires*, invalidate the appointment as a division of the capital of the marriage-contract fund. It was quite possible to separate a limitation of that kind from the gift itself, so that the gift might take effect unburdened by the condition.[9] The opening words of the clause of apportionment in Dr Duncan's will contained an unqualified equal division of the capital, and this was sufficient to make the rule stated by Lord Cairns applicable. The question raised in *Muir's*[1] case was a question of the construction of a particular deed; it related to the effect of a will dealing with the testator's own estate, as to which he was under no restriction, and not to a question whether a power of appointment had been validly exercised. 2. The fourth parties could not approbate and reprobate the will. It could not be assumed that Dr Duncan was acting in ignorance of the scope and limits of his power of appointment, and if he annexed conditions

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[1] Muir's Trustees v. Muir's Trustees, March 19, 1895, 22 R. 553.

[2] Lindsay's Trustees v. Lindsay, Dec. 14, 1880, 8 R. 281.

[3] Dalgleish's Trustees v. Bannerman's Executors, March 6, 1889, 16 R. 559.

[4] Baikie's Trustees v. Oxley & Cowan, 24 D. 589, 34 Scot. Jur. 338; Gillon's Trustees v. Gillon, 17 R. 435.

[5] Woolridge v. Woolridge, 1859, Johnson, 63; King v. King, 1864, 15 Ir. Ch. Reps. 479.

[6] May 27, 1885, 12 R. 984.

[7] Douglas' Trustees v. Douglas, June 27, 1862, 24 D. 1191, *per* Lord Cowan, 1202, 34 Scot. Jur. 642; Jarman on Wills, 5th ed. 421.

[8] Wright's Trustees v. Wright, 21 R. 568; M'Donald v. M'Donald's Trustees, 2 R. (H. L.) 125, *per* Lord Chancellor Cairns, p. 128.

[9] M'Donald v. M'Donald's Trustees, 2 R. (H. L.), 125, *per* Lord Chancellor Cairns, p. 132; Jarman on Wills (5th ed.) 265.

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which he had no power to annex it must be inferred that he meant that whoever took advantage of the provisions in his or her favour in the will should also be bound by its restrictions.[1] It would have been futile to impose the restrictions if it was open to any of his children to repudiate them without forfeiture of their other provisions. The case of *Bonhotes*[2] was a clear authority in favour of this view. Further, the acceptance of the appointment by the sons necessarily raised the question of election. If it was possible to validate by consent what would otherwise be invalid,[3] a beneficiary could not accept part of the will as valid, *i.e.*, the part of it dealing with the testator's own estate, and reject as invalid the part of it dealing with the marriage-contract fund.

At advising,—

LORD ADAM.—The first question which arises for consideration is, whether the provisions settled on the children have been validly apportioned, in whole or in part, by a joint writing under the hands of Dr and Mrs Matthews Duncan?—a question which I think is one of difficulty.

The question arises in this way: By the marriage-contract the trustees are directed to pay the provisions in favour of the children in such proportions as Dr and Mrs Matthews Duncan, by any joint writing under their hands, failing which, as the survivor, by any writing under his or her hand, should direct or appoint.

Dr Matthews Duncan, by his trust-disposition and settlement, executed with consent of his wife, after providing for payment of certain legacies and annuities, directed his trustees on the death of his wife to divide his whole remaining free estate into as many portions as there were children of the marriage then alive, or who should have predeceased leaving issue then alive, one of which portions was to be allocated to each such child or the issue of a child, and should be dealt with as thereinafter provided. The deed then contains a clause in these terms:—"And we, the said James Matthews Duncan and Mrs Jane Hart Hotchkis or Matthews Duncan, hereby apportion amongst our children equally, share and share alike, the fund falling to them under our marriage-contract, the issue of any of them predeceasing taking their parent's share, the share of any such child or his or her issue being held, managed, and dealt with as hereafter provided for my children's shares of my estate."

The manner in which the shares of his own estate provided to his children were to be dealt with will be found in the eighth purpose of the settlement, and was as follows:—The portion allocated to a son was to be held by the trustees during his lifetime, and the income paid to him as he might desire, but power was given to the trustees, if they should think it prudent, to pay over to him his share absolutely.

The portion allocated to a daughter was to be held by the trustees during her lifetime, and the income paid to her as she might desire, but no power was given to pay over the share absolutely.

It is obvious that the share of a son might at the date of his death be

[1] Darling's Executor v. Darling, July 3, 1869, 41 Scot. Jur. 545.
[2] Bonhotes v. Mitchell's Trustees, 12 R. 984.
[3] Mackie v. Mackie's Trustees, July 4, 1885, 12 R. 1230.

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still held by the trustees, and that the shares of the daughters would be so held at their deaths; the truster accordingly directed, by the fourth subsection of the eighth purpose, that in case any of the children should survive his wife, and should thereafter die without leaving issue surviving him or her, and whose portion of the estate was held by the trustees at the time of such child's death, such portion should be allocated equally, *per stirpes*, among the children then surviving and the families of children who had predeceased leaving issue.

The result appears to me to be that in the case of a son whose share was held by the trustees at the time of his death, his right or interest in his share was reduced to a mere liferent, and that the fee was destined to his issue, and failing issue, to the surviving brothers and sisters and the issue of a predeceasing child; and that in the case of daughters their right or interest in their shares was also reduced to a liferent with a similar destination of the fee; and in neither case had the children a right to dispose of their shares by will or otherwise.

Turning again to the terms of the writing under the hands of Dr and Mrs Matthews Duncan, it will be observed that the apportionment is not limited to the children of the marriage, but includes the issue of a child who may have predeceased. It is said that the power reserved to Dr and Mrs Matthews Duncan was merely to apportion the provision among the children of the marriage, that the giving of a share to the issue of a child is the introduction of a stranger to the power, and that therefore the whole apportionment is vitiated. I do not think it necessary to determine how that might have been had the facts of the case raised the question. But no child has predeceased, and the apportionment is in fact solely among the children of the marriage. I do not see that the attempted giving of a share in an event which has not happened should militate against an apportionment which is in fact limited to the proper objects of the power, and I think authority for that is to be found in the case of *M'Donald* v. *M'Donald's Trustees*.[1]

It will be next observed that a child's share of the settled fund is to be held, managed, and dealt with, in the same way as his or her share of Dr Matthews Duncan's own estate is to be held, managed, and dealt with. I have explained what these conditions are. Now, Dr Matthews Duncan was entirely master of his own estate, and could impose such conditions as regards it as seemed good to him. But Dr and Mrs Matthews Duncan were in a different position under the marriage-contract. They had thereby settled a provision of £4000 on the children of the marriage, and they had only a reserved power to divide or apportion that sum among the children. The question, accordingly, arises whether they were entitled to impose such conditions as those in question on a child's right to a share of the provision so settled on them.

It does not appear to be clear whether it was intended that the shares should be held and managed by the trustees of the contract or by the trustees of the settlement, but however that may be, I do not think that Dr and Mrs Duncan could competently impose conditions, which, as I have

[1] 2 R. (H. L.) 125.

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said in the case of sons might, and in the case of daughters would, have the effect of reducing their right in a share to a mere liferent, and in both cases without the right to dispose of it by will or otherwise. In my opinion the conditions are *ultra vires* and invalid. I do not think that the cases of *Lennock's Trustees*[1] and *Wallace's Trustees*[2] are authorities to the contrary. In both of these cases power was reserved or given to apportion under conditions and limitations, and in both the appointee had power to dispose absolutely of the share appointed. I do not think that the principle of these cases should be carried further.

If I am right in this, the question then arises, whether the effect is merely to nullify the conditions, leaving the apportionment itself still valid, or whether the effect is to nullify also the whole apportionment?

The general principle is thus stated in Sugden on Powers, at p. 526—"Where conditions are annexed to the gift not authorised by the power, the gift is good and the condition only is void, so that the appointee takes the fund absolutely."

The Lord Chancellor in the case of *M'Donald's Trustees*,[3] to which I have already referred, thus states the rule of law applicable to such cases. After referring to various cases he says—"From all these cases the plain rule is to be derived that if you cannot disconnect that which is imposed by way of condition or mode of enjoyment from a gift, the gift itself may be found to be involved in conditions so beyond the power that it becomes void. But where that is not so, where you have a gift to an object of the power, and where you have nothing alleged to invalidate that gift, but conditions which are attempted to be imposed as to the mode in which that object of the power is to enjoy what is given to him, then the gift may be valid and take effect without reference to those conditions."

In this case I think that we have a clear apportionment among the children equally, share and share alike, of the provisions settled upon them by the marriage-contract. It is a gift of one-ninth of the fund to each of the children, who are the objects of the power. No doubt the gift is attempted to be qualified by conditions, but I think the conditions may be disconnected from the gift, and only amount to an attempt to regulate the mode in which the gift shall be enjoyed by the objects of the power.

If I am right in the conclusions at which I have arrived, the résult is that question 1 will be answered to the effect that the apportionment is effectual to the extent of giving to each child an equal share of the fund.

The next question which arises is, whether the children are entitled to take the shares of the marriage-contract funds apportioned to them free of the trusts of the settlement, as well as their shares of the residue under the settlement, or whether they are bound to elect between the said provisions.

Vice-Chancellor Wood, in the case of *Woolridge*,[4] stated the principle applicable to such cases in terms which seem to be very pertinent to the present case. He says,—"Where there is an absolute appointment by will in favour of a proper object of power, and that appointment is followed by attempts to modify the interest so appointed in a manner which the law will

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[1] 8 R. 14. [2] 18 R. 921. [3] 2 R. (H. L.) 132.
[4] 1859, Johnson, 63.

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not allow, the Court reads the will as if all the passages in which such attempts are made were swept out of it for all purposes, *i.e.*, not only so far as they attempt to regulate the *quantum* of interest to be enjoyed by the appointees in the settled property, but also in so far as they might otherwise have been relied upon as raising a case of election."

And the Lord Justice-Clerk, in the second case of *M'Donald*,[1] said "that where, in the exercise of a power of appointment, an attempt is made ineffectually to attach limitations to the appointment, the appointee may both take the fund absolutely and other gifts contained in the same deed, without thereby giving force or vitality to the inoperative directions, on the principle of election."

This being the rule of law, it is clear that no case of election arises in this case. If the settlement is to be read as if it contained none of the conditions attempted to be imposed on the children's shares of their provisions, then they are only claiming what the settlement gives them.

I do not think that the case of *Bonhotes* v. *Mitchell's Trustees*,[2] is an authority to the contrary. In that case the provisions given to the children by the father's settlement were declared to be in full satisfaction of all claims competent to them under his marriage-contract, so that clearly, if they took the provisions under the settlement, they could not claim the provisions under the contract.

It is sufficiently clear that Dr Matthews Duncan did not know that he had no power to impose the conditions he has attempted to impose on the children's shares under the marriage-contract, and naturally, therefore, the settlement contains no clause of forfeiture in the event of the children repudiating these conditions. But there is nothing in the settlement to indicate, and no presumption, that had he known he would have put the children on their election. I think, therefore, that question 7 should be answered to the effect that the children are not bound to elect between the provisions under the marriage-contract and under the settlement.

The LORD PRESIDENT, LORD M'LAREN, and LORD KINNEAR concurred.

THE COURT found, in answer to question 1, "that the apportionment in the settlement of the trust fund is effectual to the extent of giving to each child an equal share of the fund"; and in answer to question 7, found "that the children are not bound to elect between the provisions under the marriage-contract and those under the settlement, but are entitled to receive their shares of the said sum of £4000 free of all conditions, in addition to the provisions made for them by their father in his trust-disposition."

BOYD, JAMESON, & KELLY, W.S.—F. J. MARTIN, W.S.—Agents.

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Kinnear v. J. & D. Brodie.

DAVID KINNEAR, Pursuer (Respondent).—*Campbell, K.C.*—*Lyon Mackenzie.*

J. & D. BRODIE, Defenders (Appellants).—*Salvesen, K.C.*—*Chree.*

Sale—Sale of horse—Breach of warranty—Death of horse shortly after delivery—Passing of property—Res perit domino.—A firm of contractors

[1] 4 R. 45. [2] 12 R. 984.

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purchased and got delivery of a cart-horse, warranted by the seller to be "correct in wind and work." On being put into a cart on the day of delivery by one of the buyers' servants, the horse was very unruly, and plunged violently, although carefully managed; and on the following day, after behaving in a similar manner, it ran into a mill-dam and was drowned. The seller having brought an action for the price against the buyers, the defenders pleaded that they ought to be assoilzied, in respect that the horse was disconform to warranty.

Held (1) that the horse was disconform to warranty; (2) that the defenders would therefore have been entitled to return it to the pursuer if it had not been drowned; and (3) that as the defenders' inability to return it was due to the pursuer's breach of warranty, the defenders were not liable for the price.

2D DIVISION. Sheriff of Perthshire.

ON 31st July 1900, J. & D. Brodie, contractors, Coupar-Angus, bought a cart-horse from David Kinnear, Todhill, Tealing, by Dundee, at the price of £30, 15s. The sale was subject to this warranty,—"Horse correct in wind and work." The horse was delivered to J. & D. Brodie, and on 2d August, when pulling a loaded cart in charge of one of their carters, it, after plunging violently, ran into a mill-dam and was drowned. J. & D. Brodie in consequence declined to pay the price, on the ground that the horse was disconform to the warranty. Kinnear then brought this action in the Sheriff Court at Perth under the Debts Recovery (Scotland) Act, 1867, for £30, 15s., being the price.

The note of pleas for the pursuer set forth, *inter alia*, as follows:—(4) The horse conformed to the warranty given when it was delivered to the defenders. (6) The property in the horse passed to the defenders at the time of the sale, or, at latest, at the time of delivery to them, and the risk was thereafter with them.

The note of pleas for the defenders contained, *inter alia*, the following:—(6) The horse having been misrepresented as "correct in wind and work," and having been lost through no fault of the defenders or their servants while they were endeavouring to work it, the defenders are entitled to be assoilzied, with expenses.

On 17th November 1900, the Sheriff-substitute (Sym) pronounced the following interlocutor, after a proof, the import of which sufficiently appears from the interlocutor:—"Finds in fact (1) that the defenders, who are contractors, having heard that the pursuer, a farmer at Tealing, had a chesnut horse which would be suitable for their business, went to Tealing about 31st July 1900, with a view to buy said horse; (2) that said horse, which had been foaled at Tealing, and had spent all its life there, was then seven years old, and though a somewhat fractious horse when being broken in, had for some time been quiet and tractable in pursuer's hands; (3) that the pursuer on said date sold him to the defenders for £31, with 5s. of a luck penny, or £30, 15s., and gave a warranty that he was 'correct in wind and work'; (4) that on the following day the pursuer sent him to Auchterhouse Station, where he was met by Charles Ogilvy, the defenders' servant, and whence he was led by Ogilvy to the defenders' premises at Coupar-Angus; (5) that on the same day he was put into a waggon laden with a little over a ton of coal, and, though carefully managed, was very unruly and plunged violently; (6) that on 2d August he was put into a stone cart to fetch stone from Keithick Quarry to Cupar Grange, and, though carefully managed by Ogilvy, was again unruly and plunged violently; (7) that on his second journey from the quarry, with about 18 cwts. of load, he stood fast, and then

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plunged violently and ran into a mill-dam some yards to the left of the road, where, being held down by the loaded cart, he was drowned, and that without any fault on the part of the defenders' said servant: Finds in law that, until he was so drowned, it was still within the power of the defenders to return him as not 'correct in work,' and that the conduct of the horse while in their possession justified his being so returned, and constituted a breach of said warranty, in respect that the defenders were entitled to expect that the horse was fit for immediate use: Therefore sustains the defences; assoilzies the defenders, with expenses."

The pursuer appealed to the Sheriff (Jameson), who, on 17th January 1901, pronounced this interlocutor:—"Adheres to the findings in fact in the Sheriff-substitute's interlocutor of date 17th November 1900: *Quoad ultra* recalls the said interlocutor: Finds in law (first) that after the sale and delivery of the horse in question by the pursuer to the defenders, the said horse was at the defenders' risk: (second) that the said warranty did not operate as a suspensive condition of the sale to the effect of preventing the passing of the risk from the pursuer to the defenders; (third) that the loss caused by the death of the horse falls on the defenders; (fourth) that the pursuer having sold and delivered the said horse to the defenders, is entitled to payment of the stipulated price: Therefore repels the defences; finds the defenders liable to the pursuer in the sum of £30, 15s. sterling, and decerns, and ordains them to make payment of said sums to the pursuer," with expenses.

The defenders appealed, and argued;—(1) The horse when sold was not conform to warranty. "Correct in work" meant fit for immediate work.[1] It did not mean that after an indefinite period of training in the defenders' hands it would prove fit for work. The evidence shewed clearly that it was not fit for immediate work. (2) If, then, the horse was not conform to warranty, the defenders were not liable for the price. A horse sold and delivered subject to a warranty was sold and delivered subject to a suspensive condition, and neither the property nor the risk passed to the buyer on delivery. The buyer was entitled to a reasonable time in which to determine whether it was conform to warranty, and if during that time it died the buyer was not liable for the price, unless its death was due to the buyer's fault. At all events the buyer was not liable if, as in the present case, the horse died in consequence of the very fault against which the warranty was given.[2]

Argued for the pursuer;—(1) There had been no breach of warranty here. That was to say, the defenders had not discharged the *onus* on them of proving breach of warranty. A horse could not be fairly tested as to whether it was conform to such a warranty as that now in question until it had become accustomed to its new work and surroundings.[3] This the horse here, which had been quiet with the pursuer, had not had time to do. (2) But even if the horse was disconform to warranty, the defenders were liable for the price. It had been delivered, and the property and the risk had consequently

[1] Dundas v. Fairbairn, July 6, 1797, Hume, 677; Begbie v. Robertson, June 24, 1828, 6 S. 1014.

[2] Head v. Tattersall, 1871, L. R., 7 Exchcq. 7; Elphick v. Barnes, 1880, L. R., 5 C. P. D. 321; Chapman v. Withers, 1888, L. R., 20 Q. B. D. 824.

[3] Thomson v. Miller, March 15, 1859, 21 D. 726, 31 Scot. Jur. 382.

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passed to the defenders. No doubt if it was disconform to warranty the defenders might have returned it and so dissolved the sale, but as they had not done so, the rule *res perit domino* applied. The English cases cited by the defenders were all cases of sale *per expressum* conditional.

The parties were also heard on the question whether the defenders, assuming them to be held to have accepted the horse, were entitled to damages in diminution or extinction of the price, under the Sale of Goods Act, 1893 (56 and 57 Vict. cap. 71), sec. 53.

LORD YOUNG.—This is an action by the seller of a horse against the purchasers for payment of the price. The sale was subject to a warranty which is thus expressed:—"Horse correct in wind and work." A most proper defence to the action, and one which, in my opinion, is quite sufficient in itself, if true in point of fact, is that which is stated in the sixth plea for the defenders,—"The horse having been misrepresented as 'correct in wind and work,' and having been lost through no fault of the defenders or their servants while they were endeavouring to work it, the defenders are entitled to be assoilzied, with expenses." That is a proper defence, and I do not think that the case required any other. There is, in my opinion, no question of damages here.

I am of opinion with both the Sheriffs—I so read their judgments, although their interlocutors are not expressed with complete exactness on the point—that the horse was not according to warranty. I think that it behaved exactly—indeed conspicuously—as it was warranted not to behave. That being so, I think that the defenders are under no liability to pay the price; for it is a sound proposition in law that the purchaser of a horse is not liable to pay the price if the horse is not conform to warranty. The purchaser may so act after he gets the horse as to exclude himself from defending an action for the price on the ground that the horse is not conform to the warranty. He is at liberty to keep the horse although he finds that it is not conform to warranty. That is his right. And, without deliberately exercising this right to keep the horse if he pleases, he may so behave, by keeping and using it, as to make it too late for him to plead its disconformity to warranty. But unless, by his words or his actions, the purchaser has excluded himself from pleading that defence, it is a good defence to an action for the price.

In my opinion the defenders here have not excluded themselves—have not done anything whatever to exclude themselves—from pleading the defence that this horse was not conform to the warranty which the pursuer gave. I quite recognise the rule of law that when an article sold is delivered to the buyer the property passes. The seller is divested and the purchaser is invested with the property. But that investiture is subject to defeasance if the article with which the purchaser has been invested turns out, within due time and after proper trial, not to be the article which the purchaser had contracted to buy—not to be the article with which it was intended he should be invested. He is, in that event, entitled to divest himself and to reinvest the seller with the property. If the article remains extant it is a condition of the purchaser so reinvesting the seller with the property that the purchaser should return the article to the seller. The peculiarity, the

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only peculiarity, in this case is that the article sold, the horse, was itself extinguished by its proving not to be according to the warranty given by the seller, so that the purchasers were unable to comply with the condition of divesting themselves and reinvesting the seller by returning the horse to the seller; and it is upon this point that the two Sheriffs have differed.

I have no hesitation in agreeing with the Sheriff-substitute that it is not an answer to the defenders' right—the buyers' right—to resist the action for the price to say that the condition of returning the article sold has not been complied with, when the article sold has perished in the circumstances which we find here, or in any similar circumstances,—when, that is to say, the condition of returning the article sold has become impossible, through no fault of buyers, but, if through any fault at all, through the fault of the seller in having represented the article to be what it has been proved not to have been, which, in my opinion, as I have said, has been proved here. I am therefore of opinion that the judgment of the Sheriff should be recalled, and the judgment of the Sheriff-substitute restored.

LORD TRAYNER.—I am of the same opinion. I do not doubt that the maxim to which the Sheriff refers, *res perit domino*, expresses a rule of our law, but I think it has no application in the present case. The horse in question, although delivered to the buyer, was delivered under a warranty. The purchaser's right and duty was to try the horse and see if it was conform to that warranty; if it was disconform to warranty, his right was to return it to the seller. When trying the horse in exercise of his right the horse came to its death by reason of the very vice against which the warranty was intended to insure the purchaser. That circumstance absolves the purchaser from the necessity of returning the horse as disconform to warranty. I think the case is the same as if the horse having been sold and delivered under a warranty of perfect soundness had died immediately of a mortal disease under which it laboured at the time of the sale. In such a case the buyer could not return the horse, as it was dead, but he would not be liable in payment of the price. The breach of warranty absolved the buyer from his obligation under the contract here.

LORD MONCREIFF.—I concur. I think it is proved that the horse was not according to the warranty given, and therefore before its death the purchaser was entitled to return it, or to retain it, and set up the breach of warranty against a demand for payment of the price (section 53 (1) (*a*) of the Sale of Goods Act, 1893). The peculiarity of the case is, that the horse perished through the very fault against which it was warranted, and the question arises, whether as the horse was killed instead of merely injured, the purchaser is in a worse position than if it had only been injured. I am unable to affirm that.

The seller's plea is that because the purchaser cannot return the horse he must pay the price. It is a sufficient reply that the reason why he cannot return it is because it died in consequence of the viciousness against which the seller's warranty was given. I therefore think that the judgment of the Sheriff-substitute is right.

I would only add, that it is not necessary to express, and I do not ex-

press, any opinion on the question which would have arisen if the horse, though not conform to warranty, had died from some cause not connected with the vice against which it was warranted. As things stand the seller is barred from founding on the non-return of the horse.

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LORD JUSTICE-CLERK.—The defender got delivery of the horse on a warranty. It was therefore a horse which could be rejected and the sale cancelled if after fair and proper trial it proved not to be what it was described to be in the warranty. On the facts I am satisfied that if, after the two trials it was subjected to, it had been saved out of the pond, the defender would have been entitled to return it and to refuse to pay the price. The fact is that in consequence of the conduct of the horse, by which its disconformity to warranty was demonstrated, it perished, by being drowned in the pond into which it fell when behaving in such a manner as to entitle the defender to reject it as disconform to warranty. I asked Mr Campbell whether, if what is proved constituted conduct by the horse in breach of warranty, but the horse had been saved out of the pond, and returned, the pursuer could have had any claim to insist for the price. I cannot see how he could. Now, being satisfied that the conduct of the horse was such that the defender would have been entitled to return the horse, I cannot hold that its having perished in consequence of the very fault against which warranty was given, puts the defender in a worse position than he would have been in the former case supposed of the horse being got out of the water and being returned alive.

THE COURT pronounced this interlocutor:—"Recall the interlocutor of the Sheriff of 17th January last; affirm the interlocutor of the Sheriff-substitute of 17th November 1900: Remit to him of new to assoilzie the defenders" with expenses in both Courts.

DAVID MILNE, S.S.C.—ADAMSON, GULLAND, & STUART, S.S.C.—Agents.

MISS JESSIE CAIRNS, First Party.—*Salvesen, K.C.—Christie.*
MRS AGNES MENZIES OR CAIRNS, Second Party.—*Dundas, K.C.—Clyde.*
ALEXANDER M'KINNON AND OTHERS (Cairns' Trustees), Third Parties.—*Dundas, K.C.—Clyde.*

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Cairns v. Cairns' Trustees.

Succession—Testament—Construction—Trust—Powers—Advances to beneficiary—Repudiation by widow of testamentary provision—Vesting—Acceleration of period of payment.—A testator directed his trustees to pay his widow the whole revenue of the residue of his estate during her life, subject to restriction to an annuity of £100 in the event of her second marriage. He then, in the seventh place, directed them "on the death of my said wife" to apply the residue to and for behoof of C., his adopted daughter, and to expend a part or the whole of the annual income, or part of the capital if they thought fit, in the maintenance, education, and upbringing of C. until she should attain the age of twenty-one or be married, and that on either of these events happening the trustees should, as they considered it most for the advantage of C., either denude of the trust and make over the whole estate to her, or in the event of her marriage settle the same or part thereof on trustees for C. in liferent

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alimentary and her children in fee, paying over the remainder to her absolutely, or, whether married or unmarried, allow her a liferent and postpone payment of the fee and retain it in their hands for such length of time as they deemed best, declaring that C., on attaining twenty-one years of age or being married, should have power to test on the fee of the residue, if settled on her issue, then among such issue in such proportions as she might fix, and if not settled on issue, or failing issue, then in favour of such persons as she might name by any writing under her hand, "declaring that it is my wish that my trustees should act towards my said adopted daughter as if she were my own child, and as they consider will be best at all times for her moral good and comfort and advancement in life." Then in the last place, in the event of C. dying before attaining twenty-one years of age or being married, or of her surviving that age or event but dying before receiving payment of the residue and having failed to test thereon, the truster directed his trustees to pay the residue, or what remained of it, equally to and among the then surviving children *per stirpes* of his brothers and sisters.

The truster was survived by his wife and by C., who was in minority. The widow rejected the provisions in her favour in the settlement, and took her legal rights.

On C. attaining twenty-one years of age she asked the trustees (1) to pay her a part of the capital of the residue, to enable her to repay certain advances for education and maintenance which had been made to her by the truster's widow; and (2) to make her for the future an allowance out of the income of the estate during the survivance of the widow. The trustees were willing to make these payments if they had power to do so.

In a special case, to which the parties were C., the widow, and the trustees, *held* that the trustees had power to make the payments in question, *per* Lord Young and Lord Trayner, on the ground that even if the fee of the residue had not vested in C. the trustees had power, if they saw fit, to make the payments, looking to the special terms of the settlement, and *per* Lord Low, on the ground that the right to the fee had vested in C. on her reaching twenty-one years of age.

Opinion (*per* Lord Young) that the clause declaring that the trustees should act towards C. as if she were the testator's own child would have come into operation even if the widow had abided by the settlement.

Muirhead v. *Muirhead*, 17 R. (H. L.) 45, *commented on*.

2D DIVISION.

ROBERT WEBSTER CAIRNS, wine and spirit-merchant in Glasgow, died on 14th September 1894, leaving a trust-disposition and settlement dated 18th February 1889, by which he conveyed his whole means and estate, heritable and moveable, real and personal, to trustees, for the purposes therein specified, and appointed the trustees to be his executors, and also to be tutors and curators to such of his beneficiaries as might be in pupillarity or minority at and after his death.

By his trust-disposition and settlement Mr Cairns, after providing for payment of debts, &c., and certain legacies, in the sixth place directed his trustees to convert his whole estate into cash, and to pay to his wife the whole annual income of the residue of his means and estate, and that during all the days and years of her life after his death, so long as she remained his widow, with power to his trustees if they in their discretion should think the annual income of his estate insufficient for the proper maintenance of his wife, to encroach from time to time upon capital, and pay to her such sum or sums therefrom as they thought right; declaring that in the event of his wife entering into a second marriage the provision in her favour of

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the annual income of his estate should *ipso facto* be restricted to an annuity of £100 per annum, which provisions in favour of his wife were to be accepted by her as in full of all claims of terce or *jus relictæ* competent to her by and through his decease.

The trust-disposition and settlement then proceeded as follows:—"(*Seventhly*) On the death of my said wife I direct my trustees to hold and apply the residue of my means and estate to and for behoof of my adopted child, Jessie Cairns, at present residing with me, and to expend such part of the annual income or the whole thereof, or even a part of the capital of the said residue, if they think fit, towards the suitable maintenance, education, and upbringing of the said Jessie Cairns (it being my desire that she should receive a liberal education) until she attain the age of twenty-one or be married, whichever of these events shall first happen, and on either of these events happening my trustees shall, if they consider it most for the advantage of the said Jessie Cairns, denude themselves of the trust, and make over the whole estate under their charge to her for her own absolute use, or they may, in the event of her marriage, settle the same or a part thereof upon trustees for her, for her liferent alimentary use, and for behoof of her issue in fee, paying over the remainder to her absolutely, or whether married or unmarried, they may allow her only a liferent, and withhold or postpone payment of the fee, and retain the same or part thereof in their hands for such length of time as they deem best: Declaring that the said Jessie Cairns, on attaining twenty-one years of age or being married, shall have full power and faculty, which I hereby confer upon her, to test upon the fee of the said residue, if settled upon her issue, then among such issue in such proportions as she may fix, and if not settled upon issue, or failing issue, then in favour of such person or persons as she may name by any writing under her hand: Declaring that it is my wish that my trustees should act towards my said adopted daughter as if she were my own child, and as they consider will be best at all times for her moral good and comfort and advancement in life. And (*Lastly*) in the event of the decease of the said Jessie Cairns before attaining twenty-one years of age, or being married, or of her surviving that age or event but dying before receiving payment of the said residue and having failed to test thereon, I direct my trustees to pay and convey the said residue, or whatever portion may then remain, equally to and among the then surviving children *per stirpes* of all my brothers and sisters—the issue of any child who may have deceased leaving issue being always entitled equally among them to the share which their parent would have taken on survivance."

Mr Cairns was survived by his wife, Mrs Agnes Menzies or Cairns, and by Miss Jessie Cairns, his adopted daughter. The nett value of his estate, heritable and moveable, after deduction of debts, amounted to £22,028, 13s. 2d.

Mrs Cairns, the widow, rejected the provisions in her favour in her husband's settlement, and elected to take her legal rights. She was accordingly paid a sum of £4289, 12s. 11d. in name of *jus relictæ*, and she thereafter was regularly paid her terce.

In January 1901 this special case was presented for the determination of questions which had arisen as to the power of the trustees, under the seventh and the last purposes of the trust-disposition and settlement, to make immediate payments to Miss Cairns out of the trust funds in their hands.

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The parties to the case were—(1) Miss Cairns; (2) Mrs Cairns, the widow; and (3) the trustees.

In addition to the facts already narrated, the case set forth that the whole trust purposes had been fulfilled or (by Mrs Cairns' repudiation) superseded, with the exception of the seventh and the last purposes, for implement of which the trustees held the balance of the estate, amounting to £17,292.

(8) "At the date of Mr Cairns' death the first party was in minority. Upon Mrs Cairns' election of her legal rights an agreement was entered into, dated 9th April 1895, between her and the first party. By said agreement Mrs Cairns agreed to maintain and educate the first party until she should attain the age of twenty-one years, and for such time thereafter as the said parties might agree upon, the first party being taken bound to pay to Mrs Cairns for such maintenance and education certain sums, to secure the payment of which an insurance upon her life was to be effected. . . . The first party was further taken bound, when she should attain the age of twenty-one years, to borrow on the security of her interest in the estate of Mr Cairns such an amount as would cover the principal sums due by her to Mrs Cairns, with interest thereon, and to pay the same to Mrs Cairns, whereupon the latter should be bound to convey to Miss Cairns her whole interest in said policy of insurance. By minute annexed to said agreement, dated 30th April 1895, provision was made for the application of any surplus remaining out of the proceeds of the said policy after payment of the sums due to Mrs Cairns in the event of Miss Cairns dying before payment of said sums otherwise."

(9) "The first party was duly maintained and educated in terms of said agreement by Mrs Cairns from 14th September 1894 to 14th September 1900, and for said education and maintenance she is due to Mrs Cairns the sum of £1227, 10s. 7d. (including interest), and sums expended in maintaining and keeping in force a policy over her life for £1500 effected with the English and Scottish Law Life Association, and relative interest."

(10) "The first party has now attained the age of twenty-one years. She is still unmarried. As she finds it would be seriously to her disadvantage to borrow the sums necessary to discharge her indebtedness to Mrs Cairns, and as she has no independent means of support, she is desirous of obtaining payment of at least a part of the sums falling to her from the estate of the said Robert Webster Cairns. The third parties believe it to be desirable to make over to her in fee a portion of the estate held by them under the said trust-disposition and settlement, and they are prepared to do so at once if it can be done legally. There are no further trust purposes interfering with payment, except in so far as such may exist in consequence of the clause providing that in the event of the first party dying before receiving payment of the residue and having failed to test thereon, there is a destination over to the then surviving children *per stirpes* of the truster's brothers and sisters—the issue of any child who may have deceased being entitled equally among them to the share which their parent would have taken on survivance. Miss Cairns has already executed a testament disposing of the estate in the event of her decease before she shall have received payment thereof. Mrs Cairns, the second party, for any interest she may have, is quite agreeable that Miss Cairns should have a part of the capital of the

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estate made over to her. Having regard, however, to the terms of the trust-disposition and settlement, the third parties are advised that it is doubtful whether they are entitled to make payment to the first party of any portion of the said estate until the death of the second party, the said Mrs Agnes Menzies or Cairns."

The following was the question of law:—"Are the third parties entitled or bound (1) to pay to the first party a part of the residue for the purposes specified in article 9 hereof, and (2) to make her for the future, or termly, an allowance out of the income of the estate during the survivance of the truster's widow?"

Argued for the first party;—The trustees were bound, or at least entitled if they saw fit (as they did), to make the payments in question to the first party. (1) The residue of the estate had vested in her. She had attained the age of twenty-one, and after that event (whatever might have been the case before) the testator's nephews and nieces were mere substitutes. There was nothing therefore to postpone vesting in the first party. It might be that the first party would not have been entitled to the payments in question if the widow had elected to take her liferent under the deed. But the widow having repudiated, and the fee having vested in the first party, the first party, as the only person interested in the estate, was entitled to the payments in question.[1] (2) Even if the residue had not vested in the first party, the trustees were entitled to make these payments, looking to the powers conferred on them. They were enjoined to act towards the first party as if she were the testator's "own child." It was unreasonable to suppose that such a clause was governed by the words "on the death of my said wife" at the beginning of the seventh purpose—at least in the event, which had happened, of the widow's repudiation, or in the event of her second marriage. It was not easy to see how the trustees could act as if the first party were the testator's own child if they were bound to keep the whole residue locked up indefinitely, and for the immediate benefit of no one, while she got nothing.

Argued for the trustees, the third parties;—The trustees were willing to make the payments in question if they had the power to do so, but it was doubtful whether they had the power. The sound construction of the sixth and seventh purposes seemed to be that vesting was postponed until the death of the widow. It was clear on the authorities that her repudiation did not accelerate the period of vesting. If then vesting was postponed, from the language of the settlement it was doubtful whether the first party was intended in any event to take any benefit under the settlement during the widow's lifetime.[2]

At advising,—

LORD YOUNG.—The question we have to deal with is as to whether the trustees are entitled to pay out of the trust-estate under their charge a sum of £1500 for the purpose of paying up a debt said to be due by the adopted daughter of the truster to his widow for the expense of her education and maintenance till she attained twenty-one years, and also as to whether they

[1] Muirhead v. Muirhead, May 12, 1890, 17 R. (H. L.) 45.

[2] *Authority cited*—Russell's Trustees v. Gardiners, June 18, 1886, 13 R. 989.

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have power to pay to the adopted daughter in future a termly allowance out of the income of the estate.

The trustees state that they are willing to make both these payments. I understand that to mean that in their judgment it is right and proper that they should, in exercise of the discretion conferred on them by the deed, and in discharge of their duty as trustees, make the payments in question.

A good deal was said during the argument on the question whether under this ill-framed deed vesting of the testamentary estate in the adopted daughter has not taken place. I think that is an important question, but it is not raised in this case. If we should be of opinion that the powers of the trustees to make the payments in question depended on whether the fee had vested or not, then in order to determine the question of power we would need to consider whether or not vesting had taken place. But that might lead to further discussion, for if we determined that the fee had vested, another question would arise which is not put in this case, viz., whether, the adopted daughter being now twenty-one years of age, the trustees could refuse to hand over the whole estate to her. But I think that the only question presented to us in this case is, whether it is in the power of the trustees to make the advance out of capital and the allowance out of revenue to the adopted daughter, and I am of opinion that, irrespective altogether of the question of vesting, it is in the power of the trustees to make these payments, they informing us that they believe that that is a proper thing to do. I found this opinion on the expression in the deed—"Declaring that it is my wish that my trustees should act towards my adopted daughter as if she were my own child, and as they consider will be best for her moral good and comfort and advancement in life." I do not read this provision as inapplicable and inoperative so long as the widow lives. I do not read it as having effect only on the death of the widow. Holding that it would have come into operation during the widow's lifetime even if she had abided by the deed, and that it has come more especially into operation now that she has betaken herself to her legal rights, I consider that it confers powers of an independent character on the trustees to act according to their discretion, and make payments to the adopted daughter which they consider beneficial for her interests. Agreeing as I do that what they desire to do is the right and proper thing, I think it is in their power to make the payments in question.

LORD TRAYNER.—It is not necessary, and indeed we are not specifically asked, to determine whether any right to the residue of Mr Cairns' estate has already vested in the first party to this case, for the question put before us may be answered upon other and to my mind satisfactory grounds. The main purposes of Mr Cairns' settlement were two—first, to provide for his widow by leaving her the liferent of his estate, and second, to provide for the first party "as if she were his own child," by leaving to her the estate so liferented under certain conditions. These conditions were evidently dictated by a desire to protect the first party's interest in so far as the foresight of the testator could provide for this.

The trustees were directed to hold the estate during the lifetime of the

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testator's wife, and on her death to communicate the benefit of the testator's bounty to the first party in the manner and under the restrictions enumerated in the settlement. The testator's wife is still alive, but is taking no benefit under the settlement, as she elected to take her legal rights rather than the conventional provisions there conceived in her favour. It appears to me that the existence of the testator's widow does not *per se* hinder the trustees from exercising in favour of the first party any discretion committed to them by the testator as to the disposal of the fee of his estate. The postponement of the period at which the first party should be entitled to the enjoyment of any beneficial interest under the settlement was obviously only for the purpose of protecting the widow's liferent, and that in the circumstances does not now call for any protection. I therefore read the settlement as if it had provided that "on the expiry of the liferent" the trustees might proceed to deal with the fee of the estate in the interest and for the benefit of the first party as there directed. The discretion conferred on the trustees is of a very comprehensive character, but for the purposes of the present decision it is enough to notice that (the liferent being out of the way) the trustees are authorised, *inter alia*, if they think fit, on the first party attaining majority or being married, "and on either of these events happening," to make over to her the whole estate or part thereof. The first party has attained majority, and the trustees inform us that they are willing, and in the interest of the first party think it right, to pay to her the sum mentioned in article 9 of the case as well as to make her a yearly allowance out of the income of the estate which they are meantime retaining in their hands. To do so is, I think, entirely within the power of the trustees, and I am content to answer the questions put to us by affirming that they are entitled to make both the payment and the yearly allowance as proposed.

LORD LOW.—I agree with your Lordships that we should find that the trustees are entitled to make the proposed payments to the first party, but I confess that I have some difficulty, in view of the opinions delivered in the House of Lords in the case of *Muirhead's Trustees*,[1] as to the grounds upon which the judgment should proceed.

In *Muirhead's Trustees*[1] it was laid down that if, in such a case as that with which we are now dealing, the widow elects to take her legal rights instead of the liferent provided to her by the settlement, the Court will not be justified in authorising an acceleration of the period of payment (1) unless the only object for which the period of payment was postponed until the widow's death was to secure her liferent, and (2) unless the party seeking payment has taken a vested right, or all the parties interested in the residue consent to the payment being made.

I have no doubt that the first of these conditions is present here, because I think that it is plain that the only reason for postponing the period of payment was to secure the liferent. The question remains, whether the second condition, in either of its alternatives, also exists.

If the only person interested in the fee of the estate is the first party there

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is no difficulty, but there is a gift over to the children of the truster's brothers and sisters. It is that fact which creates a doubt in my mind in regard to the proposed ground of judgment.

If the children of the brothers and sisters are conditional institutes, then there can be no vesting in anyone until the death of the second party, because until that event it cannot be ascertained who, in terms of the settlement, is to take the estate. Further, if these children are conditional institutes, they are, in my judgment, entitled to say that the fee of the estate, which may turn out to belong to them, shall not be diminished by any payments out of capital, and that the income shall be applied in restoring to the estate the amount which has already been withdrawn, under the operation of the well-established doctrine of equitable compensation.

Now, the children of the truster's brothers and sisters are not parties to this case, nor do they consent to the proposed payments. And that would, in my opinion, be a fatal objection to the course proposed if they are truly conditional institutes.

I do not, however, think that they are conditional institutes in the event, which has happened, of the first party attaining majority. The settlement provides in the first place for the event of the second party dying while the first party is in minority or unmarried. In that case the trustees are directed to hold the residue for her behoof, and to expend the revenue, and, if necessary, part of the capital, for her maintenance and education, and then the trustees are directed to pay the residue to the children of the truster's brothers and sisters "in the event of the decease of the said Jessie Cairns before attaining twenty-one years of age or being married." That, I think, is a proper conditional institution, and, therefore, if the first party had not attained majority, I do not think that it would have been competent to authorise the trustees to make the proposed payments to her.

But in the event of the first party attaining majority or being married the trustees were empowered either (1) to denude of the trust and make over the whole residue to her, or (2) in the event of her marriage, to settle the residue, or any part thereof, upon her for her liferent alimentary use, and her issue in fee, or (3) to withhold payment of the fee for such time as they deemed best, and allow her a liferent only. In any case power to test upon the residue was given to the first party—an absolute power in the event of the trustees not settling the fee upon her issue, and a power of apportionment if and in so far as the fee was settled upon her issue.

In the case of the first party attaining majority or being married, the trustees were directed, in the event of her decease "before receiving payment of said residue, and having failed to test thereon," to pay the residue to the children of the truster's brothers and sisters.

The right there given to the children of the truster's brothers and sisters is, therefore, defeasible at the will either of the trustees or of the first party. They are only given right to the residue if the trustees elect to retain it in their own hands, and if the first party dies intestate. I do not think that that is a right of conditional institution. It appears to me to be a simple destination intended to take effect only if the first party dies without having altered it.

If that view is sound, then it removes the barrier which a conditional

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institution of the children of the truster's brothers and sisters would, in my opinion, have presented to the proposed payments.

I think myself that when the first party attained majority the fee of the residue vested in her, subject to defeasance or divestiture if and in so far as the trustees might settle the fee upon her issue in the event of her marriage.

Apart, however, from the question of vesting, I think that the fact that the children of the truster's brothers and sisters are not, in the event of the first party attaining majority, conditional institutes, distinguishes this case from that of *Muirhead's Trustees*[1] and the class of cases which is there dealt with, and makes it plain that after providing for his widow the first party was the person whom the truster desired to benefit.

The settlement is badly drawn. The only event in terms provided for is the death of the widow while the first party was still in minority and unmarried. Of course there were many other events which ought to have been contemplated and provided for, notably the event of the second party marrying a second time, when her liferent would have come to an end, and she would only have received an annuity of £100. No provision, however, is made for the disposal of the surplus capital and income in that event. Again, no provision is made for the maintenance of the first party during the subsistence of the liferent, or in the event, which has happened, of the second party taking her legal rights. The settlement, therefore, is open to construction, and the Court must deal with cases which are not provided for in accordance with what appears to be the intention of the testator, as that may be gathered from the provisions which he has actually made. In the case which has occurred I agree with your Lordships, for the reasons which you have stated, that in authorising the proposed payments we shall act in accordance with the truster's intention.

The LORD JUSTICE-CLERK and LORD MONCREIFF were absent.

THE COURT found and declared in answer to the question put in the special case that the third parties thereto were entitled to pay to the first party a part of the residue of Mr Cairns' estate for the purposes specified in article 9 of the case, and also to make payment to the first party for the future, or termly, of an allowance out of the income of the estate during the survivance of the second party.

SIMPSON & MARWICK, W.S.—SMITH & WATT, W.S.—Agents.

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JAMES MACPHERSON (James Gibson Dougan's Trustee), Pursuer (Respondent).—*Salvesen, K.C.—Munro.*

JOHN DOUGAN, Defender (Reclaimer).—*Jameson, K.C.—Baxter—Crabb Watt.*

Trust—Duty of Trustee—Purchase of beneficiary's interest by trustee.—In 1899, John Dougan, one of the trustees and also a beneficiary under his parents' antenuptial contract of marriage, purchased the interest in the trust-estate of his brother James, who was not a trustee. At the date of

[1] 17 R. (H. L.) 45.

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the purchase the interests of the beneficiaries had vested absolutely, and, both spouses being dead, were payable in the ordinary course of trust realisation, but none of the trust-estate, which consisted of house property and feu-duties, had been realised, and its value was somewhat uncertain. Before making the purchase, John Dougan had seen a valuation of the trust-estate. Upon the basis of this valuation, the value of James Dougan's interest was about £3500. This valuation was never communicated to James Dougan. The consideration for the purchase was the payment of £450 by John to James and the taking over by John of the bulk of James' debts. If the valuation turned out to be correct, John would make a profit on the transaction of about £600. On receiving payment of the £450 from John, James left the country without paying the balance of his debts. The estates of James having thereafter been sequestrated, the trustee in the sequestration brought an action for reduction of the sale by James to John.

Held on a consideration of the foregoing facts and the evidence generally (*aff.* judgment of Lord Stormonth-Darling, *diss.* Lord Young), that decree of reduction fell to be granted, on repayment of the £450 paid by John.

2D DIVISION. LdStormonth-Darling.

JOHN DOUGAN, surgeon in Glasgow, died on 12th March 1884, survived by his wife and by six children of their marriage, of whom James Gibson Dougan and John Dougan junior were two.

There was an antenuptial contract of marriage between the spouses, and Dr Dougan left a trust-settlement. Under both these deeds the fee of the estates vested equally in the children of the marriage who should survive their mother. Prior to her death the children had merely a *spes successionis*.

John Dougan junior was one of the trustees under the antenuptial contract, and also under his father's settlement. James Gibson Dougan was not a trustee under either deed.

On 12th April 1898 James Gibson Dougan, who was in impecunious circumstances, and against whom a decree of *cessio* had been awarded in 1893, made a written offer to sell his rights under the antenuptial contract and his father's settlement to his brother John for £400, John undertaking to pay the debts in the *cessio* and certain other debts due by James.

At the date of this offer Mrs Dougan, the mother, was alive, and consequently James' rights were still *in spe* merely, but Mrs Dougan died five days afterwards, *i.e.*, on 17th April 1898, and the rights of James and the other children of the marriage then became vested.

On 19th April John sent a written acceptance of James' offer of 12th April, but James, on hearing of his mother's death, declined to carry out the transaction, and John ultimately, on the advice of counsel, abandoned the attempt to enforce it.

On 12th January 1899 James, being still in much pecuniary difficulty, resumed negotiations for the sale to his brother John of his interest in his parents' succession, and ultimately the transaction was carried into effect by James executing an assignation in favour of John, dated 16th January 1899, by which James Dougan, in the first place, ratified and homologated the offer and the acceptance above mentioned, and the agreement thereby constituted. The assignation then proceeded,—"And now, seeing that it is proper that I should grant in favour of the said John Dougan a formal assignation in implement of the said offer and acceptance, and of other interests than those forming the subject of said offer and acceptance, therefore, and in consideration of" (first) the payment by John Dougan to James Dougan of £450, and (second) of John

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Dougan freeing and relieving James Dougan of the debts due by him under the *cessio* and certain other specified debts, James Dougan assigned to John all his (James') rights under his parents' marriage-contract, and also all rights and claims competent to him in any manner of way through or on account of his father's and his mother's death.

After receiving payment of the £450 stipulated in the foregoing assignation, James Dougan left the country without making provision for payment of his debts in so far as not specified in the assignation. The subjects assigned constituted his whole property.

Thereafter on 20th March 1899 the estates of James Dougan were sequestrated. James Macpherson, C.A., Edinburgh, was appointed trustee.

On 24th October 1899 Mr Macpherson, as trustee, brought an action against John Dougan for reduction of the assignation, and also of the prior offer and acceptance, upon, *inter alia*, the following ground:—(Cond. 10) "Further, the said pretended assignation was entered into between James Gibson Dougan, a beneficiary under the estates aforesaid, and the defender, who was at the time trustee on the said estate, and it was to the advantage of the latter. In point of fact the defender made a profit of £850 or thereby out of the transaction. The defender was disabled by his fiduciary position from transacting with the said trust-estates with a view to his own profit as he did, and the pretended assignation is therefore invalid."

The pursuer also pleaded that the assignation should be reduced in respect that it formed a part of a scheme to defraud the creditors of James Dougan, and was entered into by him and by the defender in the knowledge of that fact; and also on the ground that it was contrary to the provisions of the Act 1621, c. 18. It is unnecessary, for the purposes of this report, to enter into detail regarding these two grounds of reduction. The evidence shewed that the allegation of fraudulent conspiracy was without foundation.

The defender denied the averments in cond. 10, and pleaded, *inter alia*;—(4) The assignation sought to be reduced being a valid assignation, decree of reduction thereof ought to be refused, with expenses.

A proof disclosed the following facts:—James Dougan was the eldest of the family, and was over forty years of age at the date of the action. He had for years been in a state of continuous impecuniosity. In 1893 he attempted to sell his *spes successionis* in his parents' estates, but without success. The trustee under the *cessio* obtained in that year was still in office. In 1897 James made an abortive attempt to sell it to his brother John, the defender. Then followed the offer and acceptance in 1898.*

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* The defender deponed in cross-examination,—" . . . I have no doubt that I received the offer of 12th April 1898 in due course. I did not accept it till the 19th. I cannot remember if there was any particular reason why I did not accept it sooner. When I heard of my mother's death I was anxious the offer should be accepted without delay. (Q.) Why? (A.) So as to get the transaction completed. (Q.) Why did you want it completed? (A.) Because there was an offer made. (Q.) Didn't you realise that the death of your mother made a great difference in James' interest? (A.) Certainly not. . . . (Q.) Was the reason simply this, that you knew your mother's death increased enormously the value of James' interest? (A.) It changed a reversion to a certainty, and did away completely with the speculative

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In 1898 the defender wished to effect a loan over his own one-sixth of the trust-estates, and a valuation of his share was made up by Messrs Binnie & Sons, valuators, Glasgow, on behalf of the proposed lenders. This valuation brought out the value of the defender's share (and consequently of James Dougan's share) at £3518. This valuation was communicated to the defender, but was never made known to James Dougan.

James Dougan resumed the negotiations for the sale to the defender of his rights in his parents' succession by calling on the defender's law-agents on 12th January 1899. They told him that he ought to have a law-agent of his own. On his asking for the name of a law-agent, they recommended one of their friends, to whom accordingly James Dougan went, and by whom the assignation under reduction was prepared on behalf of James Dougan.*

The pursuer led evidence to shew that, on the assumption of the

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element. (Q.) You knew that? (A.) Yes; everybody would know that. . . . As regards the price which I was to pay for the reversion, I knew generally what debts I undertook to pay. I understood the value of James' interest to be about £3000. The sum was payable immediately upon realisation; but the properties have not yet been realised. I had Mr Binnie's valuation before me. I had no reason to doubt it was correct. (Q.) Is it the case that you have made profit of between £800 and £900 out of the transaction? (A.) I am not aware. I am afraid I will make no profit—absolutely none. When I concluded the bargain I estimated that I would make a few hundred pounds. I was taking a considerable risk, because it was unvested property. At the date of the assignation I thought I would make perhaps £200 out of the transaction. (Q.) If you were told it was between £800 and £900, would that alter your opinion as to its fairness? (A.) I simply would not believe it. I do not see that fairness has anything to do with it; if a man sells at his own valuation, and another man buys, it has nothing to do with fairness. James was not an executor under our father's settlement, or a trustee under the marriage-contract. I did not personally at any time submit to him a statement of his interest under either deed; I was not called upon to do so, because I was never asked. (Q.) Didn't you think it was a duty upon you as trustee, and holding a fiduciary relation to your brother, to disclose to him the extent of his interest in the trust-estate? (A.) Certainly not, when he could get all information from the law-agent of the trust."

* The law-agent employed by James Dougan in regard to the assignation deponed that after consulting with James Dougan he made an offer to John's law-agents to sell James' interest in the trust-estates for £450,—"I understood, when I agreed to make this offer, that the result would be that John would make a profit of £200 or £300." Witness further deponed in answer to the Lord Ordinary,—"(Q.) Did you consider yourself charged with the duty of advising Dougan, or that your instructions were simply to carry out a transaction, the heads of which had been arranged? (A.) The latter; he came to me with his mind made up, that he wanted to settle this affair, and instructed me to do my best to get it settled for £400, if possible. The man seemed to be terribly worried about something. (Q.) Did you gather from him why he was willing to surrender his interest to the extent of £200 or £300, when his share of the estate was immediately payable? (A.) It had been going on for so long, and the man was worried and sick of the whole business, he said to me, and if he got this settled up now for £400 he would be quite pleased. I understood he was in possession of the whole facts, and how much the estate was worth to him, and his debts, and everything. He did not ask me to give him any advice, or make any inquiry."

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correctness of Messrs Binnie's valuation above mentioned, the value of James Dougan's share, after deducting the debts taken over by the defender under the assignation, was about £1100, or, in other words, that the defender made a profit of about £650. The trust-estate consisted almost entirely of house property and feu-duties, none of which had been realised at the date of the proof. Two valuators adduced by the pursuer deponed that they considered Messrs Binnie's valuation of the trust-estate to be an undervaluation by about £100. On the other hand, the defender adduced evidence to the effect that Messrs Binnie's valuation was considerably too high, especially in regard to the feu-duties, the value of feu-duties generally having, it was said, fallen in the market, the result of this and other evidence adduced by the defender being that the defender might make little or no profit.

On 18th July 1900 the Lord Ordinary (Stormonth-Darling) pronounced this interlocutor:—"Finds that the transaction complained of was entered into by the defender, when a trustee on the estates condescended on, with James Gibson Dougan, a beneficiary on the said estates, and was to the material advantage of the defender: Finds, therefore, that on repayment to the defender of the sum of £450 the pursuer will be entitled to decree of reduction as concluded for: Finds the pursuer entitled to expenses," &c.: "Grants leave to reclaim."*

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* "OPINION.— . . . It appears that the bankrupt has for many years been in a state of chronic impecuniosity. He has in his time played many parts, from that of medical student to that of tramway-car conductor. In 1893 a decree of cessio was awarded against him, and the trustee is still in office. His sole estate consisted of his interest under the marriage-contract of his parents and under the will of his father, who was a surgeon in Glasgow. But counsel agreed in representing that no right vested in him under either of these instruments until the death of his mother on 17th April 1898. The defender is a trustee under both the marriage-contract and the will. As early as 1893 the bankrupt seems to have endeavoured to sell his *spes successionis*, but at first without result. Again in 1897 an abortive attempt was made to sell it to the defender, who admits that he was anxious to secure it. In 1898 negotiations were resumed on the basis of the defender taking over the debts in the cessio and some other specified debts, and paying down a sum in cash. These resulted in an offer by the bankrupt on 12th April 1898, in which the sum to be paid in cash was fixed at £400. This offer was accepted by the defender on 19th April, but in the meantime (*i.e.*, on 17th April) the mother had died, and the expectancy had been converted into a vested right. In these circumstances I am not surprised that the bankrupt refused to carry out the transaction; and it is undoubtedly an ugly feature in the case that both the defender and his agent, . . . contrary to what I should have thought the most obvious notions of fair dealing, maintained that the contract was binding on the bankrupt until they were advised by counsel that it was not. Some months passed, and the bankrupt, being in greater pecuniary straits than ever, again approached the agents for the defender with a view to having the transaction carried out. They, properly enough, advised him that he must have another agent, and they recommended a friend of their own. . . . I have nothing to say against his part in the affair, except that the relation of the parties as trustee and beneficiary ought to have put him on his guard, and to have led him to scrutinise the transaction with more than ordinary care in the interests of his client. His own view of his duty was simply that he had been employed to carry out a bargain, the

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The defender reclaimed.

In addition to argument on the question under the Act 1621, cap. 18—

Argued for the defender;—The Act 1621, cap. 18, and the element of fraudulent conspiracy being out of the way, the pursuer, as trustee, had no better right of action than James Dougan himself would have had. If the transaction was shewn to be of such a character that James would have been entitled to decree of reduction, the pursuer would be entitled to decree—otherwise not. It was to be kept in mind that the transaction here impugned was not a purchase of trust-estate by a trustee; it was a purchase by a trustee of a beneficiary's interest under the trust. A purchase of the former class, being a purchase by a trustee from himself, was absolutely illegal; but a purchase by a trustee of a beneficiary's interest would be sustained if it were shewn to be, in the whole circumstances, a fair and reasonable transaction. It was not necessary that the highest possible price should have been paid, nor even that the price should be adequate. Mere inadequacy was not sufficient; the inadequacy

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heads of which had been already arranged, and all he did was to obtain for the defender an increase of £50 in the sum to be paid in cash. The result was that, on 16th January 1899, the assignation now sought to be reduced was executed, and the cash consideration of £450 was paid to the bankrupt, who immediately absconded with it. His estates were sequestrated on 20th March following.

"I have come to the conclusion that this transaction cannot stand, but I do not thereby affirm all the grounds of reduction stated on record, some of which I think have been put forward rather recklessly. There is nothing to shew that the defender had any idea of the bankrupt's intention to leave the country, or that he conspired with him to defraud his creditors. It is proved, I think, that the two brothers, so far from being in each other's confidence, were on rather distant terms; and all that can fairly be charged against the defender is that he took advantage of his brother's urgent necessities to make a decidedly advantageous bargain for himself.

"The first ground of challenge—that of fraud at common law—is therefore, in my view, disproved. The second is laid on the Act 1621, c. 18, but that also fails. Some of the conditions required by the Act are no doubt present. The grantee of the deed was a conjunct person; the granter was insolvent at the date of raising the action; and upon this latter fact being proved, there arises a legal presumption that he was insolvent at the date of granting the deed. But that is a presumption which is capable of being rebutted by proof, and here such proof is clearly forthcoming. James Dougan's financial position is, of course, to be tested as at the time when the transaction was completed, and undoubtedly the transaction left him with £450 in his pocket, and debts to pay of certainly not more than £200. That being so, it is of no consequence, so far as the Act of 1621 is concerned, whether the price was a just one or not, because a solvent man is perfectly entitled to make as bad a bargain as he likes.

"But then the third ground of challenge is that the transaction was one between a trustee and beneficiary, and that such a transaction cannot stand if it is materially advantageous to the trustee. Now, I quite concede that there is no ground for charging the defender with having taken advantage of his position as a trustee to misrepresent anything, or to conceal anything, with reference to the condition or value of the estate. I think that James Dougan had full opportunities of knowing, and did know, the nature of the

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must be so great as to shock the conscience.[1] In the present case the price was not so inadequate as to warrant decree of reduction. In the first place, it was not clear that the defender would, if the transaction stood, make any profit worth speaking of. The value of the trust-estates was still uncertain, because they had not yet been realised, and there was also an uncertainty as to how much of James Dougan's debts had effectually been made burdens on his share of the trust-estates. But even if the figures were something like those brought out by the Lord Ordinary, the bargain was a fair one. There had been no undue concealment by the defender—Binnie's valuation was not obtained by the defender *qua* trustee. Further, it was clear that James Dougan knew perfectly well what he was doing. It was not the case of a beneficiary who had just attained majority, and was ignorant of business and of the trust affairs, selling his interest in the trust to one of the trustees for an immediate but inadequate payment in cash. James Dougan was a man of mature years, with a somewhat varied experience of life, and it could not well be doubted, on the evidence, that he was as conver-

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estate, and the approximate value of his interest in it. If there had been either misrepresentation or concealment, the transaction could not have stood even as between strangers. But the position of a trustee towards a beneficiary is a fiduciary one, and the law views with extreme suspicion any transaction whereby the trustee acquires the interest of the beneficiary in the estate. There are cases, no doubt, in which such a transaction may be upheld, as where the beneficiary has urged it upon the trustee, and has received a full and fair consideration. But, I think, all such cases postulate, not only that the parties are dealing with each other at arm's length, but that they stand upon an equal footing. If the trustee takes advantage of the known necessities of the beneficiary to procure from him a bargain which is prejudicial to him, and correspondingly advantageous to the trustee, the transaction must, I think, be condemned by the law.

"Now, in this case, it is not denied by the defender that he expected to make 'a few hundred pounds' out of the transaction. He estimated his brother's share as worth £3000; I think, on the evidence, it was worth about £3250. He knew that the consideration which he was giving, over and above the £450 paid down, fell considerably short of £3000; I think, on the evidence, it fell short of the true value of the share by not less than £500. The share was not only fully vested, but it was capable of being realised in the ordinary course of administration at an early date; yet James Dougan was so absolutely reckless of his own interests, owing to his impecunious condition, that he was willing to sell an interest of that kind for substantially the same price as that at which, a few months before, he had offered to sell his share when it was only an expectancy. If the defender had realised the fiduciary relation in which he stood, he could not have agreed to enter into such a bargain. The truth is that he did not realise it. Even at the proof he remained so completely unconscious of it that, in answer to a question in cross-examination, he said, 'I do not see that fairness has anything to do with it; if a man sells at his own valuation, and another man buys, it has nothing to do with fairness.' . . .

"I shall therefore find that the transaction complained of was entered into

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[1] Coles v. Trecothick, 1804, 9 Vesey, 234, *per* Lord Eldon, at p. 246; Buckner v. Jopp's Trustees, July 16, 1887, 14 R. 1006; Morse v. Royal, 1806, 12 Vesey, 355; Luff v. Lord, 1864, 34 Beav. 220; Bell's Comm. 7th edit. II. 179.

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sant with the trust affairs as the defender. He made this arrangement with his eyes open to its possible favourable consequences to the defender, and there was no principle of trust law which entitled him, or the pursuer in his place, to have it reduced.

Argued for the pursuer;—The Lord Ordinary's judgment ought to be affirmed. The *onus* was on the defender to shew the fairness of the transaction, and he had failed to discharge this *onus*. The proof shewed that the price was wholly inadequate. The defender had his brother, who was embarrassed for want of ready money, at his mercy; practically, in the whole circumstances disclosed by the proof, the defender was the only possible purchaser, and could make his own price. Further, the defender ought to have made known Binnie's valuation to James Dougan, but he had not done so. It might be that James Dougan knew generally that he was parting with his interest for an inadequate consideration, and probably if the defender had not been a trustee the transaction would have been unimpeachable. But a trustee ought to discourage the reckless disregard by a beneficiary of his own interests; and for a trustee to take advantage of such recklessness to his own substantial profit was illegal. In the whole circumstances the assignation was in breach of the defender's duty as trustee, and ought to be reduced.[1]

Lord Justice-Clerk.—The question in this case is, whether a bargain made by a trustee, by which he for a price purchased the interest of a beneficiary, can be allowed to stand on being challenged. The rights conveyed were those of a son, under his father's and mother's marriage-contract.

The facts are that the son who sold his interest was and had been for long in very impecunious circumstances. He is still under cessio, granted in 1893. On the death of his mother a share of his parents' estate came to him under the marriage-contract. While his mother was still alive he and his brother were negotiating for a sale and purchase of his prospective share, and £400 was offered and accepted; but before the transaction was carried out the mother died, and the brother who was the proposing purchaser became trustee. The brother who was selling declined to carry out the transaction, and new negotiations were entered into which resulted in the share being purchased by the trustee for £450. The money was paid, and on receiving it the recipient left the country.

The Lord Ordinary has held that the transaction cannot stand, as being

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by the defender, when a trustee on the estates condescended on, with James Gibson Dougan, a beneficiary on the said estates, and was to the material advantage of the defender. Of course (as the pursuer's counsel admits) decree of reduction cannot be pronounced except upon condition of the pursuer repaying to the defender the sum of £450, and I shall find that, upon this being done, he will be entitled to decree of reduction as concluded for. The reduction, when pronounced, will include the offer and acceptance of April 1898 as well as the assignation of January 1899, because, although the offer and acceptance were really superseded by the assignation, still the latter deed ratified and homologated the former."

[1] Gibson v. Jeyes, 1801, 6 Ves. 266; Denton v. Donner, 1856, 23 Beav. 285; Tate v. Williamson, 1866, L. R., 2 Ch. App. 55; Gray v. Warner, 1873, L. R., 16 Eq. 577; Plowright v. Lambert, 1885, 52 L. T. 646; Lewin on Trusts, 10th edit., p. 554.

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materially advantageous to the trustee, he having taken advantage of the necessities of his brother to make a bargain for his own benefit. The trustee is quite frank on this matter, saying that he did not look upon it as a question of fairness, that "if a man sells at his own valuation, and another man buys, it has nothing to do with fairness." Thus his purpose was admittedly to gain an advantage for himself, and it appears that he did make a substantial advantage. That is demonstrated by the fact that an expectancy for which the trustee was willing to pay £400 was, after it became a fully vested interest, purchased by him for only £50 more, and also by the fact that he did not disclose to his brother the valuation he had obtained.

I have been unable to see any ground for altering the Lord Ordinary's interlocutor, and concur in the grounds he has stated for it in his opinion.

LORD YOUNG.—(His Lordship, after intimating his concurrence with the Lord Ordinary as to the first and second grounds of reduction, continued)—But it is on the third ground that the judgment proceeds, so I shall confine my observations to that. According to our law there is no legal objection to a trustee under a settlement purchasing the interest of a beneficiary so long as the trustee acts uprightly and fairly. If, however, it is represented that the trustee has taken advantage of his position as trustee, and has used the knowledge acquired by him as trustee to make an unfair bargain with a beneficiary, the Court will make inquiry into the matter with considerable suspicion. I think from the language used in any decisions quoted to us, that while the Court is against a trustee dealing with a beneficiary, the transaction will be held to be legal if it is proved that the trustee has acted fairly and honestly, but otherwise the presumption will be that the trustee has taken advantage of his position as trustee, and of the knowledge which he has thereby acquired.

If I understand the Lord Ordinary's views on the evidence they ought to have led to a different decision from that at which he has arrived. He says—"I quite concede that there is no ground for charging the defender with having taken advantage of his position as trustee to misrepresent anything or conceal anything with reference to the condition or value of the estate. I think that James Dougan had full opportunities of knowing and did know the nature of the estate, and the approximate value of his interest in it." That is in accordance with my own opinion of the evidence. This statement of what the Lord Ordinary considers the import of the evidence negatives, in my opinion, the sole ground on which an otherwise legal transaction should be set aside. It negatives all ground of suspicion by shewing that all the facts were equally known to the trustee and to the beneficiary, and that the trustee did not take advantage of his position of trustee to the prejudice of the beneficiary. In my opinion that is the only ground on which the transaction could be found invalid. Here there was no purchase by a trustee of the trust-estate of which he was the seller. It was a purchase by the trustee from a beneficiary of the latter's interest in the trust-estate. That is quite a legal proceeding, although it may be regarded by the Court with suspicion, which suspicion, if the purchase is afterwards questioned by the beneficiary, will require to be negatived before the sale is held valid.

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The Lord Ordinary goes on to say—"The position of a trustee towards a beneficiary is a fiduciary one, and the law views with extreme suspicion any transaction whereby the trustee acquires the interest of the beneficiary in the estate." I object to the qualifying word "extreme." "There are cases, no doubt, in which such a transaction may be upheld, as where the beneficiary has urged it upon the trustee and has received a full and fair consideration. But I think all such cases postulate not only that the parties are dealing with each other at arm's length, but that they stand upon an equal footing. If the trustee takes advantage of the known necessities of the beneficiary to procure from him a bargain which is prejudicial to him and correspondingly advantageous to the trustee, the transaction must I think be condemned by the law." I am of opinion that a case of fair dealing has been proved, that these two brothers were at arm's length, and that the impecunious brother approached the other and pressed him to purchase his interest in the trust-estate, the true value of which he had better means of knowing than the defender. I do not attach any importance to the circumstance to which the Lord Ordinary and your Lordship have both referred, that after the defender had agreed to buy, the mother died and the other brother wanted to be released from the transaction, thinking that the death of his mother had increased the value of his share of the trust-estate. I do not think it made it more valuable, and I am not surprised that the defender remonstrated against throwing up the agreement on that account. But I do not think it enters into the question, because it is proved that subsequently the impecunious brother came back and again asked the defender to purchase.

The Lord Ordinary is of opinion that something like £500 more than the amount agreed on should have been given. I cannot say that an impression to that effect has been induced in my mind by the evidence. No one can be certain as to the exact value of a reversionary interest of the kind we are here dealing with; it depends on the value of the properties when they are turned into money, and they have not yet been turned into money. In my opinion the evidence that they are not likely to realise more than enough to provide the amount the defender gave is just as strong as the evidence that they are likely to bring more. The defender says—"I understood the value of James' interest to be about £3000. The sum was payable immediately upon realisation; but the properties have not yet been realised. I had Mr Binnie's valuation before me. I had no reason to doubt it was correct. (Q.) Is it the case that you have made a profit of been £800 and £900 out of the transaction? (A.) I am not aware. I am afraid I will make no profit, absolutely none. When I concluded the bargain I estimated that I would make a few hundred pounds. I was taking a considerable risk because it was unvested property. At the date of the assignation I thought I would make perhaps £200 out of the transaction. (Q.) If you were told that it was between £800 and £900, would that alter your opinion as to its fairness? (A.) I simply would not believe it." On the whole evidence I see no reason to doubt the perfect integrity of the witness in saying that although he expected at the time he concluded the bargain to make a profit, he was satisfied that he ran a considerable risk, and that he now is of opinion he will make no profit at all. But there is no authority

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for the proposition, and no reason to assume that, in order to uphold a transaction of this sort by a trustee, the Court must be satisfied that he has lost money through the purchase, or at anyrate made no gain. Every purchase is made with a view of getting some advantage from it.

I should have expected that if the defender had been relieved of this obligation which he undertook under the agreement, and had received back the £450 which he paid down, he would have been willing to renounce the transaction. But he could not do so, if the position taken up by the pursuer in this action was adhered to, without prejudicing his character, for he is here charged with falsehood, fraud, and wilful imposition. As long as his character was assailed he could not reasonably be expected to give up his claim.

I am of opinion that the conduct of the defender was consistent with perfect integrity and honesty, and that this action, which is only in name the action of the bankrupt's trustee, is unfounded, not only as regards the first and second grounds on which it is laid, but also in regard to the third ground on which the Lord Ordinary has sustained it.

LORD TRAYNER.—I think the judgment of the Lord Ordinary is right, and should be affirmed. I should like, however, to add, that in my opinion the defender had knowledge acquired by him as trustee as to the value of the estate which he purchased from his brother which the latter had not. I will not say that the defender intentionally concealed that knowledge from his brother, but he certainly did not communicate it to him. This I regard as very material. A purchase by a trustee of part of the estate under his administration from the beneficiary to whom that part belongs cannot be sustained unless it appears clearly that the beneficiary was possessed of all the knowledge regarding the value of what he was selling which the purchasing trustee had, and which as trustee he had acquired. With this addition (if it be an addition) to what the Lord Ordinary has said, I concur generally in his Lordship's opinion.

LORD MONCREIFF.—I agree with the Lord Ordinary. It is a wholesome general rule that there should be no trafficking between a trustee and a beneficiary in regard to the beneficiary's interest in the trust. There may be cases in which it so clearly appears that the trustee has intervened solely in the interests of the beneficiary, and with no view to his own profit, that the Court will not set aside such a transaction. But it lies on a trustee who transacts with a beneficiary to vindicate his conduct, and when it appears that the trustee's motive in becoming a purchaser is not disinterested, but in order to make a profit by the transaction, especially where he has not made a complete disclosure of his means of knowledge as to the value of the interest to be sold, there is no reason why the usual rule should not be applied.

It must be admitted that the present case is very near the line which separates the two positions to which I have referred. James Dougan was anxious, indeed determined, to dispose of his interest, and was not without professional and skilled advice if he had chosen to take it; and I agree with the Lord Ordinary that if this had been a transaction between

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strangers it could not have been impugned on the ground of fraud or misrepresentation or inadequacy of consideration. But this is a case between a trustee and a beneficiary, and I hold it to be proved (first) that John Dougan's motive and expectation in going into the transaction was to make a profit; (secondly) that he obtained from Mr Binnie, and did not disclose to James Dougan, a valuation dated 14th June 1898, according to which his profit on the transaction would be about £661, 10s. 6d.; and (thirdly) that in point of fact at the date of the transaction the reversion of James Dougan's interest was capable of yielding that or at least a substantial amount of profit to the defender.

The defender's motives become the more apparent on consideration of the position which he took up in regard to the offer made by James Dougan on 12th April 1898, while his mother, the liferentrix, was still alive. The mother died on 17th April, and thus James Dougan's interest became absolute. John Dougan accepted the offer on 19th April 1898, and although matters had changed so materially in the interval, he did his best to hold his brother to that bargain.

Indeed the defender from the first, and even in the witness-box, shewed that he was quite unconscious that any duty lay on him as trustee in regard to the purchase of his brother's interest. Without reading the passage, I refer particularly to his evidence in cross-examination.

Now, this is not a gross case, but I think that the defender has not cleared himself. There is sufficient evidence that he abused or at least neglected the duties of his position as trustee to justify us in adhering to the Lord Ordinary's interlocutor, of course upon the footing that the pursuer repays the defender the sum of £450.

THE COURT adhered.

ST CLAIR SWANSON & MANSON, W.S.—CLARK & MACDONALD, S.S.C.—Agents.

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ANDREW FALCONER, Pursuer (Respondent).—*Craigie.*
THE LONDON AND GLASGOW ENGINEERING AND IRON SHIPBUILDING COMPANY, LIMITED, Defenders (Appellants).—*Campbell, K.C.—Younger.*

Master and Servant—Workmen's Compensation Act, 1897 (60 *and* 61 *Vict. c.* 37), *sec.* 1 (1)—*Accident arising out of and in the course of the employment.*—A workman in the course of his employment in a "factory," within the meaning of the Workmen's Compensation Act, 1897, met with an accident caused by his fellow-workmen, who, at the time, were not engaged at their work, but were indulging in horseplay.

Held (*diss.* Lord Moncreiff) that the accident was not one arising "out of" the employment in the sense of the Workmen's Compensation Act, 1897, sec. 1 (1), and that the injured workman was not entitled to compensation under the Act.

2D DIVISION. Sheriff of Lanarkshire.

IN an arbitration upon a claim for compensation by Andrew Falconer, who had met with an accident in the works of his employers, the London and Glasgow Engineering and Iron Shipbuilding Company, Limited, Govan, against them, the Sheriff-substitute (Boyd), at Glasgow, awarded compensation.

The defenders, the company, obtained a case.

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The case stated that the following facts were admitted or proved: —"(1) That the respondent was employed as a blacksmith in the works of the appellants, which are a factory within the meaning of the Workmen's Compensation Act, 1897. (2) That on 10th April 1900 the respondent was working at the anvil at said works when two of his fellow-workmen, who were engaged in horseplay, stumbled against him and knocked him over a bucket of water, whereby his left leg was broken. The respondent was no party to the pushing or knocking that took place."

In these circumstances the Sheriff-substitute found that the accident arose out of and in the course of the pursuer's employment, and that the defenders were liable to pay compensation to him.

The question of law for the opinion of the Court was,—"Whether the injury sustained by the respondent was caused by 'accident arising out of and in the course of the employment,' in the sense of section 1 (1) of the 'Workmen's Compensation Act, 1897?'"

Argued for the appellants;—Unless the accident could be said both to have arisen out of and to have been in the course of the employment, the master was not liable under the Act. It could not be said that a master would be liable if, in the course of his employment, a workman were killed by lightning. The accident arose out of horseplay, and not out of any employment for the benefit or in the interests of the employer. At common law an employer was not liable for an accident caused by his own servant when that servant was engaged not on his employer's business but on some business or pastime of his own,[1] and the meaning of the words used by the Act must be the same, whether the question involved the liability of the employer to a third person, or his liability under the statute to his own workman.[2]

Argued for the respondent;—The respondent, admittedly by the negligence of his fellow-workmen, was injured during the course of his employment. That being so, the Act protected him against such negligence, however arising. The only bar to a claim under the Act following on an accident to a workman while engaged in his employment was where the accident was attributable to his own serious and wilful misconduct[3]; if the accident were caused in any other way, a claim was competent.[4]

At advising,—

LORD JUSTICE-CLERK.—The facts with which we have to deal are that a workman engaged at his work in a factory to which the Workmen's Compensation Act applies, was injured by the act of fellow-workmen. In ordinary circumstances such a case would present no difficulty. But the case is peculiar. According to the facts as stated by the Sheriff, the fellow-workmen were not at the time of the occurrence doing their master's work, or doing anything in the course of their employment. They were engaged in amusing themselves by indulging in horseplay. No detail is given, but

[1] Pollock on Torts, 5th ed., p. 79.

[2] M'Nicol v. Speirs, Gibb, & Co., Feb. 24, 1899, 1 F. 604, Lord Kinnear, p. 609.

[3] Workmen's Compensation Act, 1897 (60 and 61 Vict. cap. 37), sec. 1 (2) (*c*).

[4] Menzies v. M'Quibban, March 13, 1900, 2 F. 732; Monaghan v. United Collieries, Limited, Nov. 27, 1900, *ante*, p. 149.

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the word itself used by the Sheriff sufficiently indicates that they were not working, or doing anything having relation to their work, but were doing something inconsistent with work. The question is whether an accident so caused can be held to have, in the words of the Act, arisen "out of and in the course of the employment." I recognise to the full that the statute in question, which is remedial in its character, must receive a liberal interpretation. But I have considered the case again and again, and have not been able to find it possible to hold that the words of the statute can cover the case stated. I cannot read the statute as if it had said there should be liability for every accident occurring to a workman when engaged at his work in the factory, no matter how the accident occurred, unless it was through his own wilful fault or negligence. It must, I think, have arisen "out of" his employment in a more exact sense than that it occurred to him when at or going about his own employment in or about the factory. Here the facts seem to me to point to the accident not having arisen out of the employment. Two men, not doing their master's work, and not in course of doing it, but leaving their work aside, and engaging in play,—which was not what they were there for at all,—threw the respondent down, with the result that he was injured. It was not "out of" the employment, but out of proceedings outside the scope of the employment, that the accident occurred. I am unable to hold that the statute covers such a case. The object of the statute was to secure compensation to workmen who were engaged in occupations which exposed the employees to danger from which other occupations were free. But it was as against accidents incidental to the special employment that the benefit of the statute was given. In this case there was nothing of that kind. The accident which happened was directly and solely caused by fellow-workmen engaging in play, leaving their work and doing for their own pleasure something which had nothing to do with their work. There is nothing in the Act from which it can be gathered that such a case was intended to be covered. The words actually used seem to me not only not to cover it, but to exclude it, and I am therefore of opinion that the question put in the case should be answered in the negative.

Lord Trayner.—The Workmen's Compensation Act, 1897, imposes upon employers a liability for the consequences of accidental injury happening to their workmen. It is not a general liability, but a restricted liability. It is not imposed on all employers, nor is the liability imposed for the consequences of all accidents. The employers who are subjected in this liability are enumerated in the Act, and the accidents for the consequence of which they are made liable are accidents only "arising out of and in the course of the employment." The purpose of the Act appears to have been to lay on certain employers, the execution of whose work and business was more than ordinarily hazardous, and from the nature of it more than usually attended with accidental injury to their servants, a liability from which the employers of labour in other and less hazardous employments were exempt; and even then, only to impose the liability for accidental injury which arose out of and in the course of the hazardous employment.

The present appellants are within the class of persons on whom the

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statutory liability is imposed. The only question therefore is, was the accident from which the respondent suffered one which arose out of and in the course of his employment? I think both of these qualities or conditions of the accident must be predicable of any accident, before it can be made the ground of a claim under this statute—first, because they are conjoined in the statute, and we are not at liberty to disjoin them; and second, because many accidents may happen to a workman "in the course of the employment," for which his employer would incur no liability. For example, a servant engaged in a foundry-yard in the course of his employment if struck by lightning and seriously maimed would have no claim for compensation under the Act, nor would his representatives have a claim if he was killed. Or again, if a workman so engaged was injured by a stone thrown mischievously over the wall of the yard, or by a pistol fired into the yard by an outsider, no liability for the consequences would attach to the employer, because such accidents in no sense arise out of the employment, are in no sense incidental to such employment, and might equally happen to workmen engaged in employments which are not within the employments enumerated in the statute.

Now, here the accident which happened to the respondent happened in the course of his employment—while he was engaged in his work. But did it "arise out of the employment"? I think not. It arose from the improper or inconsiderate conduct of his fellow-workmen, who were not at the time engaged in their employment, but neglecting it. If the accident had arisen from the fault or neglect of a fellow-servant when engaged in his work,—that is, his employer's work,—liability would have attached, because in that case it would have arisen out of the employment—out of the employment it may be, badly or carelessly executed—but still out of the employment. It would be properly incidental to the employment. But if some servants leave their work and indulge in horseplay to the injury of a fellow-servant, that does not infer liability on the employer. It cannot be said to be incidental to his business or one of the hazards attached to it. It might equally happen in any work. To make the employer liable in the present case would, I think, be stretching the statute beyond its purpose and its provisions. It would result in making an employer liable for the consequences of any accident, except one arising from the injured servant's own wilful misconduct. The statute does not go that length; and I am therefore of opinion that the judgment appealed against should be recalled, and the Sheriff directed to dismiss the application.

LORD MONCREIFF.—This case raises a difficult and delicate question. At the close of the discussion my impression was against the Sheriff's judgment, substantially upon the grounds which your Lordships have indicated, but after repeated consideration I have, though with hesitation, come to a different conclusion.

The question which we are asked to decide is, whether the personal injury which was sustained by the respondent was caused by "accident arising out of and in the course of the employment"—that is, employment in a factory as defined by the 7th section of the Workmen's Compensation Act, 1897. It may be doubted whether this is a question of law. It is

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much the same kind of question as often arises as to whether a servant has acted within the scope of his authority. It is a jury question depending on the special circumstances of the case, and the Sheriff, in the knowledge of all the facts proved before him, has answered it in the affirmative. Whether the question is to be regarded as one of fact or of mixed fact and law, his decision is not to be set aside unless we must affirm that no facts are stated which will in law support his decision. This I am not prepared to do.

All that we are told in this case as to the cause of the accident is "that on 10th April 1900 the respondent was working at an anvil in said works, when two of his fellow-workmen, who were engaged in horseplay, stumbled against him and knocked him over a bucket of water, whereby his left leg was broken. The respondent was no party to the pushing or knocking that took place." I regret that we have not been given fuller particulars; but taking the statement as it stands, I read it as meaning that these two workmen were in company with, and should have been working with, the respondent, and that in horseplay they pushed and jostled each other, and in doing so knocked the respondent over.

Under this statute a workman's right to recover damages from the undertaker is not dependent upon the accident being proved to be due to fault on the part of the undertaker or of those for whom he would at common law or under other statutes have been responsible. Compensation is due, whether in respect of casualties for which no one is to blame, or accidents caused through the negligence or fault of fellow-workmen or other persons engaged in the undertaking, provided always that it is proved that the accident occurred in or about the factory, and that it in a reasonable sense arose out of and in the course of the employment, and was not due to the injured workman's serious and wilful misconduct.

Now, in the present case, it is proved (1) that the accident occurred in the appellants' factory; (2) that the respondent was injured in the course of his employment while he was doing his employers' work; and (3) that he was in no way to blame. This of itself would not, in my opinion, be sufficient to entitle him to compensation under the statute; but it carries him a very long way towards that result. All that is required to complete his case is to shew that in a reasonable sense the cause of the accident was connected with the employment. Now, the cause of the accident was simply the negligence of two of the respondent's fellow-workmen, who, instead of attending to their work, engaged in horseplay, pushed against him and knocked him over. It is maintained that because they were romping and not working the accident did not arise out of the employment. I think that this is too fine a distinction. The same might be said of most cases of negligence on the part of a servant. Negligence consists in the servant neglecting—that is, not attending to his master's work. It may take many shapes. If in the course of their work the respondents' fellow-workmen had through carelessness or clumsiness pushed against the respondent and knocked him over, it is conceded that the appellants would have been liable. Does it make any material difference that the push was given in horseplay? I think not. The negligence of a fellow-workman is a risk of the common employment against which the statute insures the workman; and I am not prepared to hold that the

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workman's right to recover depends upon the precise shape which his fellow-workmen's negligence takes, provided always that it occurs in the factory, while the workman injured is at his work, and while the fellow-workman who causes the injury is or ought to be engaged in working along with him, or in the common employment.

It is unnecessary to multiply illustrations; but many may be readily figured. For instance, a miner works with a naked light, and causes an explosion; his employers are admittedly liable. But the appellants would maintain that, if instead of using a naked light for the purposes of his work, he uses it to light his pipe and smoke contrary to regulation, and thus causes an explosion, the employers are not liable, because the servant is not engaged on his master's work, and therefore the accident cannot be said to arise out of the employment.

Again, take the case of an engine-driver. If through absentmindedness he ran past a danger-signal, the railway company is liable to any fellow-workman who is injured; but, if his inattention to the signal is due to his reading a newspaper, or gossiping or bear fighting with the fireman, according to the appellants the result is different.

I do not think that for the purposes of this statute there is any solid distinction between such alternative cases. In all of them the accident was due, *ex hypothesi*, to the negligence of a fellow-workman with whom the man who was injured was bound to work.

The result would be different if the proximate cause of the accident were something wholly outwith the employment; for instance, as suggested by Lord Trayner, a flash of lightning, or a shot fired into the factory by an assassin; or even, it may be, some criminal or tortious act on the part of a fellow-servant sufficiently unconnected with the employment to liberate his employer.

But in the simple case we have here, I am of opinion that the appeal should be dismissed, and the judgment of the Sheriff affirmed.

LORD YOUNG was absent.

THE COURT answered the question of law in the negative, and remitted to the Sheriff-substitute to dismiss the claim.

EMSLIE & GUTHRIE, S.S.C.—MORTON, SMART, & MACDONALD, W.S.—Agents.

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Feb. 26, 1901. Gilmour v. Peterson.

WILLIAM EWING GILMOUR, Complainer (Respondent).—*Guthrie, K.C.* —*Chree.*

PETER PETERSON, Respondent (Reclaimer).—*Kennedy*—*Morton.*

Fishings—*White-Fishing*—*Foreland*—*Act* 1705, *cap.* 2.—The Act of Queen Anne, 1705, cap. 2, enacts that all the Queen's subjects shall have the free use of, *inter alia*, all "fore-lands" for bringing in, pickling, drying, unloading, and loading herring and white-fish.

Held that certain rocks above high water-mark, which were swept by the sea in times of storm, but which did not project beyond the line of the shore, were not "forelands" within the meaning of the Act.

Crofters Holdings Acts—*Rights of Crofter*—*Building on Croft for Fish-curing*—*Crofters Holdings* (*Scotland*) *Act*, 1886 (49 *and* 50 *Vict. cap.* 29), *secs.* 1, 8, 32, *and* 34.—*Held* that a crofter whose holding adjoined the sea-shore was not entitled under the Crofters Holdings (Scotland) Act, 1886, to erect or use buildings on his croft for the purpose of fish-curing.

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2D DIVISION. Lord Kincairney.

IN April 1899 William Ewing Gilmour, proprietor of the island of Foula, Shetland, presented a note of suspension and interdict against Peter Peterson, crofter, Ham, Foula. The complainer prayed to have the respondent interdicted "from (first) entering on, or using for the purpose of salting, curing, or drying fish, or for any other purpose whatever, two artificial beaches situated on the north and east of the lands of Liorafield, in the said island of Foula, the one beach adjoining and immediately to the north of the harbour and landing on said lands of Liorafield, and bounded on the north by the lands and croft of Veidal, and the other immediately to the west of the northern portion of said beach, and also bounded on the north by the said lands of Veidal, and also from molesting or interfering with the complainer's manager and servants and fishermen in the occupation of said beaches, and of the curing shed situated on the said lands of Liorafield; and from (second) erecting or adding to on said lands of Liorafield any shed, building, or other structure, designed or intended to be used for any other purpose than for the agricultural or pastoral purposes of the croft occupied by him at Ham or Liorafield, and in particular any shed, building, or other structure, designed or intended to be used for the purpose of curing or storing white-fish, or as a shop, and to grant interim interdict; and further, to decern and ordain the respondent to take down and remove a curing shed recently erected by him on said lands of Liorafield immediately to the east of the curing shed thereon occupied by the complainer, and lying between it and the beach first above described, and failing his doing so within such short time as your Lordships shall determine, to grant warrant to the complainer himself to remove said shed at the expense of the respondent."

The note having been passed and interim interdict to certain effects having been granted, a record was made up.

The complainer averred;—(Stat. 2) "For some years prior to the term of Martinmas 1898, the respondent, in addition to his said croft, was tenant of a store or shop, a shed used for curing and storing fish, and cellar, and of the two artificial beaches described in the prayer of the note. The beach first described was prepared for use as a fish-curing station by former proprietors of Foula at great expense, by levelling the natural surface of the rocks, cutting a trench and two vats therein for the purpose of holding and curing fish, cutting a path through the rocks from the landing place, and cutting and hollowing the rocks to form a pier and quay. The other beach was also constructed by a former proprietor at considerable expense, by laying down stones on the grass, and thus forming a stance for curing purposes. Said beaches are outside of and form no part of the respondent's croft. Said store, cellar, and artificial beaches, which are used for curing fish, were for many years let to Mr L. F. U. Garriock, fishcurer. In or about the year 1888 Mr Garriock ceased to be tenant of said subjects, and they were then let to the respondent as a separate subject from his croft. They were expressly reserved to the landlord by the Crofters Commissioners in their order, dated 6th November 1889,* pronounced on an application by the respondent to have a fair rent

* The note to the Commissioners' order contained, *inter alia*, the following:—"In dealing with the application of Peter Peterson, Liorafield, F. No. 20/318, there is hereby reserved to the landlord his whole rights to the store, shed, cellar, and beaches made or used by him, at or near Ham Voe."

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fixed for his croft. For the said subjects, other than his croft, the respondent paid a rent of £5." (Stat. 3) "The complainer, having resolved himself to carry on the industry of fish-curing at said artificial beaches on Liorafield, gave notice to the respondent terminating his tenancy of said shop, shed, cellar, and beaches. The respondent, however, refused to cede possession thereof, and the complainer accordingly raised an action of removing against him in the Sheriff Court of Orkney and Zetland, at Lerwick. The complainer obtained decree in said action on 14th September 1898. An extract of said decree is produced herewith."* (Stat. 4) "In obedience to said decree of removing, the respondent ceded possession of said shop and shed occupied by him at Liorafield, and removed from the beaches. He has, however, recently erected another fish-curing shed on said lands of Liorafield, of which he is tenant, within 4 yards of the shed formerly occupied by him as tenant foresaid, and between said shed and said artificial beaches, free access to which is thereby obstructed. He has also brought a quantity of materials to the island with a view to enlarging said shed, or building a shop or some such erection on the lands of Liorafield, as soon as the season permits. He has further intimated his intention of again taking possession of and using said beaches or part thereof when the curing season comes round. Said beaches are indispensably necessary for the proper conduct of the complainer's fish-curing business. In these circumstances the present application has been rendered necessary. The statement in answer is denied."

The respondent answered;—(Ans. 2) "Admitted that prior to Martinmas 1898 the respondent, in addition to his croft, was tenant of a shop, shed, cellar, and of the artificial beach second referred to in the prayer of the note, at a rent of £5 a year. *Quoad ultra* denied." (Ans. 4) "Admitted that the respondent ceded possession of the said shop and shed, and of the said artificial beach referred to in answer 2, and that he has erected a shed on his croft. *Quoad ultra* denied. The only beach which the respondent intends to use consists of natural rocks sloping up from the sea. The respondent has, in virtue of the Acts 1705, cap. 2, and 29 Geo. II. cap. 23,† the right to use these for

* The decree ordained the defender to "remove himself, his family and servants, with their goods and gear and whole belongings, furth and from the shop or store, shed, cellar, and beaches at Ham, in the island of Foula, Zetland."

† By the Act 1705, cap. 2, Her Majesty Queen Anne, *inter alia*, "authorises and impowers all her good subjects of this Kingdom to take, buy, and cure herring and white-fish in all and sundry seas, channells, bays, firths, lochs, rivers, &c., of this Her Majesties ancient Kingdom and Islands thereto belonging, wheresoever herring or white-fish are or may be taken: And for their greater conveniency to have the free use of all ports, harbours, shoars, fore-lands, and others for bringing in, pickeling, drying, unloading and loading the same, upon payment of the ordinary dues where harbours are built, that is, such as are paid for ships, boats, and other goods, and discharges all other exactions."

The Act 29 Geo. II. cap. 23, was repealed by the Sea Fisheries Act, 1868 (31 and 32 Vict. cap. 45), sec. 7, with the exception of secs. 1 and 17, in so far as they related to Scotland.

Sec. 1 of the Act 29 Geo. II. cap. 23, on the narrative, *inter alia*, of the above portion of the Act 1705, cap. 2, enacts,—"All persons whatsoever, inhabitants of Great Britain, shall, and they are hereby declared to have

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all purposes of or coincident to bringing in, unloading or loading, drying and pickling herring and white-fish. Further, said rocks are part of respondent's statutory holding, which is *de facto* bounded by the sea on its seaward side. In fixing the fair rent payable by respondent for said holding, in virtue of the Crofters Holdings Act, 1886,* its situation as contiguous to the sea, and affording facilities for carrying on the trade or industry of white-fishing, was taken into account by the Crofters Commissioners, under an application made by the respondent to have a fair rent fixed for his holding."

The complainer pleaded, *inter alia*;—(1) The operations complained

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power and authority at all times and seasons when they shall think proper, freely to take, buy from fishermen, and cure any herrings, cod, ling, or any other sort of white-fish in all and every part of the seas, channels, bays, firths, lochs, rivers, or other waters where such fish are to be found on the coasts of that part of Great Britain called Scotland, and of Orkney, Shetland, and all other islands belonging to that part of Great Britain called Scotland, any law, statute, or custom to the contrary in anywise notwithstanding"; any person obstructing such fishing, or taking any gratuity for liberty of fishing, for every such offence to forfeit £100.

Sec. 17 deals with the recovery and application of penalties.

* The Crofters Holdings (Scotland) Act, 1886 (49 and 50 Vict. cap. 29., enacts,—

Sec. 1. "A crofter shall not be removed from the holding of which he is tenant except in consequence of the breach of one or more of the conditions following (in this Act referred to as statutory conditions), but he shall have no power to assign his tenancy." These conditions do not include the prohibition of the erection of buildings for carrying on a fish-curing business.

Sec. 8. "When a crofter renounces his tenancy or is removed from his holding, he shall be entitled to compensation for any permanent improvements, provided that," *inter alia*, "(*a*) the improvements are suitable to the holding."

The Schedule to the Act contains a list of "permanent improvements." This list included, *inter alia*,—"(8) Making piers or landing-stages. (9) Roads practicable for carriages from the holding or holdings to the public road or the seashore. (10) All other improvements which, in the judgment of the Crofters Commission, shall add to the value of the holding to an incoming tenant."

Sec. 32. "For the purpose of enabling the Fishery Board for Scotland, established under the Fishery Board (Scotland) Act, 1882, to make advances by way of loan to persons engaged in the prosecution of the fishing industry, whether crofters or others, in crofting parishes in all or any of the counties to which this Act applies, and abutting upon the sea, it shall be lawful for the Treasury to advance to the Fishery Board such sums as may from time to time be placed at their disposal by Parliament for the purpose.

"The purposes to which the sums advanced as aforesaid shall be applied by way of loan shall be deemed to include the building, purchase, or repair of vessels, boats, and gear for fishing purposes, and any other purpose of the like nature, for the benefit or encouragement of the fishing industry within the localities above specified, which may be sanctioned by the Fishery Board, with consent of the Secretary for Scotland. . . ."

Sec. 34, *inter alia*. "'Holding' means any piece of land held by a crofter, consisting of arable or pasture land, or of land partly arable and partly pasture, and which has been occupied and used as arable or pasture land (whether such pasture land is held by the crofter alone or in common with others) immediately preceding the passing of this Act, including the site of his dwelling-house and any offices or other conveniences connected therewith, but does not include garden ground only, appurtenant to a house."

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of being illegal, and in prejudice of the complainer's rights as proprietor of Foula, he is entitled to interdict as craved. (2) The respondent having been duly removed from the beaches described in the prayer of the note, the complainer is entitled to interdict against his returning thereto. (3) The respondent not being entitled to erect buildings for use as a shop or for fish-curing purposes on his croft, the complainer is entitled to interdict thereagainst as craved.

The respondent pleaded, *inter alia*;—(2) The operations complained of, so far as the complaint is founded on fact, being legal, and within the respondent's rights under the Acts 1705, cap. 2, 29 Geo. II. cap. 23, and under the Crofters Holdings Act, 1886, the note should be refused, with expenses. (3) The respondent being under no legal obligation to use his croft solely for agricultural or pastoral purposes, the present application for interdict should be refused, with expenses. (4) The shed complained of having been already lawfully erected for a lawful purpose, the complainer is not entitled to remove or interfere with the same, and the application for its removal, being incompetent, should be dismissed, with expenses.

A proof was allowed. The import of the evidence sufficiently appears from the opinions of the Lord Ordinary and the Court.

On 27th July 1900 the Lord Ordinary (Kincairney) pronounced this interlocutor:—"Finds (1) that the complainer is proprietor of the beaches and rocks *ex adverso* of the respondent's croft, shewn on the plan No. 27 of process, and referred to in the record; (2) that the respondent is not entitled to use the said beaches or rocks for the purpose of curing or drying white-fish thereon; and (3) that the respondent is not entitled to erect buildings on his croft for the purpose of fish-curing, or which are not designed for agricultural or pastoral purposes: Therefore interdicts, prohibits, and discharges in terms of the prayer of the note of suspension and interdict, and decerns: Finds the complainer entitled to expenses," &c.*

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* "OPINION.—This case is somewhat involved in details, but raises questions of general importance. It relates chiefly to the use of certain rocks in the island of Foula, in Shetland, for drying and curing white-fish. The complainer is proprietor of the island, which he purchased from Dr Scott of Melby in 1894. The respondent is a crofter in the island. His croft, or the land of which it forms part, is called Liorafield. A plan, No. 27 of process, which is by no means so distinct as might be desired, has been produced by the complainer. It purports to shew the portions of ground which, in the complainer's view, form the croft. They are coloured green, and the space coloured brown or red shews the adjacent rocks to which the chief question refers. The plan shews a plot of land coloured yellow, called by both parties an artificial beach. It is a space artificially prepared for drying and curing fish. The respondent does not claim right to use it. The plan also shews, by oblong spaces coloured pink, the respondent's house, a store or shop, a cellar, and certain sheds connected with drying and storing the fish. A similar oblong space, coloured black, shews a shed put up by the proprietor, and near it is one of the pink coloured patches, which is a shed recently put up by the respondent, to which the complainer objects.

"The complainer alleges that there are two artificial beaches—the one coloured yellow admitted to be artificial, and the other, brown or red, being the rocks, about which there is a dispute whether an artificial beach has been formed on them or not. The complainer further states that the store, cellar, and artificial beaches had been let to Lewis Garriock, a fish-curer, who gave up the tenancy in 1888, and that they were then let to the

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The respondent reclaimed, and argued;—The decree of removing did not ordain the respondent to remove from any of the subjects now in question. It referred only to the shop, &c., and to the artificial beaches from which the respondent had removed; it did not refer to the natural rocks or to the shed which the respondent had erected within his own croft. The decree, therefore, had no bearing on the present case. Further, the decree merely removed the respondent from the tenancy of the subjects; it did not deprive him of any rights he might have under the Fishery Acts. The Act 1705, cap. 2, was not in desuetude.[1] The rocks were forelands within the meaning of that Act.[2] The case of *Hoyle*,[3] referred to by the Lord Ordinary, was really in favour of the respondent. Under the Crofters Holdings Act, 1886, the respondent was entitled to use the shed which he had erected on his croft for the purpose of curing fish. Fish-curing was not among the things prohibited by section 1 of that Act, and section 32 shewed that a fishing business might be incidental to the possession of a croft. Even if it was not, the decree to take down the shed which the Lord Ordinary had granted, was not warranted. The shed

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respondent as a subject separate from his croft; and that the Crofter Commissioners, in an order dated 6th November 1889, pronounced in an application by the respondent to have a fair rent fixed for his croft, had 'reserved to the landlord his whole rights to the store, shed, cellar, and beaches made or used by him at or near Ham Voe.' There is no very clear proof of the letting of these subjects; but the respondent admits that 'prior to Martinmas 1898 the respondent, in addition to his croft, was tenant of a shop, shed, cellar,' and of one artificial beach, namely, that coloured yellow on the plan, 'at a rent of £5 a year.'

"In 1898 the complainer formed the resolution of carrying on the fish-curing at Liorafield himself, and for that purpose desired to have the sole occupation of the rocks and beaches, and, after certain proceedings, he obtained, in the Sheriff Court at Lerwick, a decree in absence, dated 14th September 1898, against the respondent, decerning him to remove 'from the shop or store, shed, cellar, and beaches at Ham, in the island of Foula.' The complainer further sets forth that the respondent had ceded possession of the shop and cellar, and had removed from the beaches. But he further avers—and this averment, with the respondent's answer, discloses the points in dispute—that the respondent has recently erected another fish-curing shed on the lands of Liorafield, and has brought to the land materials for enlarging that shed or erecting a new building, and intends to take possession of the beaches or part of them as soon as the season permits. The complainer avers that the beaches are necessary for the proper conduct of his fish-curing business.

"The respondent's answer is that the shed (the erection of which he admits) is on his croft, and that he intends to use the natural rocks sloping up from the sea 'for all purposes of or coincident to bringing in, unloading or loading, drying and pickling herring and white-fish.' These 'natural rocks sloping up from the sea' are the rocks coloured brown or red on the pursuer's plan, which the complainer alleges to have been artificially prepared for the purpose of fish-curing.

"The first and main question is therefore whether the respondent has right to use these rocks for drying and curing white-fish; and I will con-

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[1] M'Douall v. Lord Advocate, April 16, 1875, 2 R. (H. L.) 49, at p. 56; Bowie v. Marquis of Ailsa, March 18, 1887, 14 R. 649.

[2] Scott v. Gray, Nov. 15, 1887, 15 R. 27.

[3] Hoyle v. M'Cunn, Dec. 10, 1858, 21 D. 96, 31 Scot. Jur. 63.

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was not *per se* illegal, even if the respondent was not entitled to use it for fish-curing.

The complainer was not called upon.

LORD JUSTICE-CLERK.—I do not see any ground for interfering with the general result at which the Lord Ordinary has arrived. A crofter is not entitled under the Crofters Act to set up a fish-curing station on his croft. No doubt there are certain things which he is forbidden to do by the Act. If he does these things he may be deprived of his croft. But it does not follow that everything not specially forbidden is permissible without the consent of the landlord. What is now complained of, although it is not specified in the Act among the things forbidden, may nevertheless be in breach of the rules applicable to a crofting subject. The purpose of a croft is agricultural. No doubt in many cases the crofter is also a fisher; but a croft is an agricultural subject, and is let as such, and the buildings to be erected upon it must be for agricultural purposes only, unless it is

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sider that question in the first place. The fish in question are ling, cod, and tusk (which last is a species of codling), but not herring, which are not caught at Foula. The place in question is not the shore. It is above high water-mark. It is occasionally, perhaps frequently, swept by the sea in times of storm, but it is not reached by the tide. This is proved, and it is necessarily so, because a place covered by ordinary tides could not be used for drying fish.

"The note prays for interdict against entering on two artificial beaches, the one being the space coloured yellow on the plan, to which the respondent makes no claim, and the other the rocks; and with regard to them the respondent has pleaded—'(2) The operations complained of, so far as the complaint is founded on fact, being legal and within the respondent's rights under the Acts 1705, cap. 2, 29 Geo. II. cap. 23, and under the Crofters Holdings Act, 1886, the note should be refused with expenses.'

"I am of opinion, in the first place, that the rocks are not part of the respondent's croft. That is proved by the evidence of the surveyor Hoseason, to whom the respondent pointed out the boundaries of his croft, and is expressly admitted by the respondent. The respondent had therefore not the right which he claims of occupying the rocks as a crofter. The Crofters Holdings Act, 1886, on which he founds, does not assist him. It might, perhaps, have been expected that the Crofters Act would have conferred some right on crofters to use the rocks adjacent to their crofts, but it does not mention the seaboard at all. The respondent as a crofter, it may be observed, is not a proprietor, but a tenant—*Macdonald* v. *Dalgleish*, 12th June 1894, 21 R. 900. The *locus* is not *inter regalia*, nor within the respondent's croft, but is the complainer's private property.

"But the respondent founds on two Fisheries Acts, 1705, cap. 2, and 29 Geo. II. cap. 23. He does not found in his pleas on the Act 2 Geo. III. cap. 31, although it was mentioned in the argument. That is the only Act now in force which relates to waste and uncultivated land, for the space of one hundred yards beyond the highest high water-mark. It is repealed, except sections 11, 12, and 13, and I have no doubt that the unrepealed part of it is inapplicable, because it is an Act made for the encouragement of the white herring fishing, which the fishing at Foula is not. The respondent's defence, therefore, so far as regards the rocks, seems to depend on the other statutes, 1705, cap. 2, and 29 Geo. II. cap. 23.

"But, in the first place, there is a preliminary point, which is this: The complainer, as has been mentioned, founds on a decree of removing of the respondent from 'the beaches at Ham.' It is a decree in absence,

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otherwise arranged between the crofter and his landlord. In the present case the building was erected for curing fish, and if it was erected and is being used for that purpose by the crofter, I think the landlord is entitled to get such use stopped. If the building had been erected upon a foreland, the respondent would have had a good deal more to say for himself, but Lord Trayner has expressed what is clearly meant by a foreland within the meaning of the Act of Parliament. This is certainly not a foreland.

It is true that from the proof it appears that when the building is not being used for drying fish, it is sometimes used for agricultural purposes. If that is necessary, the respondent may be entitled to keep the erection for these purposes, but the complainer is entitled to interdict against his using it as a fish-drying station.

LORD YOUNG.—I am substantially of the same opinion. There are three findings in the interlocutor of the Lord Ordinary. The first is not disputed. I think the second finding is right. The third finding is also, in my

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but it has never been recalled; and if the beaches at Ham mentioned in it can be identified with the rocks now in question, this decree of removing, while it stands, would seem to be conclusive. Now, I am of opinion that the complainer has succeeded in identifying the rocks now in question with the beaches. The word is used in the plural, both in the decree of removing and in the note by the Crofter Commissioners, already referred to; and I think it sufficiently appears that the beaches referred to must necessarily be the two beaches mentioned in the prayer of the note. The use of the word in the plural excludes any other meaning. I am of opinion that on that preliminary ground alone the defence of the respondent as to this part of the case must be repelled.

"Apart, however, from the decree of removing, I am of opinion that the respondent's case as to the right to cure on the rocks in question fails. The complainer contended that the two statutes founded on are either repealed or are in desuetude. I am, however, not able to agree with that argument. The statute of Queen Anne is very lengthy and detailed, and some of its provisions are not now in force. But I see no reason for thinking that the provision that all the Queen's subjects shall 'have the free use of all ports, harbours, shores, forelands, and others, for bringing in, pickling, drying, unloading, and loading the same, upon payment of the ordinary dues where harbours are built,' which is the provision on which the respondent founds, is in desuetude, and there is no ground for holding it repealed. It has not unfrequently been pleaded in Court, and it was referred to by the Lord Chancellor in *M'Douall* v. *The Lord Advocate*, 16th April 1875, 2 R. (H. L.) 49, as an existing statute of importance.

"The Act 29 Geo. II. cap. 23, has been in part repealed by the Act 31 and 32 Vict. cap. 45, but sects. 1 and 17, so far as relating to Scotland, are excepted from the repeal. It is important, however, to notice that sect. 2 has been repealed. That section extended the right of fishermen to one hundred yards beyond high water-mark, as in the Act of Geo. III., but that extension of their right has been withdrawn, except in regard to the white herring fisheries. It appears to me that these statutes give no right of use, except to the shore and ports and harbours, and have no operation above high water-mark, and do not interfere with private property. That view is supported by the case of *Hoyle* v. *M'Cunn*, 10th December 1858, 21 D. 96, and, in particular, by the opinion of the Lord Justice-Clerk Inglis at p. 101.

"The other cases quoted at the debate turned mainly on the provisions of the White Herring Fisheries Act of Geo. III., or on the second section

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opinion, sound in law. The respondent's rights as a crofter do not entitle him to erect buildings within the limits of his croft which are not designed for agricultural or pastoral purposes. I should therefore affirm all the Lord Ordinary's findings.

With respect to the shed, we have no very satisfactory account of it so as to enable us to judge whether or not it ought to be removed. It is explained in evidence that one of the purposes for which it is used is that of sheltering sheep and cattle. It may be an erection quite proper for these purposes, and any other agricultural purpose, but I do not think it can be used for the purpose of curing or salting fish even although at other times it might be used for sheltering sheep and cattle.

LORD TRAYNER.—The complainer in this case complains that the respondent is making certain use of, and proposing to carry on certain operations on, part of the rocks adjoining his croft, and admittedly the property of the complainer. If these rocks are the private property of the complainer, the respondent is not entitled to use them for his purposes unless permission to do so is conceded by the proprietor or unless he is empowered to do so by public authority. It is on the latter ground that the respondent bases his right to do what the complainer seeks to prevent. The respondent's second

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of the Act Geo. II., which has been repealed, and I do not think that they apply to this case.

"It may be observed that the argument of the respondent goes very far, for it affirms the right of all fishermen to dry and cure their fish on any part of any rocks adjoining the sea, although above high water-mark, without any limitation as to the waste or unoccupied character of such lands, or as to their distance from high water-mark. The respondent's argument must go that length if it be sound at all; but I think it clear that the statutes founded on do not support it.

"It is further maintained by the complainer that these rocks form an artificial beach, by reason of the labour which has been bestowed on them in forming an access from the landing-place, and in constructing a trench and vats for holding fish, and are in the same position as the other beach, which is admittedly artificial, and to which the respondent has never made any claim. It is said, therefore, that the ground is not waste or unoccupied. I have some difficulty in understanding this argument, because the statutes founded on, so far as unrepealed, do not say a word about waste or unoccupied land. But I think that there were operations by the complainer or his tenant by which these rocks were fitted for curing fish, and these operations may perhaps fortify his claim to the exclusive use of them, which, however, I think he has independently of such operations, in virtue of his title of property. I think, further, that the proof shews that it would be exceedingly difficult, if not impossible, to make a beneficial use of these rocks as a place for curing fish if an indiscriminate use by all fishermen were lawful.

"I am therefore of opinion that the complainer is entitled to interdict against use by the respondent of this beach, and as right to the other beach, that coloured yellow on the complainer's plan, is not now asserted, that the interdict as to the use of the beaches may go out in terms of the prayer.

"This is the principal part of the case, the other points being subordinate, and, I suppose, unimportant when the complainer's right to the exclusive use of the beaches is affirmed. They raise, however, points of considerable novelty. This prayer is for interdict against erecting on the croft any structure designed for curing or storing white fish, or to be used as a shop, or for any other than agricultural or pastoral purposes, and for decree for

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plea in law is as follows:—"The operations complained of, so far as the complaint is founded in fact, being legal and within the respondent's rights under the Acts 1705, cap. 2, 29 Geo. II. cap. 23, and under the Crofters Holdings Act, 1886, the note should be refused." Now, the Act 29 Geo. II. cap. 23, cannot aid the respondent, because it has been repealed except sections 1 and 17. Section 1 relates to public rights of fishing, and section 17 deals with the recovery of the penalty for breach of section 1. This Act is therefore out of the case altogether.

The Lord Ordinary says that in the course of the debate the respondent also relied upon 2 Geo. III. cap. 31. But that Act is of no avail either, because it relates solely to herring-fishing, and the respondent is not engaged in herring-fishing. Even if he were, it may be doubtful—perhaps more than doubtful—whether the provision of that statute authorises the respondent's proceedings, but we do not need to consider that, as it is admitted that he is not engaged in herring-fishing.

The respondent is therefore driven back on the Act of Queen Anne. The Lord Ordinary thinks that this Act is still in force, and in that I agree with him. It provides that all the Queen's subjects shall have the free use of all ports, harbours, shores, forelands, and others for bringing in, pickling,

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the removal of a shed recently built by the respondent on said lands of Liorafield.

"Parties seem agreed on the record that this shed last mentioned was built on the respondent's croft, and it must be so assumed, although the evidence seems the other way. I suppose, however, that it was erected by the respondent as ancillary to the curing of his fish on the rocks, and that it may not be of any use otherwise. It is, however, necessary to determine the question which has been raised.

"The two latter parts of the prayer stand on the same footing, and they depend on the position that a crofter is not entitled to build on his croft buildings which are not designed for agricultural or pastoral purposes.

"The complainer maintains that a crofter's right is the right of a tenant, and that the common law as to the inversion of possession, which applies to ordinary tenants, applies to crofters. The respondent, on the other hand, maintains that the right of a crofter is different from that of a tenant at common law, and is exceptional, and dependent solely on the Crofters Act, and that he can do anything on his croft which the Crofters Act does not prohibit. No authorities were quoted which touch this point very closely. The complainer referred to *Stuart & Stuart* v. *Macleod*, 8th December, 1891, 19 R. 223, as shewing that an inn could not be a holding under the Act, and to *Breadalbane* v. *Orr*, 1896, 4 S. L. T. 118, in which it was decided that subjects which were let, and which included a ferry as an important part of the subjects let, could not be held to be a croft. I am disposed to hold that a crofter may be interdicted from erecting on his croft any building which, if it had at first formed part of the subjects leased, would have warranted a decision that they did not form a statutory holding, such as was pronounced in the case of *Breadalbane*, and, if built, would make sec. 34 of the Act inapplicable. I further consider that the erection of buildings designed for curing and storing fish would be, and that the shed already erected is, an illegal inversion of the use and purpose for which the respondent holds the croft, although I do not say that such erections would be such a breach of the conditions of the holding as would warrant the removal of the crofter under section 1 of the Crofters Act.

"The point, however, is, so far as I was informed by counsel, or am aware, new, and I do not pretend to hold a confident opinion upon it."

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drying, and unloading herring and white fish. The respondent admits that the only word in this provision on which he can found is the word "foreland," and the question comes to be—Is this a foreland? I understand a foreland to be a rocky promontory jutting out into the sea beyond the ordinary line of the shore. Mr Morton admits that the place in question does not fall under this definition. If it does not, there is no statutory right on which the respondent can base his claim.

Has he any claim under the Crofters Act, 1886? By that Act a crofter's holding is defined as "any piece of land held by a crofter, consisting of arable or pasture land or of land partly arable and partly pasture, and which has been occupied or used as arable or pasture land . . . immediately preceding the passing of this Act, including the site of his dwelling-house and any offices or other conveniences connected therewith," &c. That is the character of the respondent's croft. He may erect a building which is a necessary adjunct to an arable or pastoral subject, but under the Act he is not entitled to turn his croft into a fish-curing station. That is, however, what the respondent wishes to do.

If neither the Crofters Act nor any of the older Acts entitles the respondent to act as he has done and proposes to do, then he has no right to do so against the wishes of the complainer, the admitted proprietor of the rocks. I therefore am of opinion that the complainer is entitled to interdict.

LORD MONCREIFF was absent.

THE COURT pronounced this interlocutor:—"Adhere to the three findings of the Lord Ordinary expressed in said interlocutor: *Quoad ultra* recall the said interlocutor: Interdict, prohibit, and discharge, in terms of the first and second conclusions of the note, but reserving always to the respondent any claim that he may have to use the beaches and rocks *ex adverso* of the respondent's croft, shewn on the plan No. 27 of process, and referred to in the record, for the purposes of the white herring-fishing, and the complainer's answers thereto, but dismiss the note in so far as it prays for removal of the shed there mentioned, and decern."

A. P. PURVES & AITKEN, W.S.—SLATER & ROSE, W.S.—Agents.

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ROBERT COCKBURN MILLAR (Lord Napier and Ettrick's Trustee), Petitioner (Respondent).—*Dundas, K.C.*—*Cullen.*
THE HON. FRANCIS EDWARD BASIL NAPIER AND ANOTHER, Respondents (Reclaimers).—*A. O. M. Mackenzie.*

Entail—Disentail—Bankruptcy—Application by Trustee in Sequestration for Disentail of debtor's estate—Entail (Scotland) Act, 1882 (45 *and* 46 *Vict. cap.* 53), *sec.* 18.—The Entail (Scotland) Act, 1882, enacts, by sec. 18, that if the estates of an heir of entail in possession are sequestrated, the trustee may apply to the Court to disentail the estate, "and the Court shall forthwith proceed in the same manner as is directed in this section with regard to an application of a creditor." The same section enacts that the creditor of an heir of entail in possession "who has obtained decree against him for payment and charged upon the decree, shall, in the event of the debt so incurred not being paid for six months after the expiration of the charge, be entitled to apply to the Court, and the Court shall, if the said debt is not paid within three months after the date of the application, order intimation

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to be made to the heirs whose consents would be required or must be dispensed with by the Court in an application for disentail by the heir in possession," and after certain further procedure, shall "ordain the heir in possession to execute an instrument of disentail of the estates."

Held (*rev.* judgment of Lord Pearson) that in an application for disentail by the trustee in a sequestration of the estates of an heir of entail in possession, as in the case of an application by a creditor, intimation to an heir whose consent is required, or must be dispensed with, cannot validly be given till after the expiration of three months from the date of the application.

Bill-Chamber. 1st Division. Lord Pearson.

On 7th December 1894, the estates of the Honourable William John George Napier, Master of Napier, the eldest son of Lord Napier and Ettrick, were sequestrated, and Robert Cockburn Millar, C.A., Edinburgh, was appointed trustee. The Master of Napier succeeded to the title and became heir of entail in possession of the estate of Thirlestane on his father's death on 19th December 1898.

On 13th March 1899 the trustee presented a petition for disentail under section 18 of the Entail (Scotland) Act, 1882.* The usual order for intimation and service was made upon 14th March, and under this order the petition was served upon Lord Napier and upon the three next heirs, namely, his two sons (the Master of Napier and the Honourable Frederick William Scott Napier), and the Honourable John Scott Napier (Lord Napier's brother.)

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* The Entail (Scotland) Act, 1882 (45 and 46 Vict. cap. 53), enacts, by section 18, as follows :—"Where any heir of entail in possession is entitled to disentail the estate, with the consent of any other heir or heirs, or upon such consent being dispensed with by the Court, any creditor of such heir in possession, in respect of debt incurred after the passing of this Act, who has obtained decree against him for payment and charged upon the decree, shall, in the event of the debt so incurred not being paid for six months after the expiration of the charge, be entitled to apply to the Court, and the Court shall, if the said debt is not paid within three months after the date of the application, order intimation to be made to the heirs whose consents would be required or must be dispensed with by the Court in an application for disentail by the heir in possession, and in the event of any of the said heirs, or his curator *ad litem*, appointed in terms of this Act, refusing to give his consent, the Court shall ascertain the value in money of the expectancy or interest in the entailed estate of such heir, and shall ordain the heir in possession to grant a bond and disposition in security over the estate for the amount so ascertained in favour of such heir, and if he refuses or fails to do so, the Court shall grant authority to the Clerk of Court to execute such a bond and disposition in security, and such bond and disposition in security so executed shall be as valid as if it were executed by the heir in possession himself; and the Court shall thereafter ordain the heir in possession to execute an instrument of disentail of the estate; and if he refuses or fails to do so the Court shall grant authority to the Clerk of Court to execute such instrument, and after provision is made for the interests of any other creditors whose debts are secured on the estate, the creditor aforesaid shall be entitled to affect the estate for payment of such debt, and shall have the same rights and interests therein as if an instrument of disentail had been executed and recorded by the heir in possession himself.

"If the estates of such heir of entail in possession of an entailed estate shall be sequestrated for debt incurred after the passing of this Act, the trustee on his sequestrated estates shall be entitled to apply to the Court for authority to disentail the estate, and the Court shall forthwith proceed in the same manner as is directed in this section with regard to the application of a creditor."

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On 7th April the Lord Ordinary on the Bills (Lord Kinnear) made a remit to Mr Charles Cook, W.S., to report as to the regularity of the procedure, and to an actuary, to determine the value of the expectancy of the next heir, the Honourable Francis Edward Basil Napier, the Master of Napier, whose consent was alone necessary to a disentail.

On 9th September 1900 a son was born to the Master of Napier, who took the place of the Hon. F. W. Scott Napier as heir second entitled to succeed to the estates. A curator *ad litem* was appointed to the son on 20th January 1901.

On 7th February, on the case coming up on an interim report by Mr Cook, objection was taken by the Master of Napier and by the curator *ad litem* to his son to the competency of the above procedure.

They contended that a petition by a trustee in a sequestration presented under the provisions of section 18 ought to proceed in all respects in the same manner as a petition by a creditor under the prior part of that section; that upon the presentation of such a petition there must in both cases be a delay of three months before intimation is given to the heirs whose consents must be obtained or dispensed with, and that no such period having been allowed to elapse, the previous intimation did not suffice, and that intimation in terms of the statute required still to be made.

The Lord Ordinary (Pearson), by interlocutor of 7th February 1901, repelled this objection.*

The Master of Napier and his brother the Hon. F. W. Scott Napier reclaimed.

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* "NOTE.— . . . The conditions which enable a creditor to disentail are (1) that he has obtained decree for his debt, and has charged upon the decree; and (2) that the debt shall not have been paid for six months after the expiry of the charge. He may then present his petition, 'and the Court shall, if the said debt is not paid within three months after the date of the application, order intimation to be made to the heirs whose consent must be given or dispensed with,' and if any such heir refuses to consent, the value of his expectancy is to be ascertained.

"This, it is said, contemplates such a petition lying dormant after its presentation until after the lapse of three months, when (if the debt has not then been paid) the usual service will be made upon the next heirs. The statute does not say that the usual first order (for intimation, advertisement, and service) shall not be made in ordinary course at once; and, as the heirs whose consent is required are always the three next heirs, or some of them, service upon these heirs in ordinary course would amount to intimation of the petition to them. But whether such order is pronounced or not, it is contended that, when the three months have expired without payment, 'intimation' must thereafter be made to the heirs whose consent requires to be dealt with. I suppose that where a creditor petitions, it was thought proper that all interested should have an opportunity of procuring payment of the debt charged for, so as to obviate the drastic remedy of disentail. Certainly it would be right that the heir in possession, whose debt it is, should have the earliest intimation of the petition. But the next heir may also have an interest in seeing the debt paid; and yet the statute does not in terms provide for any intimation to him until after the lapse of three months from the presentation of the petition. Probably in such a case the usual first order would be pronounced as matter of course, including an order for service upon the next heirs; and then, after the lapse of three months without payment, a special intimation would be made in terms of the words I have quoted, to those heirs only whose consents are required to be dealt with, certiorating them that if they did not

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LORD PRESIDENT.—This question arises under section 18 of the Entail Act, 1882, which provides that where an application for disentail is presented at the instance of the trustee in the sequestration of an heir of entail in possession "the Court shall forthwith proceed in the same manner as is directed in this section with regard to the application of a creditor." The question is, whether the word "forthwith" requires the Court to proceed with the application without taking cognisance of the provision in the earlier part of the section to the effect that in an application at the instance of a creditor, "the Court shall, if the said debt is not paid within three months after the date of the application, order intimation to be made to the heirs whose consents would be required, or must be dispensed with, by the Court in an application for disentail by the heir in possession."

It was contended that the delay of three months to afford an opportunity of paying the debt is only a condition of the disentail, not a matter of procedure, and that, therefore, the order for intimation to the heirs mentioned may be made at once. It is true in one sense that delay is a condition, but in many cases with which we are familiar specified periods of time are allowed for certain steps of process, *e.g.*, reclaiming, and in such cases it appears to me that regulations as to time are matters of procedure. I therefore think that, unless it can be shewn that this condition is in some way inapplicable or inappropriate to the case of a trustee in bankruptcy, the direction to proceed "forthwith" must mean to proceed at once to carry out the procedure specified in the earlier part of the section, including the provision as to the three months.

The difference between the two parts of section 18 is that the first part relates to the case where the estates of the heir have not been sequestrated. In that case, where the application is at the instance of a single creditor, it cannot be made until six months after the heir has been charged upon a decree. That provision is inapplicable to a case like the present where the estates of the heir are sequestrated, because sequestration is a congeries of all requisite diligences. But all that follows in the section seems to me to be applicable to the case of a trustee in sequestration, and if we were con-

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consent the Court was now to proceed to value their expectancy. At all events, in the case of a single creditor petitioning, the statute provides for a delay of nine months from the expiry of the charge before the present stage is reached; and I assume that the object is to enable anyone whom it may concern to pay off the debt.

"Now, in the case of a trustee in bankruptcy petitioning, the statute requires that 'the Court shall forthwith proceed in the same manner as is directed in this section with regard to the application of a creditor.' *Prima facie*, I think this is a direction to proceed without any delay, and, in particular, without the delay of three months after the petition is in Court. The lapse of six months after the expiry of the charge in the other case has no counterpart in the case of a trustee petitioning; and when the petition is presented the Court is to proceed 'forthwith.' It appears to me that the construction contended for by the respondents takes all significance out of that important word. Moreover, while the Court is to proceed 'in the same manner' as is directed in the other part of the section, I doubt if these words are appropriate to include the condition, 'if the said debt is not paid within three months after the date of the application.' I, therefore, hold that no further intimation is required."

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sidering, not the language of the statute, but the reason of the thing, it is difficult to see why the delay of three months should not be given in the one case as well as in the other. Many things might happen to improve the heir's position within the three months; he might, for instance, succeed to money or other estate, and I think the delay of three months is quite consistent with the direction to proceed forthwith.

It therefore appears to me that the Lord Ordinary has erred in this matter, and that, as the expiry of three months is a condition precedent to the intimation and the further procedure, the interlocutors pronounced by his Lordship other than the first should be recalled.

LORD ADAM.—I am of the same opinion. It appears to me on reading this section (18) that the intention of the Legislature was to place a petition for disentail at the instance of a trustee in a sequestration in the same position as a petition at the instance of a single creditor. The last clause of the section provides that where the estates of an heir of entail are sequestrated, the trustee shall be entitled to apply to the Court for authority to disentail. The preceding part of the section enacts, in the case of an application by a single creditor, that he shall "be entitled to apply to the Court, and the Court shall, if the said debt is not paid within three months after the date of the application, order intimation to be made to the heirs whose consent would be required." It would seem that the same procedure must be followed in the case of an application by a trustee in sequestration, because the closing words of the section are, "and the Court shall forthwith proceed in the same manner as is directed in this section with regard to the application of a creditor." Now, if the application by a creditor were presented, I think the proper procedure would be that the Judge should forthwith apply his mind to the case, and should order intimation, not merely intimation to the next heirs, but intimation on the walls and in the minute-book, with advertisement to all who might be concerned, in order that all parties interested might be made aware of the petition. That is the first step in procedure, and after that the Court would consider what was next to be done, and would find that no further procedure was to be taken for three months, and then that an order should be made for intimation to the heirs whose consent to a disentail would be required. That is not an ordinary order for intimation; it is a particular intimation to particular persons. It does not seem clear why the same procedure should not be followed in the case of an application by a trustee in sequestration, since the statute says that the same procedure shall be followed.

If that is so, it appears that all procedure in this case subsequent to the first order for intimation must be held to be bad. These proceedings it must be remembered are statutory, and must be strictly observed. It is not a sufficient reason to say that the next heirs should have appeared and insisted on the three months' delay. Parties in these cases are entitled to rely on the Court seeing that all the statutory requisites are carried out, and it has never been our practice that they should be bound to appear. On these grounds I think there is no alternative but to recall all the interlocutors after that of 14th March 1899, and as the three months have now expired, to remit to the Lord Ordinary to proceed with intimation to the next heir.

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LORD M'LAREN.—In this case we are in a different position from the Lord Ordinary, because the Lord Ordinary had no power to recall interlocutors already pronounced, even if he had come to think the orders were incompetent or premature. I am of the same opinion as your Lordships.

The fallacy of the Lord Ordinary's opinion appears to be in attributing too much importance to the use of the word "forthwith" in section 18 of the Act of 1882. If in one clause of a statute the Judge is directed to do something, and in another clause to do something else "forthwith," the duty of the Judge in the two cases as regards the dispatch of the business would, as I think, be the same. In either case his duty is to carry out the procedure described with as little delay as possible. If, in this view, it be necessary to find a reason for the use of the word "forthwith," such a reason appears from the consideration that in the case of a single creditor he is not authorised to apply to the Court until six months after a charge has expired, while a trustee in a sequestration may present his application immediately on his appointment.

At the same time it is not, in my view, necessary that a petition under section 18 should be sisted for three months for all purposes. Many things might be done in this interval. Curators might be appointed, the claims of creditors claiming a preference dealt with, and other cognate incidental matters followed out; but nothing must be done within the time limit which could affect the rights of expectant heirs. Here there has been a remit to a lawyer and a remit to an actuary before the elapse of three months, and therefore before the expectant heir was in a position to come forward and state objections. I am therefore of opinion that all interlocutors already pronounced, except such as are merely incidental, ought to be recalled *hoc statu*, and the case remitted to the Lord Ordinary to take the proper steps of procedure afresh.

LORD KINNEAR.—I agree with your Lordship in the chair and Lord Adam. It appears to me that no procedure can be validly taken under the 18th section until the heir whose consent is to be dispensed with has received the special intimation provided by that section; and that that special intimation cannot be given until after the lapse of three months from the date of the application. It follows that the procedure in this case is ineffectual, and therefore that the interlocutors mentioned by your Lordships must be recalled, and the procedure carried out anew. It is clear enough that the special intimation in question does not dispense with the usual notice to all persons interested by intimation or service when the application is brought into Court, and the usual interlocutors may therefore be perfectly good for their own purpose.

THE COURT pronounced this interlocutor:—"Recall said interlocutor [that dated 7th February 1901], and the other interlocutors in the case subsequent to 14th March 1899, and remit to the Lord Ordinary to order intimation of the proceedings to be made in terms of section 18 of the Entail (Scotland) Act, 1882, in the same manner as in a petition by a creditor under that section, and decern."

J. A. CAMPBELL & LAMOND, C.S.—E. A. & F. HUNTER & Co., W.S.—Agents.

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Stewart v. Liquidator of the Scoto-American Sugar Syndicate, Limited.

WILLIAM JAMES STEWART, Petitioner.—*Salvesen, K.C.*—*J. D. Robertson.*

WILLIAM LAMONT (Liquidator of the Scoto-American Sugar Syndicate, Limited), and OTHERS, Respondents.—*Johnston, K.C.*—*Aitken.*

Company—Winding-up—Contributory—Shares allotted as fully paid up—Surplus Assets—Rights of contributories inter se—Companies Act, 1862 (25 *and* 26 *Vict. cap.* 89), *secs.* 38 *and* 133.—By minute of agreement between seven persons and an eighth person on behalf of a company intended to be formed and to be called the Syndicate, Limited, it was agreed that the Syndicate, Limited, should be formed and registered under the Companies Acts, for the purpose of promoting a second working company. The capital of the Syndicate, Limited, was to be 3000 shares of £1 each, of which 2401 were to be allotted among the seven persons in specified proportions on payment of 10s. per share, and "subject to such calls as may be resolved upon at general meetings of the syndicate," and the remaining 599 shares were to be issued to S., one of the seven persons, as fully paid-up "in consideration of his services in initiating and developing the scheme." The shares were not to be transferable, and each member was to have one vote, however many shares he might have. When the second working company was formed, each member of the syndicate was to receive five fully paid up shares in the new company for "every £1 share in the syndicate held by him, whether fully or partially paid up."

The Syndicate, Limited, was formed and registered, and thereafter adopted the foregoing agreement. The attempt to form the second working company having proved abortive, the Syndicate, Limited, went into voluntary liquidation. After all the debts and expenses had been paid in the liquidation (no further call having been necessary for these purposes), S. petitioned the Court for an order on the liquidator to call up 10s. per share on the 2401 shares so as to equalise the actual payments on these shares with the nominal payments on the 599 fully paid-up shares held by S., and thereafter to proceed, in terms of secs. 38 and 133 of the Companies Act, 1862, with the adjustment of the rights of the contributories among themselves. In answer the liquidator maintained that, looking to the terms of the agreement, S. had no right to require that such a call should be made.

The Court *granted* the petition.

Paterson v. *Macfarlane*, 2 R. 490, *followed*.

2D DIVISION.

THE SCOTO-AMERICAN SUGAR SYNDICATE, LIMITED, was incorporated under the Companies Acts as a company limited by shares, upon 28th January 1898, with a capital of £3000 divided into 3000 shares of £1 each. The registered office was situated in Scotland.

By the memorandum of association the principal objects were declared to be—(1) to adopt and carry into effect an agreement entered into between and among Thomas Law Patterson and others, and James Mackenzie, as trustee for the company, dated 24th January 1898, and filed with the Registrar of Joint Stock Companies on 28th January 1898; and (2) to promote and develop a scheme for the establishment of a company to construct and work a sugar factory in Washington State or elsewhere in the United States of North America.

The material terms of the agreement are quoted below.*

* "Minute of agreement entered into by and among Thomas Law Patterson, late manager to John Walker & Company, sugar-refiners in Greenock; William James Stewart, produce-broker in Glasgow; John Millar, drysalter in Glasgow; George Coats of Staneley, Paisley; and James Boyd, drysalter

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The articles of association of the syndicate (which adopted Table A annexed to the Companies Act, 1862, with certain variations and additions) provided (3) for the issue of 599 shares as fully paid up, and as to the remaining 2401 shares that 5s. per share should be payable on application and 5s. per share on allotment; (9) that every member of the syndicate should have one vote, whatever number of shares might be registered in his name; (25) that articles 72 and 73 of Table A (providing for payment of dividends) were to apply to the syndicate only subject to and in accordance with the agreement; (28) that before payment of any dividend the directors were to make due provision for the fulfilment of the company's obligations under the agreement.

After its incorporation the syndicate adopted the agreement, and in terms thereof allotted 599 fully paid-up shares to William James Stewart, produce-broker, 82 Virginia Street, Glasgow. The remaining 2401 shares were allotted as provided in the agreement to the persons therein named on payment of 5s. per share on application, and 5s. per share on allotment.

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in Glasgow (hereinafter termed the First Syndicate), of the first part; the said Thomas Law Patterson, of the second part; William James Stewart, of the third part; John Millar, of the fourth part; George Coats, of the fifth part; James Boyd, of the sixth part; Quintin Hogg, West India merchant in London, of the seventh part; and Andrew Laurie Macfie, of Farrie & Company, Limited, sugar refiners in Liverpool, of the eighth part; and James Mackenzie, solicitor in Glasgow, as trustee for and on behalf of the Syndicate (hereinafter termed the Limited Syndicate), of the ninth part.

"Whereas, the First Syndicate having incurred an expense amounting to seven hundred pounds, in promoting and developing a scheme for establishing a joint stock company to be called the Washington State Sugar Company, Limited, for the purpose of acquiring leases of certain areas of land, extending in all to three thousand acres or thereby, at Waverley, Washington, United States of America, which the said William James Stewart, on behalf of the First Syndicate, obtained the offer of securing at nominal rents upon a sugar factory being established there by the influence of the First Syndicate: And whereas the said William James Stewart also obtained promises of subscriptions for capital in the proposed company in Washington State to the amount of thirty thousand pounds or thereby, and, in the United Kingdom, to the amount of twenty-five thousand pounds or thereby, and it has been found expedient, in order to further develop the said scheme and promote the said company, that a new syndicate, with limited liability, should be formed on the terms hereinafter written: Therefore the parties have agreed and hereby agree as follows:—

"First.—With all convenient speed the parties hereto shall take the necessary steps for forming and registering the Limited Syndicate with limited liability under the name of the Scoto-American Sugar Syndicate, Limited, with a capital of three thousand pounds divided into three thousand shares of one pound each. Each of the said Thomas Law Patterson, John Millar, George Coats, James Boyd, Quintin Hogg, and Andrew Laurie Macfie agree to subscribe for and accept four hundred shares of one pound each in the Limited Syndicate, and the said William James Stewart agrees to subscribe for one share in the said syndicate. The remaining five hundred and ninety-nine shares shall be issued as fully paid up to the said William James Stewart in consideration of his services in initiating and developing the scheme. The sum of five shillings per share shall be payable on each of the shares on application, and five shillings per share on allotment of the same to the said parties respectively, and the

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It having been found impossible to carry out the objects of the syndicate, by resolution passed on 28th September 1898, and confirmed on 14th October 1898, it was resolved that the syndicate be wound up voluntarily. William Lamont, C.A., Glasgow, was appointed liquidator. His appointment was subject to the condition "that the liquidator is to advise and consult with a committee of shareholders . . . the liquidator is not empowered to make any arrangement without the sanction of a majority of said committee."

At the general meeting of the syndicate held on 28th September 1900, in terms of section 139 of the Companies Act, 1862, the liquidator reported upon the progress of the liquidation, and presented his

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balance shall be subject to such calls as may be resolved upon at general meetings of the syndicate from time to time."

"Third.—The articles of association of the Limited Syndicate will provide as follows:—

"(*a*) That the shares held by each member of the syndicate shall not be transferable.

"(*b*) That all questions at meetings of the Limited Syndicate shall be decided by the votes of the majority of the members present or represented by proxy at such meetings, each member having one vote whatever number of shares he may hold, and in the event of equality, the chairman of each meeting having a casting vote: And

"(*c*) That this agreement shall, on incorporation of the Limited Syndicate, be adopted by it.

"Fourth."—Provision for the appointment and remuneration of William James Stewart as manager and secretary.

"Fifth.—When the arrangements of the Limited Syndicate shall have been fully matured, it will take the necessary steps to form a company with limited liability for the purpose of taking over the concessions obtained, or that may be obtained, by the Limited Syndicate and establishing a sugar factory in Washington State or elsewhere in the United States of America as the Limited Syndicate may determine, on the basis of the Limited Syndicate receiving twenty-four thousand fully paid shares of one pound each in the company as the consideration for the scheme and the provisional tenders of lease of land, whether more or less than three thousand acres in extent, the cost of advertising, forming, and registering the company (including the preparation of its memorandum and articles of association) being paid by the company, but all prior costs payable by the Limited Syndicate. The capital of the company will be one hundred and twenty thousand pounds or such other sum as may be fixed by the Limited Syndicate, and, if necessary, the consideration payable to the Limited Syndicate will be modified to such an extent as the Limited Syndicate may determine at a meeting duly called.

"Sixth.—As among the members of the Limited Syndicate, the total price received from the company will be applied as follows, namely, each member will receive five fully paid shares in the company for every one pound share in the syndicate held by him, whether fully or partially paid up, and the balance of shares received will be applied according to the decision of meetings of the Limited Syndicate duly called for underwriting premiums and securing capital in the company either in Great Britain or abroad, or otherwise as such meeting may determine. Any balance of shares not required for these purposes will be realised so far as necessary to meet the expenses of forming, carrying on, and winding up the Limited Syndicate, and any residue of cash or shares will be divided among the shareholders in the Limited Syndicate in proportion to the number of shares held by them respectively."

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accounts. These accounts brought out the surplus assets at about £27.

On 18th December William James Stewart presented this petition in which, founding on the Companies Act, 1862, sections 38 and 138,* he prayed for an order on the liquidator "to make a call of 10s. per share upon all the shareholders of the company who have not paid more than 10s. per share; and thereafter to proceed in terms of the statute with the adjustment of the rights of the contributories amongst themselves, and the distribution of the surplus assets amongst the parties entitled thereto."

The petitioner stated that from the liquidator's accounts it appeared "that the realised assets of the company are more than sufficient to pay the whole debts of the company and the expenses incidental to the winding-up, and all that now remains to be done in the liquidation is the adjustment of the rights of the contributories amongst themselves, and the distribution of the surplus assets among them according to their rights. The petitioner is one of the said contributories in respect of the 599 shares held by him in the company, and appears as such on the list as settled by the liquidator.

"According to the said accounts, which only shew a surplus of about £27, the liquidator does not propose to make a call upon the holders of the 2401 shares upon which 10s. per share only has been paid. He ignores the fact that the petitioner is the holder of 599 fully paid-up shares, and has accordingly contributed 20s. per share, while the holders of the said 2401 shares have only contributed 10s. for each share, notwithstanding that they are liable to pay 20s. per share. A call of 10s. per share would produce £1200, 10s., and adding to this the amount of the free assets appearing in the liquidator's accounts, viz., £27, there would be available for division among the shareholders the sum of £1227, 10s. (subject to any further expenses of liquidation), being about 8s. 2d. per share. If such a call were made, the petitioner's share of the surplus assets would amount to £244, 11s. 10d.

"The petitioner maintains that the liquidator, in the adjustment

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* The Companies Act, 1862 (25 and 26 Vict. cap. 89), enacts:—

Sec. 38.—"In the event of a company formed under this Act being wound up, every present and past member of such company shall be liable to contribute to the assets of the company to an amount sufficient for payment of the debts and liabilities of the company, and the costs, charges, and expenses of the winding-up, and for the payment of such sums as may be required for the adjustment of the rights of the contributories amongst themselves," subject to certain qualifications here immaterial.

Sec. 133.—"The following consequences shall ensue upon the voluntary winding up of a company," *inter alia*:—

(9) "The liquidators may at any time after the passing of the resolution for winding up the company, and before they have ascertained the sufficiency of the assets of the company, call on all or any of the contributories for the time being settled on the list of contributories, to the extent of their liability, to pay all or any sums they deem necessary to satisfy the debts and liabilities of the company, and the costs, charges, and expenses of winding it up, and for the adjustment of the rights of the contributories amongst themselves . . ."

(10) "The liquidators shall pay the debts of the company, and adjust the rights of the contributories amongst themselves."

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of the rights of the contributories of the company amongst themselves, is bound to make a call upon the holders of shares which have not been fully paid up, of an amount sufficient to equalise the contributions and losses of all the shareholders, and thereafter to divide the sum received in respect of said call, together with the funds at present in his hands, among the contributories in proportion to their shareholdings."

Answers were lodged for the liquidator and three of the shareholders, being, with the petitioner, the committee of shareholders appointed to consult with the liquidator.

The respondents founded on the agreement, and stated;—"The said agreement was entered into by the parties other than the petitioner on the faith of representations made to them by the petitioner that he could succeed in overcoming the law of Washington State prohibiting aliens and alien corporations from holding lands on lease or otherwise, or carrying on business in that state, and that he had obtained subscriptions in the United States for capital in the proposed company which the syndicate was intended to promote to the extent of £30,000, and in the United Kingdom to the extent of £25,000; and on the faith of these representations they agreed that the petitioner should have an equal but no greater *pro rata* share with them in the profits to be derived from the promotion of the company. It was also clearly understood and agreed among all the parties to the said agreement that no other capital should be paid up than the 10s. per share on the 2401 shares, except with the consent of the majority of the parties, and hence the provision in the articles of the association that each party should have one vote at meetings of the syndicate whatever number of shares he might hold. The only object in giving to the petitioner paid-up shares was to prevent his being liable for calls by the votes of a majority of the members. If the scheme failed it was never intended that he should receive any payment of money on account of his shares being treated as paid up, while the other shares were only partly paid up, and this was well known to the petitioner. It was clearly understood and agreed among all the parties, including the petitioner, that if the objects of the syndicate failed and the intended company was not formed, all the parties were to be on the same footing upon the winding-up of the syndicate whether their shares were treated as wholly or partially paid up, that if any balance of cash remained after the expenses of winding-up were provided for, it was to be divisible among the shareholders in proportion to the number of shares held by them whether wholly or partially paid up, and that no calls should be exigible upon any unpaid shares to equalise the right of the petitioner as nominally holding fully paid shares with those of the other members of the syndicate. Said understanding and agreement is expressed and clearly implied in the articles of association of the syndicate.

"The petitioner did not succeed in overcoming the difficulty regarding the alien law, and consequently he did not obtain the subscriptions for capital in the proposed company which formed the basis of the said agreement, and it therefore became impossible to form the company or to carry out the objects of the syndicate. In consequence thereof it was resolved to wind up the syndicate."

The respondents maintained that in the circumstances averred by

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them the petitioner was not entitled to insist upon the liquidator making any further call upon the holders of shares upon which 10s. per share only had been paid; and that, in any event, the petitioner was only entitled to a share of any surplus of the assets rateably with the other shareholders in the syndicate, in proportion to the number of shares held by each, whether bearing to be fully or partially paid up.

Argued for the petitioner;—The petition ought to be granted. The case was ruled by authority, both in Scotland[1] and in England.[2]

Argued for the respondents;—The question arose *inter socios*, and consequently it was competent to look at the agreement of 24th January 1898 in order to discover the true bargain between the parties.[3] The agreement made it clear what the true bargain was. The Syndicate, Limited, the company now in liquidation, was a mere provisional arrangement, considered to be advisable as the means of promoting the company which was intended to be the real working company. Towards the promotion of this new company the petitioner agreed to give his services only; the other promoters contributed the necessary funds, and all were to be paid in shares of the new company, if it were formed. If it was not formed, the petitioner lost his services and the others lost their money. The shares in the syndicate were simply vouchers for so many shares in the new company. The petitioner's shares in the Syndicate, Limited, were allotted to him as fully paid, because otherwise he would have been obliged to contribute money as well as his services, but it was clear from the whole tenor of the agreement that his shares were in every other respect in the same position as the remaining shares. There was no suggestion in the agreement that he was to be paid for his services whether the new company was formed or not—that was to say, whether his services were successful or not—but that he was to be so paid was what his contention came to.

At advising, the opinion of the Court (THE LORD JUSTICE-CLERK, LORD YOUNG, and LORD TRAYNER) was delivered by—

LORD TRAYNER.—We concur in the decision which was pronounced in the case of *Paterson* v. *Macfarlane*,[1] and are of opinion that it governs the present case, which is not distinguishable from it. The case of the *Holyford Company*,[3] cited by the respondents (regarding the decision in which we express no opinion) proceeded upon a specialty which is here wanting. Our interlocutor will be practically the same as that pronounced in the case of *Paterson*.[1]

THE COURT pronounced this interlocutor:—"Ordain the respondent William Lamont to make a call of as much per share upon all the shareholders of the company who have not paid more than 10s. per share as will with the funds in his hands be sufficient to equalise the contributions of the shareholders, and thereafter to proceed in terms of the statute with the

[1] Paterson v. M'Farlane, March 2, 1875, 2 R. 490.
[2] *In re* Anglesea Colliery Co., Limited, 1866, L. R., 1 Ch. App. 555.
[3] Holyford Mining Co., Limited, 1869, Irish Law Rep. 3 Eq. 208.

adjustment of the rights of the contributories among themselves, and decern: Find the expenses of the petitioner and of the said William Lamont payable out of the first of the funds, and remit," &c.

SIMPSON & MARWICK, W.S.—WEBSTER, WILL & Co., S.S.C.—Agents.

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ROBERT JAMESON AND OTHERS (Montgomerie-Fleming's Trustees), First Parties.

MRS JANE ROBERTSON PRICHARD OR MONTGOMERIE-FLEMING, Second Party.—*R. S. Horne.*

MISS ELIZABETH TENNENT MONTGOMERIE-FLEMING AND OTHERS, Third Parties.—*Dundas, K.C.—Spens.*

Feb. 28, 1901.

Montgomerie-Fleming's Trustees v. Montgomerie-Fleming.

Liferent and Fee—Casualty—Duplications of Feu-duty.—A testator directed his trustees to hold his whole estate, heritable and moveable, for his widow in liferent, and for his children or their issue in fee.

A third of the income of the trust-estate was derived from duplications of feu-duties payable at fixed intervals of nineteen years from upwards of 300 building feus given off from time to time by the testator.

Held that the intention of the testator was to treat the duplications as income, and that they belonged to the liferentrix.

Observed that the *ratio* of the judgment in *Ewing* v. *Ewing*, March 20, 1872, 10 Macph. 678, as to such duplications, was made inapplicable by the provisions of the Conveyancing Act, 1874.

1ST DIVISION.

JAMES BROWN MONTGOMERIE-FLEMING, of Kelvinside, Glasgow, died upon 18th June 1899, leaving a trust-disposition and settlement, dated 4th February 1898, and registered on 4th July 1899. He directed his trustees, in the third place, "to hold and apply the whole residue, remainder, and reversion of my said estate and effects, heritable and moveable, real and personal, including therein the whole household furniture and plenishing, bed and table linen, books, pictures, gold and silver plate, cutlery, and china belonging to me at the time of my death, to and in favour and for behoof of my wife, Jane Robertson Prichard or Fleming, so long as she shall remain my widow, in liferent, for her liferent alimentary use allenarly; under burden, so long as she remains my widow, of suitably educating, maintaining, and providing for my son till he attains the age of twenty-five years, and my daughters till they respectively are married."

The fifth purpose contained directions for the disposal of the fee of the trust-estate among his son and daughters and their issue.

The trust-estate included (1) feu-duties payable from feus given off from time to time from the estate of Kelvinside, the earliest being dated about 1830; (2) duplications of feu-duties, payable from the feus at fixed intervals of nineteen years; and (lastly) income from other sources. The annual return from the feu-duties, after deducting burdens, amounted to about £1000; the average return payable by way of duplications (some of which fell due each year) was for the nineteen years immediately succeeding the testator's death £387.* The income of the trust from other sources was about £135.

* "Statement of duplications of feu-duties falling due for nineteen years

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The feu-contracts did not expressly bear that the duplications were payable in lieu of casualties. There was no direction in the testator's will specially dealing with the duplications.

A question having arisen as to whether these duplications were to be dealt with as income or capital, a special case was brought for its determination, in which Mr Montgomerie-Fleming's trustees were the first parties. His widow and his whole surviving children were respectively the second and third parties.

The second party maintained that the duplications falling due, as they did, some every year, were to be treated as income, and paid to her, as liferentrix, under the third purpose of the trust-deed above quoted.

The third parties maintained that the duplications were to be considered as capital of the estate of the deceased, and did not fall to be paid to the liferentrix, and that in like manner the interest on any accumulations or investments of the said duplications fell to be credited to capital account, and was not payable to the liferentrix.

The questions were:—"(1) Do the duplications, as well those applicable to feus given off prior to deceased's death as those applicable to feus that are being and that may be given off by his trustees, fall to be considered as income or revenue of the estate and effects of the deceased, and to be paid to the second party as liferentrix under the bequest to her made in the third place in the said trust-disposition and settlement? (2) Do the duplications, or any of them, or any part of them, fall to be considered as capital of the estate and effects of the deceased, so as not to be payable to the second party as liferentrix?"

Argued for the third parties;—Duplications of feu-duty, whether expressly declared in the feu-contract to be so or not, were to be treated as payments made in lieu of casualties, and as a consideration for entry with the superior.[1] Accordingly it was the fiar in the

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after the death of Mr James Brown Montgomerie-Fleming on 18th June 1899:—

"Year to Whitsunday	1900,	. . .	£862	5	1
Do.	do.	1901, . . .	418	3	5
Do.	do.	1902, . . .	320	15	0
Do.	do.	1903, . . .	190	10	0
Do.	do.	1904, . . .	47	15	0
Do.	do.	1905, . . .	58	15	0
Do.	do.	1906, . . .	264	16	4
Do.	do.	1907, . . .	57	0	4
Do.	do.	1908, . . .	608	1	8½
Do.	do.	1909, . . .	148	7	11
Do.	do.	1910, . . .	842	19	10
Do.	do.	1911, . . .	819	14	11
Do.	do.	1912, . . .	767	11	2½
Do.	do.	1913, . . .	362	14	9½
Do.	do.	1914, . . .	247	1	11
Do.	do.	1915, . . .	566	10	0
Do.	do.	1916, . . .	396	13	9½
Do.	do.	1917, . . .	225	3	2½
Do.	do.	1918, . . .	153	1	5
			£7358	0	10½"

[1] Magistrates of Dundee v. Duncan, Nov. 20, 1883, 11 R. 145.

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superiority, and not the liferenter, to whom such duplications were due.[1] The feus were granted from 1830 onwards, and the original character of the payments under the then existing law could not be affected by the passing of the Conveyancing Act, 1874. Section 23 applied the word "casualty" to such duplications of feu-duty. The Act did not intend to change the nature and incidents of the feudal casualties to any greater or other extent than that expressly enacted. Thus, in the most recent case, a duplication of feu-duty payable at intervals of twenty years was held to be capital and not income.[2]

Counsel for the second party were not called upon.

LORD PRESIDENT.—The question which we have to decide in the present case is whether the periodical payments described as duplications of feu-duties should be considered as income or revenue of the estate, so as to be payable to the liferentrix, or as capital.

The testator's estate consisted of land feued for building, yielding a clear income in feu-duties of £1000 a year, while from other sources the annual income is about £135. From the estate there is a further return, the duplications of feu-duties payable at recurring periods from the different feus. The provision for payment of such duplications is quite familiar in feus of building land, and the periodical payments are not generally, as they are not in this case, described as casualties. In Appendix II. we have a statement of the amount of these duplications of feu-duties for the years from 1900 to 1918. The amount is £862 for the year ending Whitsunday 1900, for part of which the testator lived, so that at the date of his death he was receiving nearly as much from the duplications of feu-duties as from ordinary feu-duties, and it would seem in the highest degree improbable that he intended to exclude nearly half the annual income arising from his feus from the liferent provided to his widow. One would have expected that if he meant to do this he would have directed what was to be done with the income thus excluded. The average amount of the duplications for the period of years above mentioned is £387, and it seems plain that the testator intended that this should be treated as income.

But it was argued that these payments are of such a character that they are not properly income, but should, like casualties, be treated as capital. It is true that prior to 1874 the payment for an entry was due to the fiar, who could grant an entry, and not to the liferenter. But such a casualty was not a payment recurring at regular intervals. The duplications are not described as casualties in this case, but it is contended that they are in lieu of casualties. Even taking this to be so, it does not follow that they are to be dealt with as proper casualties in a question between the parties who are respectively entitled to the capital and the income of the estate. If the principle contended for was sound it must apply equally if the duplicated payments were distributed over the whole period of nineteen years, so as simply to increase the annual feu-duties, and counsel for the third parties appeared to admit that in such a case it would not be possible to regard the payments otherwise than as income.

[1] Ewing v. Ewing, March 20, 1872, 10 Macph. 678, 44 Scot. Jur. 375.
[2] Gibson v. Caddall's Trustees, July 11, 1895, 22 R. 889; Lamont-Campbell v. Carter-Campbell, Jan. 19, 1895, 22 R. 260.

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Certain cases were referred to, among others the case of *Ewing*.[1] In that case the payments were of two kinds, both periodical,—the first from subjects held under contracts of ground-annual; and the second, from subjects held under feu-contracts. In the first case the periodical payments were in name of grassum, and in the case of the feus in lieu of casualties. The decision was pronounced in 1872, when the feudal system was in full operation, and before new relations between superior and vassal were created by the Act of 1874. By section 23 of that Act, casualties, or payments for an entry depending on the occurrence of uncertain events, were abolished, while payments of additional feu-duties at fixed intervals are permitted. In view of these changes the case of *Ewing*[1] is not an authority against the view which I have expressed. In the case of the *Magistrates of Dundee*[2] it was decided that when a feu-contract contained a provision for a duplication of feu-duties at stated intervals, this was to be regarded as in lieu of casualties, even although there was no express discharge of the superior's right to casualties. That was a decision between the superior and the vassal as to liability for a casualty arising in the construction of a particular feu-contract, and it has no bearing upon the construction of a testamentary settlement as between the person entitled to the liferent and the persons having right to the fee of a trust-estate.

I therefore think the first question should be answered in the affirmative, and the second in the negative.

Lord Adam.—The only question is, whether the testator meant to leave the income derived from the duplications of feu-duties as well as the income derived from the ordinary feu-duties to his widow. It is not a question whether a duplicand of feu-duty is to be regarded in a question between superior and vassal as equivalent to a casualty. Here we have to construe a will, and I entertain no doubt that the testator never intended the part of his means arising from the duplications of feu-duties (and yielding an average of £387 a year) to accumulate year after year, and the income to go to nobody, as the third parties maintain. I agree that we should answer the first question in the affirmative.

Lord M'Laren.—I think the judgment proposed by your Lordships is sound in principle, and I venture to say that it is not in conflict with any of the decisions in this branch of the law. It is to be observed, though I do not know that the case depends very much on the distinction, that this is not a case of a direct disposition by a testator to disponees in fee and liferent, as in the case of *Crum-Ewing*,[1] but it is the case of a disposition to trustees with a direction to hold the estate for the benefit of the truster's widow in liferent allenarly, and for other purposes with which we are not concerned. The case relates to recurring payments, such as may now lawfully be made a burden on a feu, as the equivalent of casualties of superiority, the question being whether these are to be treated as capital or as income. Independently of authority, I should have no difficulty in holding such payments to be income, because they are produce of the estate, and because they may be appropriated to income without diminishing the capital value

[1] 10 Macph. 678. [2] 11 R. 145.

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of the estate. These recurring payments satisfy the definition of a usufruct, because they may be expended without consuming or destroying the estate.

While it may be that a casualty of large amount, payable only once or twice in a lifetime, might be treated as capital, yet I observe that in the *Ayr*[1] case the Lord President pointed out that if the payments there had been so large in number as to bring in a regular income every year, they would have been ascribed to income. In point of fact, the casualties on an estate consisting of a number of feus are part of the income of the estate, according to the ordinary use of language, and I have no doubt that they would be treated as income by an unrestricted proprietor. The only case which requires consideration is that of *Ewing* v. *Ewing*,[2] in which Lord Benholme held that sums paid in lieu of casualties on a feu-holding were to be given to the fiar. I observe that in that case the trustees were directed to execute a conveyance to Mrs Ewing in liferent and to the truster's heir in fee, and the question was who was entitled to receive these recurring payments. The argument was irresistible that the fiar, who alone could give an entry, was entitled to sums paid in lieu of a composition of non-entry, because he was the person entitled to give the right for which the payment was made. Then his Lordship expresses great doubt as to whether this principle was applicable in the case of grassums paid every twenty-five years on burgage subjects. That is very like the present case, and on this point I cannot think that the decision is an entirely satisfactory one, because Lord Benholme recognises that the ground of judgment in the case of proper casualties is inapplicable, and yet no new ground of judgment is suggested.

The case is assimilated to that of a bonus dividend, but we know that according to the most recent English cases the question whether a bonus paid by a company is to be treated as paid out of income or capital is entirely a question of fact. We lately had occasion to apply that principle in a question with a liferenter. The circumstances of the present case are distinguishable from *Ewing's*[2] case, because this is a case of income paid through trustees, and in my opinion such recurring payments as the present should form part of the widow's liferent.

LORD KINNEAR.—I agree with your Lordships. I think it is not of the slightest consequence whether these duplications of feu-duty are called casualties or not. In modern law language that may be a correct terminology, because it has the sanction of Parliament, although it would no doubt have offended the susceptibilities of the older feudalists. But whether they are properly called casualties or not, they are not casualties in the sense of the law under which casualties were given to the fiar, as distinguished from the liferenter, because such casualties were not constantly recurring payments, but payments dependent on uncertain events, such as the death of the vassal or the transmission of his estate. The reason why the particular casualties to which these duplications have been assimilated were paid to the fiar was because a liferenter by constitution could not enter vassals, and therefore was not entitled to exact a payment in return

[1] Gibson v. Caddall's Trustees, 22 R. 889.
[2] 10 Macph. 678.

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The case is assimilated to that of a bonus dividend, but we know that according to the most recent English cases the question whether a bonus paid by a company is to be treated as paid out of income or capital is entirely a question of fact. We lately had occasion to apply that principle in a question with a liferenter. The circumstances of the present case are distinguishable from *Ewing's*[2] case, because this is a case of income paid through trustees, and in my opinion such recurring payments as the present should form part of the widow's liferent.

LORD KINNEAR.—I agree with your Lordships. I think it is not of the slightest consequence whether these duplications of feu-duty are called casualties or not. In modern law language that may be a correct terminology, because it has the sanction of Parliament, although it would no doubt have offended the susceptibilities of the older feudalists. But whether they are properly called casualties or not, they are not casualties in the sense of the law under which casualties were given to the fiar, as distinguished from the liferenter, because such casualties were not constantly recurring payments, but payments dependent on uncertain events, such as the death of the vassal or the transmission of his estate. The reason why the particular casualties to which these duplications have been assimilated were paid to the fiar was because a liferenter by constitution could not enter vassals, and therefore was not entitled to exact a payment in return

[1] Gibson v. Caddall's Trustees, 22 R. 889.
[2] 10 Macph. 678.

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Feb. 28, 1901. Montgomerie-Fleming's Trustees v. Montgomerie-Fleming.

for an entry. But even in the case of proper casualties I doubt whether that consideration would be sufficient to solve a question arising, not on of any feudal incident, or from the conditions of a title to land, but on the construction of a settlement. In that case the question always is what the maker of the settlement intended; and on the construction of this particular settlement I have no difficulty in holding that the truster intended his widow to have the income arising from these duplications. Such payments cannot be assimilated to casualties of feu in the older sense, because they are constantly recurring payments, payable at fixed intervals under contract between the superior and the feuar. I have no doubt that a proprietor in the position of the truster would in general treat such periodical payments as income, and I think he intended his widow to have the income arising from them after his death.

THE COURT answered the first question in the affirmative, and the second question in the negative.

H. B. & F. J. DEWAR, W.S.—MYLNE & CAMPBELL, W.S.—Agents.

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Mar. 1, 1901. Hunter v. Russell.

REVEREND GEORGE HUNTER, Pursuer (Appellant).—*Watt, K.C.*—*Wilton.*

JAMES RUSSELL, Defender (Respondent).—*Constable.*

Expenses—Reparation—Slander—Apology.—In an action of damages for slander, the defender lodged a minute in which he stated "that if any expressions used by the defender concerning the pursuer could be construed as reflecting in any way upon the pursuer, his character or conduct, he unreservedly withdraws the same, there being no ground therefor, and expresses his regret for the occurrence." The pursuer having lodged a minute of acceptance, moved for expenses. The defender maintained that there should be no expenses to either party.

Held (*dub.* Lord Young) that the defender's minute accepted by the pursuer was equivalent to the verdict of a jury in favour of the pursuer, and that the pursuer consequently was entitled to expenses.

2D DIVISION. Sheriff of Fife and Kinross.

IN June 1900 the Reverend George Hunter, minister of Kelty, Blairadam, brought an action in the Sheriff Court at Dunfermline, against James Russell, grocer, Kelty, for £500 as damages for slander.

The pursuer averred that the defender had used certain words of and concerning the pursuer, meaning thereby to represent that the pursuer had dishonestly appropriated £4 belonging to the defender. The pursuer stated that he was willing to forego any claim of damages if a suitable retraction and apology were granted, but that the defender declined to withdraw and apologise.

The defender denied that he had used the words complained of.

The Sheriff-substitute (Gillespie) having allowed a proof, the pursuer appealed for jury trial, and proposed issues for the trial of the cause.

On 19th January 1901 the cause having been put out for adjustment of issues, *Constable*, for the defender, objected to issues being granted, on the ground that the words complained of were not slanderous. He stated further that the defender, while he did not admit that he had used these words, was willing to lodge a minute withdrawing and expressing his regret for any expression he might have used reflecting on the pursuer's character. The case was then adjourned.

On 19th February 1901 the defender lodged a minute in the following terms:—"*Constable*, for the defender, stated to the Court, that

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lowing terms?—"*Constable*, for the defender, stated to the Court, that if any expressions used by the defender concerning the pursuer could be construed as reflecting in any way upon the pursuer, his character or conduct, the defender unreservedly withdraws the same, there being no ground therefor, and expresses his regret for the occurrence."

On 21st February the pursuer lodged a minute of acceptance of the foregoing tender.

The case was then enrolled for disposal of the question of expenses.

The pursuer moved for expenses, and argued;—The apology which had been offered and accepted was equivalent to a verdict of the jury in favour of the pursuer, and consequently entitled him to expenses.[1]

Argued for defender;—The Court should find that no expenses were due to or by either party. The defender's minute was not equivalent to a verdict of the jury in favour of the pursuer; it contained no admission that the defender had used the words complained of. The defender's minute, and the pursuer's minute of acceptance, came to nothing more than a settlement of the action.

LORD JUSTICE-CLERK.—In this case the pursuer has succeeded in getting rid of a serious imputation upon his character, and I am of opinion that he is entitled to expenses.

LORD YOUNG.—I have some difficulty in this case, but in the circumstances I am not sorry to think—from what I know to be your Lordships' views—that it is not to be acted upon. My difficulty is this, that the pursuer does not by this minute establish the case which he must have established to the satisfaction of a jury before he could get a verdict, viz., that the words complained of were used calumniously and falsely by the defender, meaning thereby to represent that the pursuer had dishonestly appropriated £4. If the jury had found that the defender used the words complained of, but that these words did not mean that the pursuer had dishonestly appropriated £4, that would have meant a verdict for the defender, and there is nothing in this minute which negatives that possible finding by the jury, and so establishes the case which the pursuer must have established in order to get a verdict. But it is not necessary to do more than indicate my difficulty. I should have been disposed to give expenses to neither party.

LORD TRAYNER.—I cannot say that I participate in the doubts which Lord Young has just expressed. I do not know that I have ever seen or heard of a tender which really amounted to an admission of the slander on which the action was laid. In my own experience actions of damages for slander have been settled very much on the lines on which the action here has been settled. The broad question raised in this case was this—The pursuer avers that the defender had slandered him, and he came into Court in order to clear his character of that slander—a matter of importance to anybody, but especially of importance to the pursuer, looking to the nature of the slander and to the position and office which he occupies. Now, what is the result? The result has been to vindicate the pursuer entirely from the charge made against him. What the defender says comes to this—"I do not know that I used the language attributed to me, but if I did, and if it is

[1] Faulks v. Park, Dec. 22, 1854, 17 D. 247, 27 Scot. Jur. 102; Mitchells v. Nicoll, May 24, 1890, 17 R. 795.

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capable of the meaning put upon it, then I express my regret for using such language of the pursuer." That is an ample vindication of the pursuer's character.

LORD MONCREIFF.—I am of the same opinion, and on the ground that the pursuer has obtained everything for which he brought the action, viz., the vindication of his character. As to the apology, I think that it is all that can be expected. The effect of such an apology is precisely the same as if the pursuer had obtained a verdict. If a pursuer goes on with his action after receiving an apology in such terms, he is, according to the case cited (*Mitchells* v. *Nicoll* [1]), liable in expenses.

THE COURT, in respect of the minute of tender and acceptance thereof, dismissed the action, and found the pursuer entitled to expenses in both Courts.

P. R. M'LAREN, Solicitor—WALLACE & BEGG, W.S.—Agents.

No. 96. Mar. 1, 1901. Corporation of Glasgow v. Carter-Campbell.

THE CORPORATION OF THE CITY OF GLASGOW, Pursuers (Respondents). —*Lees—M. P. Fraser.*

MRS EMILY GEORGINA CARTER-CAMPBELL, Defender (Appellant).—*Johnston, K.C.—Pitman.*

Police—Glasgow Police Act, 1866 (29 *and* 30 *Vict. c. ccxxxv.*), *secs.* 4, 328, 329, *and* 330—"*Ordinary public sewer*"—*Recovery of expense of construction from adjoining proprietors—Building erected on "a land or heritage" adjoining road—"Land or heritage.*"—By sec. 328 of the Glasgow Police Act, 1866, the Corporation of that city is empowered to make provisions for draining in a suitable manner the portions of the turnpike-roads within the city and the public streets, and with that object to construct ordinary or special public sewers under the same.

By sec. 329 "the proprietor or proprietors of lands and heritages adjoining any part of a turnpike-road within the city or public street, in which no ordinary public sewer previously existed, shall severally be bound to relieve the Board (*i.e.*, the Corporation) from the expense of constructing an ordinary public sewer for the drainage thereof, in proportion to the frontage thereto of their respective lands and heritages, and such amount may be recovered from them as damages, or may be levied from them by the Board in the same way as a special police assessment, so soon as, but not before, some building is erected on a land or heritage adjoining such road or street."

Sec. 330 requires the Master of Works to lay before the Board a statement of the expense incurred in making any such sewer, and of the proportions due by each proprietor.

Held by a majority of seven Judges (*aff.* judgment of Lord Pearson, *dis.* Lord Young and Lord Moncreiff) (1) that when a sewer had been constructed in a road and the whole expense ascertained and allocated among the proprietors of the adjoining ground in proportion to the respective frontages, the sums so allocated became due by the proprietors although payment was not exigible until a building had been erected on "a land or heritage adjoining the road"; and (2) that the existence of a farmhouse twenty-five yards from the road, which had been erected on a farm adjoining the road many years before the Act was passed, satisfied this condition, and made the proportion of the cost effeiring to the proprietor for the whole frontage of his lands at once exigible.

Question, whether when a building has been erected on one property the cost of the sewer becomes exigible from the whole proprietors liable. *Opinions pro et contra.*

[1] 17 R. 795.

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2D DIVISION, with three consulted Judges. Lord Pearson.

THIS action was raised in June 1899 at the instance of the Corporation of Glasgow against Mrs Emily Georgina Carter-Campbell, of Possil, for payment of £1051, 15s. 2d., being her proportion of the expense of constructing a sewer in that part of Inchbelly Road, Glasgow, which extends northward from the middle line of Carlyle Street to a point near the Huntershill south march, fixed according to the frontage of the lands of Possil to that road.

The following narrative of the facts is taken from the opinion of the Lord Ordinary (Pearson):—

"The material facts, as to which there is really no dispute, are these: The Inchbelly Road runs northward from Springburn in Glasgow to Kirkintilloch. It was a turnpike-road, and the part of it now in question was included within the extended city boundary in 1891, and was put on the list of public streets in 1892. As described on the list, its south end is at Springburn car terminus.

"In its course northwards the road runs through the defender's lands of Possil, near the eastern march of the estate. On leaving Possil it has Huntershill on the east and Milton on the west. The road rises to the north until it crosses the railway line, from which point it slopes downwards to Bishopbriggs. At the part now in question the ground adjoining the road rises to the east, and slopes rapidly downwards to the west to the Possil Burn.

"The road was previously drained in the usual way by gullies leading in to the adjoining land. These gullies were entirely on the west side, except towards the south end, where the ground is more level. There was no sewer or drain in the road except as after mentioned.

"The estate of Possil extends on each side of Inchbelly Road southwards to its terminus, and the proprietor had feued off land on both sides of the road. On the west side three streets run off Inchbelly Road, namely (beginning from the south), Elmvale Street, Eastfield Street, and Carlyle Street. North of Carlyle Street the whole of Possil ground on the west side is in agricultural occupation, being the farm of Eastfield, the farmhouse and steading of which are situated at the south-east corner, and are approached from the Inchbelly Road.* On the east side the ground is feued and built on northward to a point in line with Eastfield Street, and there was an additional feu given off extending further north beyond the line of Carlyle Street, which, however, reverted to Possil on the failure of the feuar. From the line of Eastfield Street northwards there are no buildings on the east side of the road.

"As to the sewers in Inchbelly Road before the one now in dispute, there were (1) a public sewer which came down Balgray Road, and turning sharply north along Inchbelly Road, went along Eastfield Street, down Campbell Street, and so to the Possil Burn; and (2) a branch sewer which began at the east end of Carlyle Street and joined the other at the end of Eastfield Street. The dungstead on Eastfield Farm, situated at the south-east corner of the steading, drained into this branch, but the farmhouse drained in the other direction.

"In and prior to 1897 the proprietor of Huntershill pressed the Corporation to undertake a drainage scheme in order that he might develop his feuing. In the end of 1897 the Corporation took up the matter through its statute-labour committee. . . .

"The Master of Works having reported that the sewer in question ought to be constructed, and this being approved by the statute-

* The farmhouse and steading stood about twenty-five yards back from the road.

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labour committee and afterwards by the Corporation, it was begun in August 1898; and the first section of it, which extended northwards to a point near the Huntershill south march, was completed in February 1899. The second section of it, from that point northwards, was let under a separate contract, and was finished about six months later. It is the first or southern section which is here in question. The Corporation itself undertake the cost of so much of it (about 180 feet) as lies south of the middle line of Carlyle Street, the new sewer being to that extent a renewal and enlargement of the previously existing branch sewer already mentioned, which ran in an 18-inch pipe. North of that line the cost of this section is charged against the proprietors in proportion to their frontage to the road; and assuming the defender to be otherwise liable, I do not understand that the accuracy of the allocation is disputed, though the defender does not admit that, in allocating the charges for what is practically one sewer, the pursuers are warranted in treating the two sections separately.

"The sewer as constructed is an egg-shaped brick sewer with manholes, and its sectional area is just under 7½ square feet. It may be taken that in point of fact nothing like that size of sewer would have been constructed for the mere surface drainage of the road, although that drainage, which previously was not quite satisfactory, is now all carried into it. The moving cause for the construction of the sewer was the urgent request of Huntershill for such drainage as would serve their feuing purposes. And further, the sewer as built is calculated to serve not merely such houses as may be built fronting the Inchbelly Road or naturally draining into it, but about 200 acres of prospective building land, some of which (lying on the west of the road) has its natural drainage to the westward, and more than half of which (lying to the north of the railway) is in another watershed, and slopes downwards to the north. But, on the other hand, the sewer is not of excessive size. It is the normal size of an ordinary main sewer, and indeed is about the smallest size that can be usefully furnished with manholes for cleansing and inspection."

The pursuers pleaded;—(1) The defender Mrs Emily Georgina Carter-Campbell being the proprietor of lands and heritages adjoining a public street in the City of Glasgow in which no ordinary public sewer previously existed, and the pursuers having constructed an ordinary public sewer for the drainage thereof, in terms of the Act founded on, the defenders are bound to relieve the pursuers from the expense of such construction in proportion to the frontage to that street of her lands and heritages. (2) The sum sued for being the said defender's proportion of the expense of the construction of said public sewer, and being now payable, decree should be granted therefor, with expenses.*

* The Glasgow Police Act, 1866 (29 and 30 Vict. c. 235), enacts as follows:—Sec. 328—"The Board (*i.e.* the Corporation) shall make provisions for the draining in a suitable manner the portions of the turnpike-roads within the city and the public streets, and may with that object construct or continue in or under any of the said roads or streets one or more ordinary or special public sewers, and may from time to time alter, renew, or add to such sewers as to them shall seem proper, and may carry or continue the said sewers into or through any lands or heritages within the city, and may repair, maintain, and cleanse the said sewers."

Sec. 329 so far as material is quoted in the rubric.

Sec. 330—"The Master of Works shall make up and lay before the

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The defender pleaded, *inter alia*;—(2) The pursuers not having constructed a public sewer within the meaning of section 328 of the said City of Glasgow Act of 1866, the defender is entitled to be assoilzied. (3) In any event the defender is entitled to be assoilzied, in respect that no buildings have been erected on her property *ex adverso* of said road.

After a proof, which elicited the facts as already stated, the Lord Ordinary ordained the defender to make payment as craved.*

Board a statement of the expense incurred in constructing any such public sewer, and of the proportions due by the proprietor or several proprietors of lands and heritages, and such statement in so far as approved of or as altered by the Board, shall be *prima facie* evidence of the amount of expense so incurred and of the proportions thereof due by each proprietor."

Sec. 4—"The following words and expressions in this Act shall have the several meanings hereby assigned by them, unless there is something in the subject or context repugnant to such construction—that is to say, . . . 'lands and heritages' shall mean lands and heritages within the city, and shall have the meaning attached to that expression in the said Acts (the Lands Valuation Acts). 'Land or heritage' in the singular number shall mean one of such lands and heritages separately valued or entered in the roll as separately occupied. . . . 'Sewers' shall include any drain, vault, culvert, or water-course, and all cess-pools, traps, and other appurtenances thereof. 'Public sewer' shall mean a sewer for the drainage of a turnpike road or public street. 'Common sewer' shall mean a sewer for the drainage of a private street or court connected with a public sewer. 'Private sewer' shall mean a sewer for the drainage of the lands and heritages of one or more proprietors connected with a public or common sewer, or with a river or stream, and shall include any house drain."

* "OPINION.—(After stating the facts as above)—. . . The Corporation maintain that the sewer was constructed, and is now charged for, as a public sewer in conformity with the provision of sections 328, 329, and 330 of the Glasgow Police Act, 1866. The defence raises questions of considerable importance as to the construction and scope of these sections.

"The defender contends in the first place that this is not a public sewer at all within the meaning of the Glasgow Police Act. This seems on the statement of it a strange proposition; for if it is not a public sewer in the common acceptation of the term, it is difficult to say what it is. Yet the Act is so worded as to give some colour to the argument. The interpretation clause (sect. 4) defines the expressions sewer, public sewer, common sewer, and private sewer ('unless there be something in the subject or context repugnant to such construction') as follows:—'*Sewer* shall include any drain, vault, culvert, or water-course, and all cess-pools, traps, and other appurtenances thereof. *Public sewer* shall mean a sewer for the drainage of a turnpike-road or public street. *Common sewer* shall mean a sewer for the drainage of a private street or court connected with a public sewer. *Private sewer* shall mean a sewer for the drainage of the lands and heritages of one or more proprietors connected with a public or common sewer, or with a river or stream, and shall include any house drain.' Thus (it is said) each class of sewer is defined by reference to the thing which it is to drain; and a public sewer is one for the drainage of a turnpike-road or private street. So by sec. 328, which deals with public sewers, the Corporation 'shall make provision for draining in a suitable manner the portions of the turnpike-roads within the city, and the public streets, and may *with that object* construct . . . one or more ordinary or special public sewers.' Here again the draining of a turnpike-road or public street is assigned as the sole function of a public sewer. And sec. 329 lays on the proprietors of lands and

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The defender reclaimed.

After hearing argument, the Second Division appointed the case to be argued before themselves, with the assistance of three Judges of the First Division. This was accordingly done, the Judges called in being Lord Adam, Lord M'Laren, and Lord Kinnear.

Argued for the defender;—(1) This was not a sewer for the drainage of the street or road, and therefore not a public sewer in the sense of the Act. It was a district sewer for the district of Huntershill, and it was inequitable that a frontager should have to bear the expense of it to the relief of ratepayers in the district who were not frontagers.[1] (2) Assuming that this was a public sewer in the sense of the Act, the time at which payment could be exacted had not arrived, as no building had been erected on the defender's lands and heritages since the passing of the Act. The farm-buildings had been erected prior to the Act, and did not therefore fulfil the condition imposed by section 329. (3) Even if the farm-buildings could be looked on as buildings erected in the sense of section 329, the steading, on which the buildings were, and the farm, on which there were no buildings,

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heritages adjoining any part of a turnpike-road or public street, in which no ordinary public sewer previously existed, an obligation to relieve the Corporation from the expense of constructing an ordinary public sewer 'for the drainage thereof,' in proportion to the frontage 'thereto' of their respective lands and heritages. In other words, a public sewer must be made not for the drainage of lands and heritages (for that would make it a private sewer), but for the drainage of those parts of public streets and roads which were not previously drained. Thus the sole function of a public sewer is to carry the surface drainage of streets and roads; and since this sewer, as constructed, was not suggested and not required for that purpose, but for much wider purposes, it is either not a public sewer at all, or a public sewer and a great deal more; and in either case it is not chargeable as such against the adjoining proprietors.

"It seems singular that a 'public sewer' should be defined by one, and that not the most important, of its functions. But after all, the purpose of sec. 4 in distinguishing between public, common, and private sewers is not to describe each fully, but to assign to each its *differentia*—some feature easily recognisable which will enable it at once to be assigned to its proper category. In this view, a sewer is a public sewer if it drains a public street, although it may do a great deal more.

"If a 'public sewer' is one which drains, or is constructed to drain, a public street and nothing else, the result would be that the whole public sewers of Glasgow would serve for nothing but carrying off the rainfall. There would, I suppose, require to be a separate system of private drains, deprived of the advantage of periodical flushing and made (except under special circumstances) by the proprietors.

"The Act itself furnishes an answer to the defender's contention. It demonstrates that the systems are not to be mutually exclusive, and that a sewer is none the less a public sewer because it receives, and is constructed to receive, what may be called private sewage. One need not go beyond the interpretation clause to reach this result; for the definition of private sewer (which expressly includes house drains) requires that it shall be connected with a public or common sewer or with a river or stream; and again, a common sewer must (according to its definition) be connected with a public sewer. Clearly, therefore, it is the duty of the Corporation, in constructing a public sewer for the drainage of a street or road, to take account of prospective uses, and to adjust its size to the probable require-

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[1] *Confer* Corporation of Glasgow v. Wyllie, July 12, 1899, 1 F. 1142.

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were separate entries in the Valuation-roll, and the defender's liability to pay was in proportion to the frontage of the steading only, and not of the farm lands.

The nature of the argument for the pursuers, who cited the case of *Morton*[1] in answer to the defender's first contention, sufficiently appears from the opinions of the Court and of the Lord Ordinary.

At advising,—

LORD JUSTICE-CLERK.—The road in question in this case has been included within the burgh of Glasgow since the year 1891, and is now part of the public streets of the city. The Possil estate lies on both sides of this street for a considerable distance. The Corporation, in the exercise of their powers, have built a drain along the street suitable as regards levels for carrying off the drainage of the lands on either side of the road or street. The southern section of the drain which is here in question was completed in February 1899, where the road intersects the defender's property, and was afterwards carried further northwards. The Corporation desire by this action to

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ments of the common and private sewers which according to the Act will have to drain into it when they are made. This view is emphasised by the terms of sec. 328. That section speaks of 'ordinary or special public sewers,' and sec. 339 shews that a special public sewer means one built to carry off the refuse of a trade or manufactory which would otherwise have caused a nuisance by entering an ordinary public sewer. It is true that the cost of such special public sewer is (by sec. 340) laid upon those who use it; but the section implies or assumes that an ordinary public sewer has wider functions than merely draining a road. A further indication of the intention of the Act is to be found in sec. 329, which lays upon frontagers the cost of ordinary public sewers up to a dimension of 7½ square feet of sectional area, which is the normal area of a main drain adapted to carry off all kinds of sewage.

"The defender contends, in the second place, that in any view the proportion allocated upon her is not yet payable. By sec. 329, the obligation laid on the proprietors is to relieve the Corporation from the expense, 'so soon as, but not before, some building is erected on a land or heritage adjoining such road or street.' And in connection with this must be taken the definition given in the interpretation clause (sec. 4) of the somewhat peculiar expression 'a land or heritage.' After defining 'lands and heritages' by a reference to the Lands Valuation Acts, the clause proceeds: '*Land or heritage* in the singular number shall mean one of such lands and heritages separately valued or entered in the Valuation-roll as separately occupied,'—a definition which seems to have been inserted mainly for convenient use in framing the assessment clauses of the Act (see secs. 39, 42, 45, 46, &c.).

"The pursuers' case is, that the requirement of sec. 329, as to a building being erected before the sum is payable, is satisfied by the existence of any building upon any 'land or heritage' adjoining the road or street; that the liability of all the frontagers to make payment is brought into operation by the existence of any building upon any such land or heritage belonging to any one of them.

"The general view of sec. 329 presented by the defender is this—that the proportion of cost effeiring to the frontage of each several 'land or heritage' adjoining such road or street only becomes exigible as and when each such land or heritage comes to have a building on it; that being in the general case an indication that that particular land or heritage is beginning to use the sewer, even though it may not be doing so in fact. It

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[1] Corporation of Glasgow v. Morton, Nov. 30, 1899, 37 S. L. R. 177.

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recover from the defender the cost of the new drain proportionate to the defender's frontage on the road. This demand is laid upon section 329 of the Glasgow Police Act, which lays upon the proprietors of lands and heritages adjoining any part of a turnpike-road or public street, in which no public sewer previously existed, an obligation to relieve the Corporation from the expense of constructing an ordinary public sewer "for the drainage thereof" in proportion to the frontage thereto of their respective lands and heritages.

The drain which is now placed in this road is a drain suitable for the purpose of carrying off the drainage of the adjoining lands on both sides of the road, and the question in this case is whether the circumstances now exist under which the Corporation are entitled to insist for payment from the defender of the cost of the drain where the road or street passes through her property.

The true question is, whether the condition of section 329 has been fulfilled, under which the right to exact the cost emerges "so soon as, but

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is pointed out that the section uses distributive language; the proprietor or proprietors of the adjoining lands and heritages being 'severally' bound to relieve the Corporation in proportion to the frontage of 'their respective lands and heritages.' The contention is that the whole section must be read distributively, as between one proprietor and another; and also as between one 'land and heritage' and another, even when they both belong to the same proprietor. A proprietor of a land or heritage adjoining the road is not to be compelled to pay the proportion effeiring to its lineal frontage, unless and until some building is erected upon that land or heritage, irrespective of whether another proprietor, or even he himself, has another 'land or heritage' adjoining the road on which a building has been erected.

"This is a simple and reasonable view of the situation, and might quite fairly have been adopted as determining the liability to pay. If it had been consistent with the *prima facie* meaning of the language used in the section, I should have adopted it as the test. But, in my opinion, the ordinary and natural meaning of the language used favours the pursuers' view (though, as afterwards explained, I do not adopt that view in its entirety). Although the section opens with the expression 'the proprietor' (in the singular number), the distributive expressions which follow plainly relate to the case of an allocation falling to be made among a plurality of proprietors; and the proportion of each being ascertained *inter se*, 'such amount' may be recovered from them so soon as, but not before, 'some building is erected on a land or heritage adjoining such road or street.' This latter expression is not distributive. It is quite general, subject only to two limitations imposed by the context, to which I shall advert presently. This view gives effect to all the words, and does not require any words to be supplied. But the defender's view does require the addition of certain words; for, in place of the words 'erected on a land or heritage,' it requires the words 'erected on the land or heritage in respect of which the proprietor is sought to be charged.'

"Even this difficulty might have been got over, according to received principles of interpretation, if the natural meaning of the words led to manifest injustice or absurdity. But though cases of hardship may be figured (and the present may possibly be one), I think the operation of the pursuers' view in the general case can easily be justified as reasonable and fair. If indeed the object of the test were to mark the moment when the land begins to change its character from rural to urban, it might be regarded as absurd that this test should be held to be fulfilled by the existence (say) of a farmhouse and steading a century old. The statute might have distinguished between buildings which do and do not indicate a development of feuing in the locality; or between buildings erected before and after the

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not before, some building is erected on a land or heritage adjoining such road," land or heritage meaning a land or heritage "separately valued or entered in the Valuation-roll as separately occupied." That I read as meaning that where there is any land or heritage belonging to one proprietor, and some building is erected thereon, the claim of the Corporation for the cost of the drain emerges. In this case it is the fact that on the lands adjoining the road containing the sewer, in respect of which the claim is made, there are buildings erected, viz., the farmhouse and steading of Eastfield. That these adjoin the road is, I think, indisputable, and that it was a road or part of a road in which "no ordinary public sewer previously existed" until the Corporation built one is, I think, also beyond doubt.

Whatever may be said as regards the supposed hardship of a proprietor who has one building opposite a stretch of road running through his property being made to pay the expense of the drain for the whole lands, and before his feuing is developed, so that he can recoup himself from his feuars, it is the statutory enactment which must be construed and enforced. In

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sewer was constructed; or between buildings which do and do not use the sewer. But it takes no note of such distinctions. Consequently, if the defender's contention were well founded, it would lead to this—that a separately valued or separately occupied stance in a street, even in a feuing neighbourhood, is not to bear its proportion unless and until it has a building on it. I can well understand that in the interests of the community, the Magistrates and the Legislature thought the proprietor of such a stance should be made to pay now for such an improvement which enhances the value of his property by making it much more marketable. The alternative is, that the community have meantime to pay interest (to that extent) on the cost of the improvement while the proprietor holds up his land for the rise. That probably is the normal case which would occur of vacant ground opposite a new sewer; and it is possible that the comparatively rare case of a farm with house and steading being included in the city was not specially before the mind of the Legislature. But they use expressions which include it. The Act cannot provide for each case; it can only lay down some general rule or test of the liability to pay. And I see no such general injustice or absurdity in the test suggested by the pursuers' construction as to induce me to go beyond what I think the words naturally mean.

"Of course it falls on the pursuers to shew that some building exists answering the requirements of the statute. They suggest three alternatives: (1) the houses facing the road between Carlyle Street and Eastfield Street; (2) the colliery offices on Milton ground near the letter B on the plan; and (3) the farmhouse and steading at Eastfield.

"The first two illustrate the limitations which, I think, the context imposes upon the generality of the words of sec. 329. [His Lordship rejected the first alternative on the ground that an ordinary public sewer did previously exist adjoining the row of houses, and the second on the ground that the colliery offices, although built on a land or heritage adjoining the road, were a long way beyond the terminus of the line of sewer assessed for.]* There remains the farmhouse and steading of Eastfield, as to which the defender puts forward these special contentions—(1) that these buildings would in any view not warrant her being charged now for the whole frontage of the farm, seeing that the farm buildings and the agricultural land enter the Valuation-roll separately as regards both value and occupancy, so that each is a separate 'land or heritage' within the meaning of

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* The first and second alternatives were not maintained by the pursuers at the hearing in the Inner-House, and need not be further referred to.

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the case in question, the statute by sec. 330 enacts that when the drain is constructed the Master of Works is to lay before the Board a statement of expense, with an allocation of the proportion due by the respective lands and heritages adjoining, which is to be *prima facie* evidence of the proportions due by the different proprietors. Thus at the time the proportions chargeable are to be ascertained, and it seems to me that the only after question is, does the proprietor of a land or heritage become liable for his proportion when there is a building on it, in terms of sec. 329? And I am not satisfied that there is any real hardship in the direct application of that section, for the difficulties of a proprietor in giving off feus are necessarily substantially diminished if there is a suitable main town drain provided, into which his feuars can at once get an outfall. As I read the statute, its meaning is that, given a proprietor who has buildings on his lands and heritages adjoining the road or street when the public authority constructs a proper drain through it, he must contribute in proportion to his frontage. I agree with the Lord Ordinary that these conditions are fulfilled here, and I concur in the views he has expressed as to the expression "land or heritage," and therefore think that his interlocutor should be affirmed.

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sec. 329; and (2) that if her liability is not to extend beyond the farm buildings, she is not liable at all, for a reason to which I shall presently advert.

"The first of these arguments turns on the terms of sec. 329 and the definition of the expression 'land or heritage,' and is disposed of adversely to the defender by what I have already said on the general question. I do not think that each 'land or heritage' is to be treated separately in the matter, so as to be exempt from payment until a building is erected upon it.

"I am assuming that the fact of separate entries appearing in the Valuation-roll is conclusive as shewing that each is a separate 'land or heritage' within the meaning of the Glasgow Police Act. I may add, however, that I am not satisfied that the two subjects are to be so regarded in the present question. No doubt each formally satisfies the definition contained in the Act. But I am not aware of any warrant in the Valuation Acts for this double entry in the case of a farmhouse and steading with farm land; and there are decisions of the Valuation Appeal Court to the contrary—(*Henderson*, 1871, 11 Macph. 985; *Forbes-Irvine*, 1897, 24 R. 741)—even in cases where the entries were supposed to be justified (as here) by the circumstance that one of the subjects was or might come to be assessable on a lower scale than the other. This matter was not developed in the discussion before me, and there may be provisions in the Glasgow Acts affecting it; but however convenient such entries may sometimes be, I think they would require statutory warrant before they could be regarded as really separate entries. I should have thought that the farm—including land, farmhouse, and steading—was in a question with the proprietor a unum *quid* so far as the Valuation-roll is concerned, irrespective of its being split up for some ulterior purpose connected not with the ownership, but with the rating of the occupier.

"In the view I take, the question does not arise whether, if the present liability of the defender is confined to the frontage of the farmhouse and steading as a separate subject, she is not exempt altogether on the ground that the farm buildings do adjoin a public road in which there was previously a public sewer. It is proved that a public sewer previously ran down the Inchbelly Road southwards from the end of Carlyle Street, and that the farm dungstead drained into it, though the farmhouse appears to have drained to the westward. Now, the statute uses the word 'adjoining' in describing the position of the lands and heritages relatively to the 'part of the road or street in which no ordinary public sewer previously existed.'

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LORD YOUNG.—A variety of arguments were presented to us here on each side. The Lord Ordinary is in favour of one of the arguments and one of the views maintained by the pursuers, and is against the others. I agree with his Lordship in the opinion which he has expressed against those contentions of the pursuers which he has rejected, but I have had more than difficulty in determining what is the right view in reference to that contention on the part of the pursuers which he has sustained. The Inchbelly Road which runs north and south is, as his Lordship has said, within the city of Glasgow, and it is one of the public roads or streets of the city referred to in the Glasgow Police Act of 1866; and the statute curiously enough—though it is not more curious in this respect than it is in many others—makes no distinction whatever between public roads and public streets within the city boundaries. There was a contention on the part of the defender that this drain was not of a character which fell under the provisions of the statute which are founded on in the claim. I am of opinion that it is, and am adverse to the view of the defender on that matter. It was not very earnestly or strongly maintained before us, but it certainly was maintained, and was not formally given up. I think the drain was made by the city authorities within and according to their powers. I think that this road being a public street or road within the city of Glasgow they were entitled to make the sewer and pay the expense of it in the first instance out of the city funds at their disposal.

The matter which we have to deal with now, and upon which the difficult question arises, is what is to be paid, and when, by those of the citizens of Glasgow who are locally, immediately, materially, and intelligibly interested in this drain in respect that they are benefited by it? Of course the defender here, the proprietor of the estate of Possil—the whole or a great portion of which at all events is now within the city—contributes as the law requires to the city funds, out of which the expense is paid in the first instance. But the question is whether she is one of those proprietors who are so exceptionally benefited by this drain that she has to pay, in proportion to the extent of her benefit as measured by the statute, a certain proportion of the cost, thereby relieving the rest of the ratepayers to that extent. The Lord Ordinary has, quite properly in my view, dealt only with that part of the drain which is between the letters A and D upon the plan, although for the reason which I shall explain immediately it has to be limited by taking 180 feet or 60 yards off the south end between Carlyle Street and the letter A. The facts are correctly stated, and very clearly stated, by the Lord Ordinary in his note, and therefore I do not go into them in any detail. It appears in the evidence that the making of the drain was commenced at the instigation of the proprietor of Huntershill to

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If the road from end to end were to be regarded in this matter as indivisible, the previous existence of the small bit of public sewer at the south end would negative the proposition that it was 'a road in which no public sewer previously existed.' But a particular subject may perfectly well adjoin a part of the road in which there was a sewer previously, and another part where there was none. And in so far as it does the latter, I think the proprietor is liable in proportion to his frontage.

"The result is, that I hold the pursuers to be entitled to decree in terms of the conclusions."

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enable him to carry out a feuing plan of his lands which adjoin Inchbelly Road north of the letter D. The drain runs south to letter A, where it falls into an old Springburn drain of sufficient capacity to receive it; but for reasons which he explains the Lord Ordinary deals only with that part of the drain which is between the letters A and D, that is where it is adjoined by the Possil estate. The exact length we were not told, but from the plan it appears to be about half a mile. I said that I thought 180 feet ought to be taken off that. The reason is thus explained by the Lord Ordinary himself in his note—"The Corporation itself undertake the cost of so much of it (about 180 feet) as lies south of the middle line of Carlyle Street, the new sewer being to that extent a renewal and enlargement of the previously existing branch sewer already mentioned, which ran in an 18-inch pipe. North of that line the cost of this section is charged against the proprietors in proportion to their frontage to the road"; so that for 180 feet, that is, from A to Carlyle Street, there is no question of the cost, for the Corporation themselves have undertaken and have paid that. Therefore we are here dealing with the cost of a sewer along the road from A to D under deduction of that 60 yards or 180 feet. This road so far back as any evidence goes has been—although included by statute within the limits of the city—simply a country road.

Section 329 of the Act provides—(His Lordship quoted it.) The question which the Lord Ordinary had to consider and determine, in his view of the case in other respects, was whether some building in the meaning of the statute is erected on the land or heritage adjoining such road or street. It was contended by the pursuers that the farmhouse of Eastfield, on the Possil estate, was such a building erected on the land or heritage adjoining such road or street. Now, it is the fact that this farmhouse does not, and never did, drain in the direction of the Inchbelly Road. The Lord Ordinary says—and he is confirmed by the evidence—that the dungstead on the Eastfield farm at the south-east corner of the steading drained into the branch sewer which was formerly there, and which the town have renewed at their own expense, but the farmhouse drained in the other direction,—that is, westward. Now, is this farmhouse a building erected on the land or heritage adjoining such road or street in the meaning of the statute? The Lord Ordinary has held that it is. It is there that I think his judgment is erroneous. I am of opinion that it is not. It is an ordinary farmhouse, which has stood, I suppose, for generations where it is now; not far, as most farmhouses are not far, from the public road, that public road being the Inchbelly Road. It is a building no doubt, but is it a "building" of the sort or kind which is referred to in the statute? I looked for some definition of the word "building" in the Act of Parliament, but there is none. We are thus left to find out, from the sense of the thing, what kind of building is meant. Perhaps we are better without any definition. We had to deal with the definition of the word "building" in a Dean of Guild case lately in this Second Division of the Court,* where there was a definition in the Act then under consideration, of the meaning of the word. The definition was, I think, "any building or erection of any sort or kind what-

* [See Caledonian Railway Co. v. Somerville, Nov. 6, 1900, *ante*, p. 50.]

soever." Now, within such a definition as that, if you have a field dyke on a farm, that is a building—it is an erection of some "sort whatsoever." But I cannot take it that a field dyke is a building in the meaning of this Act of Parliament. What does the reason, the sense, of the thing lead one to conclude was intended by the word "building"? It is a building upon a street, a drain for the use of which is a street drain of very large dimensions. This drain is also very costly, for this half mile of it is to cost considerably over £1000. Now, in terms of the Act, there is to be no liability upon the proprietor exceptionally, as benefiting by this, until or before a building has been erected on the land or heritage belonging to him adjoining such road or street which is so provided with a drain. That is to say, the adjoining proprietor as such is not to pay for any part of the drain until he begins to use the road as a street and erect street buildings upon the ground adjoining it. It is a street that is drained, and it is when a proprietor of adjoining lands begins to take advantage of it as a street that he begins to be liable to relieve the other ratepayers, who have paid for the drain in the meantime, of that portion of which he has so taken advantage. I think there is reason and good sense in that. But this is a country road, and it may be a long time of becoming a street,—that is to say, it may be a long time before street houses are erected upon the adjoining lands, the occupiers of which shall have the opportunity of using the street drain for sewage purposes. Now, an old farmhouse, such as this, which has existed there for generations, is not a street house at all. It is drained as other farmhouses are, but it is drained away westward, and without interfering with any of the city drains, so far as we know. I do not think the proprietor of the estate of Possil has done anything which makes her liable to payment of a proportion of the expense of constructing this sewer under section 329 of the Act.

I am therefore of opinion that there is no liability established here on the proprietor of Possil, and that the defences ought to be sustained, and absolvitor pronounced.

LORD ADAM.—The first question argued to us in this case was, whether the sewer in question is an ordinary public sewer, lawfully and properly constructed by the pursuers, under the powers conferred upon them by the 328th section of the Glasgow Police Act, 1866?

I have no doubt that it is. That the construction should have been promoted by the proprietor of the adjoining lands of Huntershill does not appear to me to be any reason why the sewer should not be so considered. The fact that it would be suitable or necessary for the drainage of the lands was just one of the facts which the pursuers were bound to take into consideration in determining whether they would construct the sewer or not.

The next question was, whether the proportion of the expense of constructing the sewer allocated on the defender is presently payable by her or not?

That depends upon the construction of the 329th section of the Act.

That section provides that the proprietor or proprietors of lands and heritages, adjoining any part of a public street in which no ordinary public sewer previously existed (which this is), shall severally be bound to relieve

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the Board—in this case the pursuers—from the expense of constructing an ordinary public sewer, for the drainage thereof, in proportion to the frontage thereto of their respective lands and heritages. There appears to be no doubt that the persons who are bound to relieve the pursuers of the expense of the sewer are all the proprietors who have lands and heritages adjoining the street, and that the amount which each has to pay is to be in proportion to the extent of the frontage of their several lands and heritages to the street. Having thus determined the persons who are to pay, and the amount which each has to pay, the clause then proceeds to provide for the time when such amount shall be payable, and it says that such amount may be recovered from them—that is, the proprietors, as soon as, but not before, some building is erected on a land or heritage adjoining such street. This seems to me to raise a simple question of fact, whether at the date of raising the action some building was erected on a land or heritage adjoining the street?

The farmhouse and steading of Eastfield was erected at that date, and it seems to me to be just as much a building in the sense of the Act as a villa or other house would be. It is entered from the street, and it is erected on land which, apart from the rest of the farm, adjoins the street. That it does not drain into the sewer in question is not material—the question is whether it adjoins.

It appears to me, therefore, that the condition on which the pursuers are to be entitled to demand immediate relief of the expense of constructing the sewer is purified.

It is said, however, by the defenders, that this is not the proper construction of the Act, and that it leads to results so unreasonable that it cannot be the proper construction. It is said that if a proprietor happens to have, or chooses to build, a house on his own land, a matter with which the other proprietors have no concern, and over which they have no control, it is preposterous that they should all thereupon become at once liable in payment of their share of the cost of the sewer, which otherwise they would not be. The proper and reasonable construction of the Act, it is said, is, that the proprietor of each several land or heritage only becomes liable to pay his share of the cost when a building is erected on his own land and heritage.

I do not think, however, that the Act contemplates successive repayments of a proportion of the cost, as a land and heritage might, from time to time, be feued out and built upon, which this would imply.

The Act says that "such amount" may be recovered so soon as a building is erected on a land and heritage adjoining the street. "Such amount" means in the Act the whole cost of the sewer. It cannot possibly have been intended that the whole cost should be recovered so often as a building happened to be erected.

I think the Act contemplated that, as soon as the sewer was completed, the cost of it should be ascertained, and the proportion thereof due by each proprietor then fixed and determined, according to the existing state of his lands and heritages; and that the sums so fixed and determined were to be paid, and paid by the proprietors by whom they were found to be due.

I have had no occasion, and have no sufficient knowledge of civic admin-

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istration, to form an opinion as to whether the scheme of repayment suggested by the defender, or that, as I think, adopted by the Act, is the more reasonable and equitable.

In a question, which this is, with the other ratepayers in the city, I should not have thought it very unreasonable that proprietors, for the use and benefit of whose lands and heritages a sewer had been constructed, should be called upon to repay the cost of it so soon as it was completed, whether buildings adjoining it then existed or not, as it would certainly at once enhance the value of such lands in such a situation.

I think this is clear from the 330th section of the Act, which provides that the Master of Works should lay before the Board a statement of the expense of the construction of the sewer, and of the proportion due by the several proprietors of lands and heritages, and that such statement, in so far as approved of or as altered by the Board, should be *prima facie* evidence of the amount of expense so incurred, and of the proportions thereof due by each proprietor,—that is to say, the cost of the sewer is to be ascertained, and the proportion of the cost due—paid by whom? Surely by each proprietor at the time. There is no provision in the Act for any future allocation of the cost, or for recovering it from anybody else.

To postpone the repayments until a building or buildings are erected, and the sewer is in fact being used as a public sewer, as presumably it would be by a building or buildings adjoining it, seems to be sufficiently reasonable. But however that may be I have only to construe the Act, and in my opinion the words of the Act are clear, and I therefore think the interlocutor of the Lord Ordinary should be adhered to.

LORD M'LAREN and LORD KINNEAR concurred in the opinion of LORD ADAM.

LORD TRAYNER.—I entertain no doubt that the sewer in question is just such a sewer as the pursuers are authorised to construct under the provisions of the 328th section of their Act. The real questions in the case are two—(1) What was the obligation which by the construction of the sewer was laid upon the defender? and (2) When is she bound to discharge it?

1. With regard to the first of these questions, I think the terms of the statute are clear enough. The burden of relieving the Corporation of the expense of constructing the sewer is, according to section 329, to be borne by the proprietors of lands and heritages adjoining the road or street in which the sewer has been constructed, "in proportion to the frontage thereto of their respective lands and heritages." The mode of ascertaining the exact amount of each frontager's liability is also provided for. Section 330 provides that the Master of Works shall make up and lay before the Board a statement of the expense incurred in constructing the sewer, and of the proportion due by the frontagers respectively, and such statement, as approved or altered by the Board, is declared to be *prima facie* evidence of the amount due by each frontager. That course was followed in the present case, and the amount of the defender's proportion of the expense was stated at the sum which is now sued for. It will be observed that the amount of each frontager's liability is ascertained at one time, and it becomes *due* when so ascertained, although it may not become *payable* for some time thereafter. The time of payment is the second question in the case, but on the first

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question I am of opinion that when the statement of the expense made up by the Master of Works was approved by the Board the amount of the defender's obligation was ascertained to be the sum therein stated as effeiring to the extent to which her lands adjoined the road or street in which the sewer had been placed, and that that sum in its entirety was then due and owing to the pursuers.

2. But although due and owing, the pursuers could only demand payment "so soon as, but not before, some building is erected on a land or heritage adjoining such road or street." It is on this provision that difficulty has arisen. It is the fact that at and prior to the time when the sewer was constructed there existed a farm-steading, with dwelling-house and usual offices, on ground belonging to the defender adjoining the road or street in question, and entering therefrom. That steading, or part of it, now drains into Inchbelly Road at a point where the sewer in question connects with a previously existing sewer in the same road, and of which it is a continuation. I mention that as a fact in the case, but it is not, in my view, a material fact, or necessary to be taken into account in deciding the question before us. My opinion would be the same as it is even if the farm-steading did not drain into this sewer. The important fact is that on the completion of the sewer there existed a building erected on a land or heritage adjoining the road. The pursuers maintain that, such being the fact, the only condition prescribed by the statute before payment of the defender's proportion of the expense of the sewer could be demanded from her was fulfilled, and that they were therefore entitled to demand payment from her at once. In that view I concur. I think the pursuers are entitled now to the payment which this action is brought to enforce.

The views urged by the defender against the pursuers' right to decree for her share of the expense of the sewer were these:—(First) It was said that the statutory condition, "so soon as, but not before, some building is erected," should be read as if it were "some building *shall be* erected," the meaning and intention of the statute being that payment of a frontager's proportion should not be exacted until some building had been erected after the completion of the sewer. I reject that reading, because it is not what the statute provides, and the language of the statute appears to me to be quite unambiguous. There is nothing in the 329th section or in the context which suggests to me that payment by a frontager of the amount of his liability should be postponed as the defender contends. I can easily suppose a case in which the defender's view, if given effect to, would make this provision as to payment a dead letter. Suppose that the defender's land adjoining the road had been all built upon before the construction of the sewer, her period of payment would never arrive, as she could build no more thereafter. I confess I think the meaning and purpose of the statute is clear enough. The sewer being required in the opinion of those persons who were authorised to judge of that matter, and having been constructed by them, is to be paid for by the frontagers, but not until "some building existed" which did or might take advantage of the sewer. Until then the frontager was not to be called on for payment, but if and when any such building existed payment might be exacted, the frontager—or someone deriving right from him—being then in a position, if he chose, to make use of the sewer.

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The second view urged by the defender was that she should not be called on *now* to pay the whole of the proportion of the expense of the sewer allocated upon her, but only so much thereof as effeired to the extent of frontage on which some building existed. It was, consistently with this, maintained that this obligation to pay would only become prestable in so far as, and only to the extent to which, the defender in future (by herself or her feuars) built on the ground adjoining the road. I dissent from that view also. I have already pointed out the time when, and the manner in which, the defender's liability was to be ascertained and fixed. The amount of the defender's liability is one sum, not several—the time when it has to be paid seems to me one time, not many. There is no provision for the payment of the defender's proportion of the expense as a frontager by instalments. Where a building exists which fulfils the statutory condition, the obligation to pay what has been fixed as the defender's proportion has arrived. Before then it was a debt, but not exigible, but whenever the statutory condition is fulfilled, "such amount" (that is, the amount fixed and determined in the manner already alluded to), and not a part of that amount, is to be recoverable "as damages," or levied "in the same way as a special police assessment." Now, claims of damages and police assessments are not recovered in instalments. Let it be noted, further, that the statute provides for the payment of each frontager's proportion "so soon as," and not "as often as," a building is erected on the adjacent ground.

The third argument urged by the defender was that to enforce the obligation in the way which the pursuers seek to enforce it—that is, by payment of the whole debt now—would be a hardship on the defender. I do not think this argument deserving of any serious consideration. If the statutory enactment does impose a hardship on an individual, it does so in the interest of the community. Every citizen has to submit to such hardship more or less. But the hardship is scarcely more, if anything more, than imaginary. The defender's land in question has now become proper feuing land, and cannot long be devoted to agricultural purposes. She will derive a larger return from feus than from a farm, and that larger return for her own sake she will, one may presume to think, very soon take means to obtain. The existence of the sewer in question will greatly facilitate feuing, and, indeed, feuing would have been impracticable without some such sewer. Each feuar can, and doubtless will, be taken bound to pay to the defender the expenses of the sewer so far as it is *ex adverso* of the several feus, and the defender will be entirely reimbursed. The fancied hardship disappears before these considerations.

I am of opinion that the judgment of the Lord Ordinary should be affirmed.

LORD MONCREIFF.—While I acknowledge the difficulty of the question, I am not prepared to concur in the judgment proposed by the majority of your Lordships. The circumstances of the present case afford an excellent illustration of the extreme results which attend the construction which the pursuers put upon section 329 of the Glasgow Police Act of 1866. It appears that the proprietors of the lands of Huntershill, which lie to the north of the lands of Possil, were desirous of feuing their ground. Drainage was required, and

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accordingly it was necessary to run a drain southwards through the lands of Possil, and this they induced the magistrates to do, as they are entitled to do under the powers conferred upon them by the Glasgow Police Act. Accordingly a drain was formed under the Inchbelly Road, which runs through the lands of Possil for a distance of about a third of a mile. This part of the estate of Possil is entirely agricultural, and the only buildings upon it are the farmhouse and steading which lie near the southern extremity of the piece of drain to which I have referred. There is at present no prospect of the proprietors of Possil using the ground fronting the road and sewer for the purposes of feuing or for any other purpose than as an agricultural farm. The proposition is that because the lands of Possil adjoin Inchbelly Road, and another proprietor has erected colliery offices on his property, or otherwise, because there is an existing farm-steading on part of Possil, the proprietors of Possil are bound at once to contribute (£1051) to the formation of the sewer in proportion to the whole of the frontage of their lands to the road.

I concede that the words of the section will admit of this interpretation. The "amount" is to be payable "so soon as, but not before, some building is erected on a land or heritage adjoining such road or street." This may mean that the total amount shall be payable by the whole of the proprietors proportionally according to frontage, so soon as some building is erected on any one of the adjoining lands. But as a whole, the section will also bear the more equitable and reasonable construction contended for by the defenders, viz., that each proprietor through whose lands the sewer runs is only bound "severally" to contribute when by building on his property he makes or indicates an intention to make use of the sewer. In short, the expression "a land or heritage" is ambiguous. It may either mean *any* land or heritage, as the pursuers maintain, or "*each* land or heritage," as the defenders contend.

There being, therefore, two possible constructions of the section, and the provisions being (if the pursuers' construction is correct) of a somewhat penal character, I give my vote for the defenders.

It may be that it was the intention of the framers of the Act to confer upon the corporation the somewhat arbitrary powers for which the pursuers contend, but if this was intended, it should have been expressed in unequivocal language.

If I am wrong in my construction of the clause—and the majority of your Lordships so hold—it is perhaps not necessary that I should say more, because if the pursuers' contention is sound the defenders would be liable even if there were no building upon their lands, simply because colliery offices have been erected on the lands of other proprietors about a mile away near the upper end of the section of the drain.

But if I am right so far, or if the pursuers' contention as to the colliery offices is erroneous, there still remains a serious question to be solved. It must be admitted that if a building, of the character contemplated by the section is erected upon any "land or heritage" adjoining a public street, the proprietor of such land or heritage at once becomes liable in respect of the whole frontage to the street of that land or heritage. Therefore, if the farmhouse and steading and the farm must be regarded as *unum quid*, and if the farmhouse and steading are buildings in the sense of the section, the defenders are liable to pay upon the whole frontage of these lands.

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The first question is whether the farmhouse and steading is a "building" in the sense of sec. 329. I cannot say that I have formed a confident opinion on this point. I can only say that there is sufficient doubt about it to prevent me from accepting the pursuers' contention. The difficulty arises from the character and history of the buildings. They were not erected for the purpose of forming part of a street, or in order to take advantage of a feuing-plan or drainage system on the line of the Inchbelly Road. They are simply old rural buildings—the farmhouse and steading of the farm. I do not exaggerate when I say that the pursuers' argument would have been precisely the same if the buildings had been half a mile distant from the Inchbelly Road. According to the pursuers, the words "so soon as, but not before, some building is erected on a land or heritage adjoining such road or street," do not mean that the *building* must adjoin the road or street. It is sufficient, they say, if the lands adjoin; and, accordingly, if the farmhouse, or, it might be, the mansion-house, were half a mile or a mile distant from the road or street, that would be sufficient to involve the proprietor in liability, although he might not have the faintest intention of feuing or making use of the sewer. They are entitled, they maintain, to say to the proprietor, "In our judgment the time has come for ground in this locality to be feued. We shall accordingly construct a drain through your lands; you may use it or not as you please, but you must pay for it at once." I am not prepared to put such a construction upon the words of the statute.

The farmhouse and steading happen not to be far distant from the road and drain. But that is an accident; and, in point of fact, as I understand the evidence, they drain to the west, with the exception of a dungstead, at the south-east corner of the steading, which drained into a drain to the south, which existed before the drain in question was formed. On this question I can only say that I feel sufficient doubt to prevent me from deciding it in favour of the pursuers. If that view is sound, it leads to the defenders being assoilzied altogether.

But if I am wrong in this I am not satisfied that the farmhouse and steading and the farm must be regarded for the purposes of the Act as one "land or heritage." They are separately entered in the Valuation-roll. Now, section 329 provides that the proportion of the assessment is to be recovered "so soon as, but not before, some building is erected on a land or heritage adjoining such land or street." In the interpretation clause, section 4, it is declared that "land or heritage in the singular number shall mean one of such lands and heritages separately valued, and entered in the Valuation-roll as separately occupied." Therefore the pursuers are entitled at the most to levy an assessment on the defenders in respect of the frontage of the farmhouse and steading (about 70 yards or thereby); because, as the rest of the farm, which is a separate "land or heritage" in the sense of the definition, has no building upon it, nothing is yet due in respect of it.

I therefore dissent from the judgment proposed.

THE COURT refused the reclaiming note, and adhered to the interlocutor reclaimed against.

CAMPBELL & SMITH, S.S.C.—J. & F. ANDERSON, W.S.—Agents.

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Mar. 5, 1901.
Young's Trustees v. Young.

JOHN MAXTON AND OTHERS (James Young's Trustees), Pursuers and Nominal Raisers.
JAMES YOUNG, Real Raiser and Claimant (Reclaimer).—*Sol.-Gen. Dickson—Clyde.*
MRS MARGARET WYPER, Claimant (Respondent).—*Wilson, K.C.—W. Harvey.*
DAVID GUTHRIE (Mrs Moodie's Judicial Factor), Claimant (Reclaimer).—*A. S. D. Thomson—Hunter.*

Succession—Liferent or Fee—Intestacy.—A testator directed his trustees "to hold and apply" the trust-estate "for the use and behoof of my younger children," naming them, and any other children whom the testator might have, equally among them share and share alike, "under the burdens and conditions following, viz. . . . the share falling to" Mrs Moodie (one of the younger children) "shall be held by my trustees . . . for behoof of the said" Mrs Moodie "in liferent during all the days and years of her life, and shall belong to her issue in fee, equally among such issue *per stirpes*." Mrs Moodie died without issue. *Held* that Mrs Moodie did not take a fee.

Succession—Testament—Falsa Demonstratio.—A testator, on the narrative that under his father's trust-disposition and settlement the interest of his sister in the residue of his father's estate was restricted to a liferent, and that in the event of her deceasing without leaving issue, "the residue . . . will fall and belong to me or to my children as . . . intestate succession of my father," in order to provide for the disposal of the residue, "in the event of my succeeding to it," disponed to trustees "the whole residue of said estate . . . to which I shall succeed in the event of my being predeceased by" his sister without leaving issue.

The sister survived her brother, but died without leaving issue, and the residue of the father's estate was held to have passed to the brother as intestate succession.

Held that he had effectually disposed of it, notwithstanding the misdescription of the event on the occurrence of which his settlement was to take effect.

1ST DIVISION. Lord Low.

JAMES YOUNG *primus* of Scarlethall died on 8th September 1864, survived by his second wife, Mrs Margaret Marshall Primrose or Young, and by four children, two of each marriage, viz.—(1) James Young *secundus* and Mrs Janet Edmonstone Young or Moodie, who were the children of the first marriage; and (2) Margaret Primrose Young and John Primrose Young. James Young *primus* left a trust-disposition and settlement dated 12th September 1861, with a relative codicil dated 13th April 1864, by which he appointed certain trustees, who accepted office and entered upon the possession and management of the trust-estate, and who, in terms of the first and second purposes of the trust, paid the truster's debts and sickbed and funeral expenses, and made over to Mrs Young, his widow, the furniture and other effects bequeathed to her, and during her life allowed her the use of the truster's dwelling-house, and paid her an annuity of £100 provided to her. They also paid to the truster's son, James Young *secundus*, an annuity of £40 provided to him by the third purpose of the trust-disposition and settlement and codicil.

The fifth purpose was as follows:—"*Fifth*, That my trustees shall from time to time realise and convert into money my whole estates and effects, heritable and moveable, not hereby specially disposed of, and after providing for the annuities before written, shall hold and apply the prices and produce thereof, and whole residue and remainder of my estate, for the use and behoof of my younger children, the said

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Janet Edmonstone Young, Margaret Primrose Young, and John Primrose Young, and such other child or children as may be procreated of my body, equally among said children, share and share alike, under the burdens and conditions following, *videlicet*:—The share falling to the said Janet Edmonstone Young, my eldest daughter, shall be held by my trustees, or invested by them in their names for behoof of the said Janet Edmonstone Young in liferent during all the days and years of her life, and shall belong to her issue in fee, equally among such issue *per stirpes*."

He gave similar directions in regard to the shares provided to Margaret Primrose Young and any other daughters he might have, declaring, however, that his widow should have an interest in these shares during her life or until she married.

With respect to the shares falling to John Primrose Young and other sons, if there should be any, he directed that as long as his widow remained alive and unmarried, the income thereof should be paid to her, and that upon her death or second marriage the share or shares should become vested interests in his son or sons, and should be payable to him or them on his or their respectively attaining the age of twenty-five years.

He further directed his trustees, in the event of the death of any of his younger children leaving lawful issue, and having at the time of such decease a share or interest in his estate, to pay, assign, or convey such share or interest to the children of such child; "it being hereby expressly declared, that the share of any of my younger children so dying leaving lawful issue shall be divided equally among his or her issue attaining said age of twenty-one years, and failing such issue attaining the said age of twenty-one years, I direct and appoint that the share and interest of such of my younger children deceasing shall form part of my estate, and shall belong to my other younger children, or their issue, attaining said age, equally among them, *per stirpes*; declaring also, that the liferent right of each of my daughters shall be exclusive of the *jus mariti* of any husband she may marry, and shall not be assignable or affectable by her or his deeds or debts, or by the diligence of her or his creditors, but shall be an alimentary provision for her own personal use and behoof."

The codicil contained, *inter alia*, the following clause:—"And further, I provide and appoint, that the provisions before made in favour of the said Janet Edmonstone Young, my daughter, or any part thereof, may be retained by my trustees, and dealt with as part of my general estate in the event of the said Janet Edmonstone Young refusing to comply with their wishes in selecting a residence, or of her entering into marriage without their approval, or of her otherwise conducting herself so as to render a restriction or suspension of the provisions in her favour desirable, of which my trustees shall be the sole judges."

The estate of the truster was, at the date of his death, all heritable.

John Primrose Young, the truster's younger son, died in pupillarity on 29th October 1866. Mrs Margaret Marshall Primrose or Young, the truster's widow, died on 29th August 1869. Margaret Primrose Young, the testator's younger daughter, died on 22d January 1870, in minority and unmarried, survived by James Young *secundus* and Janet Edmonstone Young or Moodie.*

* In consequence of John Primrose Young having while in pupillarity predeceased his mother, and of Margaret Primrose Young having died

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James Young *secundus* died on 18th July 1876, survived by his widow, a son, James Young *tertius*, and two daughters. Mrs Janet Edmonstone Young or Moodie died on 8th May 1899, without leaving issue.

James Young *secundus* left a trust-disposition and settlement, whereby, *inter alia*, on the narrative of the settlement of James Young *primus*, and of the deaths of John Primrose Young, Margaret Primrose Young, and Mrs Young, and "that the interest of the said Janet Edmonstone Young in the residue of the said estate is limited to the free income arising therefrom; that her right is exclusive of the *jus mariti* of any husband she may marry, and not assignable or affectable by her or his debts or deeds or by the diligence of her or his creditors, but is an alimentary provision for her own personal use and behoof; and that, in the event of the said Janet Edmonstone Young deceasing without leaving issue, the whole purposes of the said trust-disposition and codicil will have been implemented and the residue of the said estate will fall and belong to me or to my children as undisposed of and intestate succession of my father, the said deceased James Young, subject always to the payment of the liferent annuity provided in my favour and before referred to: Therefore, in order to provide for the management and disposal of the said residue, in the event of my succeeding thereto, for the benefit and behoof of myself and my wife and children, I do hereby assign, dispone, and convey to and in favour of myself," and certain other persons as trustees for certain purposes, "the whole residue of said estate, heritable and moveable, to which I shall succeed in the event of my being predeceased by the said Janet Edmonstone Young without issue."

Mrs Moodie also left a trust-disposition and settlement, and Mr David Guthrie, chartered accountant, Glasgow, was appointed judicial factor on her trust-estate. Questions having arisen as to who was entitled to dispose of the residue of the estate of James Young *primus*, an action of multiplepoinding was raised by his trustees, in which claims were lodged by the following parties:—

1. James Young *tertius*, who maintained that the estate liferented by Mrs Moodie fell on her death into intestacy; that Mrs Moodie not having predeceased James Young *secundus*, the estate was not disposed of by the latter, and that it belonged to the claimant as heir-at-law of James Young *primus*.

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in minority and unmarried, questions arose as to the disposal of the shares of residue destined to them and their issue, and for the judicial determination of these questions a special case was submitted to the Court of Session by (1) Mrs Janet Edmonstone Young or Moodie and her husband; (2) James Young *secundus*; (3) the executor-nominate of the truster's widow, Mrs Margaret Marshall Primrose or Young; (4) the trustees and executors of Margaret Primrose Young; and (5) the then acting trustees of James Young *primus*. On 19th May 1870,[1] the Court found and declared, in answer to the third question in the special case, that "the shares of the residue of the trust-estate of the deceased James Young provided to his son John and his daughter Margaret have by reason of the death of John in pupillarity and the death of Margaret without issue, fallen into and become part of the residue of the trust-estate to be administered and disposed of by the trustees in the manner provided with respect to Mrs Moodie's original share, for behoof of Mrs Moodie in liferent, exclusive of her husband's *jus mariti*, and of her children in fee."

[1] Moody v. Young, May 19, 1870, 7 S. L. R. 482.

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2. Mrs Young or Wyper, the sole surviving trustee of James Young *secundus*, who maintained that the estate in question fell into intestacy on Mrs Moodie's death, and that it was carried by the disposition of James Young *secundus*.

3. Mr Guthrie (Mrs Moodie's judicial factor), who maintained that in terms of the will of James Young *primus*, Mrs Moodie became, on the death of John and Margaret Young, entitled to the fee of the whole estate, subject to defeasance in the event of her having children.

On 28th June 1900 the Lord Ordinary (Low) pronounced the following interlocutor:—"Finds (1) that upon a sound construction of the trust-disposition and settlement of the deceased James Young of Scarlethall, the fee of the trust-estate held by the pursuers and nominal raisers as trustees acting under said trust-disposition and settlement for behoof of Mrs Janet Edmonstone Young or Moodie in liferent was not disposed of in the event which happened of the death of the said Mrs Janet Edmonstone Young or Moodie without issue, and falls to be dealt with as intestate succession of the said James Young; (2) that the said succession falls to be regulated according to the character of the estate, whether heritable or moveable, at the date of the death of the truster; (3) that James Young *secundus* was the eldest son and heir-at-law of the truster, and became entitled to the said estate in so far as the same was heritable at the date of the truster's death; and (4) that the said estate to which the said James Young *secundus* became entitled as aforesaid was carried to his testamentary trustees by the trust-disposition and settlement left by him."*

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* "OPINION.—The first question in this case is whether the late Mrs Moodie, in the event, which happened, of her dying without issue, was entitled to the estate held by the testamentary trustees of her father in fee?"

(After quoting the material clauses of the trust-disposition of James Young *primus*)—"The truster died in 1864, leaving no younger children except the three mentioned in the settlement. John Primrose Young died in pupillarity in 1866, and Margaret Primrose Young died unmarried and in minority in 1870. John predeceased his mother, but Margaret survived her.

"A special case was then presented to the Court in regard to the shares of the estate held by the trustees for Margaret and John, and the Court (7 S. L. R. 482) found and declared that their share had 'fallen into and become part of the residue of the trust-estate to be administered and disposed of by the trustees in the manner provided with respect to Mrs Moodie's original share, for behoof of Mrs Moodie in liferent, exclusive of her husband's *jus mariti*, and of her children in fee.'

"Mrs Moodie died in 1899, and the claimant David Guthrie is judicial factor upon her trust-estate. He argued that upon a sound construction of the fifth purpose of Mr Young's settlement a right of fee was given to Mrs Moodie, and that the sole object of the truster in restricting her enjoyment of her share during her life to a liferent, was to protect and secure the succession of her children, if she had children.

"There are several cases in which where a daughter died without issue she was held to have taken a fee in a share of the estate, her enjoyment of which, during her life, was limited to a liferent. The leading cases are *Lindsay's Trustees*, 8 R. 281; *Dalgliesh's Trustees*, 16 R. 559; and *Logan's Trustees*, 17 R. 425. In all these cases, however, there had either been a direct gift to the daughter or a direction to the trustees to pay to her. In this case no direct gift was given to Mrs Moodie, nor were the trustees directed to pay or convey to her any part of the capital of the trust-estate. The trustees were merely directed 'to hold and apply' the residue of the estate 'for the use and behoof of my younger children . . .

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Mrs Moodie's factor reclaimed, and argued;—On a sound construction of the disposition and codicil it was intended that Mrs Moodie should take the fee of her share in the event of her having no issue. It was just the ordinary case of a fee burdened with a gift over to children if there should be any.[1] At the date of the special case,[2] Mrs Moodie might still have had children, and the present claim was not made on her behoof.

Argued for Mrs Wyper (trustee of James Young *secundus*);—There was here no unqualified gift in the first instance to Mrs Moodie with a burden super-imposed by an after clause of the deed, and accordingly the present case was not within the principle of the case of *Lindsay*.[3] "Hold and apply" might amount to an absolute gift if the context of the deed favoured such a construction. Here it did not mean more than "hold and invest," which did not infer a gift of fee.[4] It was to be noted that the limitation to a liferent was imposed by the direct act of the testator, and not by way of a direction to the trustees. Such a consideration was important.[5] There was besides a

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'under the burdens and conditions following,' and the conditions following gave no right whatever to Mrs Moodie except a liferent.

"Mr Hunter founded on the word 'burdens'—'under the burdens and conditions following'—and argued that the use of that word shewed that the right given to her children was only a burden upon Mrs Moodie's right. I cannot accept that view. I think that the word 'burdens' referred to the fact that the shares given to sons and to younger daughters other than Mrs Moodie were burdened with a liferent to the truster's widow.

"Mr Hunter also founded upon the declaration in the clause dealing with the event of the death of a child that the share of the deceaser shall 'form part of my estate, and shall belong to my other children or their issue.'

"I do not think that that declaration aids the view that Mrs Moodie took a fee. The clause in which it occurs applies to the whole children, whether sons or daughters, and must be read with reference to the rights which had been already conferred upon sons and daughters respectively. The declaration, therefore, appears to me to amount to no more than this, that, in the event contemplated, the share of the deceasing child shall fall back into residue, and shall be held for, or paid to, the surviving children or their issue, upon the same terms as the original shares given to them. And that appears to me to have been the construction of the settlement adopted by the First Division in the special case. Upon the death of Margaret Young and John Young, the very event contemplated in the clause with which I am dealing arose, and the First Division held that the shares of these children fell into residue, to be 'administered and disposed of by the trustees in the manner provided with respect to Mrs Moodie's original share, for behoof of Mrs Moodie in liferent and her children in fee.'

"I am not sure that that was not a direct decision of the question raised

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[1] Downie's Trustees v. Cullen, March 16, 1882, 9 R. 749; Mackay's Trustees v. Mackay's Trustees, June 8, 1897, 24 R. 904; White v. Gow, July 11, 1900, 2 F. 1170; Dunlop's Trustees v. Sprot's Executor, March 9, 1899, 1 F. 722; Maitland's Trustees v. M'Dermaid, March 15, 1861, 23 D. 732, 33 Scot. Jur. 372.

[2] Moodie v. Young, May 19, 1870, 7 S. L. R. 842.

[3] Lindsay's Trustees v. Lindsay, Dec. 14, 1880, 8 R. 281.

[4] Muir's Trustees v. Muir's Trustees, March 19, 1895, 22 R. 557.

[5] Dalglish's Trustees v. Bannerman's Executors, March 6, 1889, 16 R. 559, Lord M'Laren at p. 561.

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clause of return here into the residue of the estate in the event of a child dying without issue. The point, moreover, was determined in the special case to which Mrs Moodie was a party. There the Court had negatived the view that the fee of their shares had been given to the children who had died, and Mrs Moodie's provision was in identical terms. (2) The estate therefore became intestate succession of James Young *primus*, and passed to James Young *secundus*, who was the heir of James Young *primus*, as at the date of his death.[1] (3) Having vested in James Young *secundus*, it was carried by his settlement. It was clear that what he was minded to dispose of was any and all estate which he might succeed to as heir *ab intestato* of his father. He, however, had failed to state exhaustively the circumstances on the occurrence of which the contingency would arise. That was merely *falsa demonstratio*, and should not be allowed to defeat the obvious intention of the testator.[2]

James Young *tertius* adopted the first part of the argument of Mrs Wyper. (2) The estate accordingly vested in James Young

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in this case, because Mrs Moodie was a party to the special case, and claimed in fee the shares which had been set free. I assume, however, that at the time when the special case was presented it was possible that Mrs Moodie might still have children, and if that were so, probably the judgment of the Court cannot be regarded as deciding the rights of the parties in the event, which has happened, of Mrs Moodie dying without issue. It was decided, however, that the residue fell to be disposed of in the manner provided with respect to Mrs Moodie's original share, and, for the reasons which I have given, I am unable to find anything in the settlement which would justify the view that any other or higher right was given to Mrs Moodie with respect to her original share than a liferent.

"The result is that the residue of the estate in the hands of the trustees has not, in the events which have happened, been disposed of, and falls to be dealt with as intestate succession of the truster. The next question, therefore, is who in these circumstances is entitled to the residue?

"I understand that the truster's estate may, for the purposes of this case, be regarded as having consisted at his death entirely of heritable property, and, notwithstanding the direction to the trustees with which the fifth purpose of the settlement begins, 'to realise and convert into money my whole estate and effects,' I think that his succession must be regulated by the character of the estate at the time of his death—(*Cowan*, 14 R. 670).

"Now, besides the three younger children mentioned in the fifth purpose, Mr Young had an elder son, James Young, for whom in his settlement he had provided an annuity. James Young was his father's heir in heritage, and he died in 1876, survived by a widow and by a son and two daughters. The widow, Mrs Wyper, is a claimant as now sole trustee acting under her husband's trust-disposition and settlement, and the son James Young is a claimant as heir-at-law of his father.

"James Young maintains that the heritable estate of the truster was not carried by the settlement of his (the claimant's) father, (1) because the latter predeceased Mrs Moodie, and the succession did not open to him until that lady's death, and (2) because the terms of the settlement are not habile to carry the said heritable estate.

"I am of opinion that the first of these grounds cannot be sustained. If the view which I have taken is sound, the truster, in the events which

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[1] Cowan v. Cowan, March 19, 1887, 14 R. 670.

[2] Forbes' Trustees v. Forbes, Jan. 13, 1893, 20 R. 248; Bruce's Trustees v. Bruce, June 7, 1875, 2 R. 775.

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secundus, and he having also failed to dispose of it, for the clause in his will was so expressed as in terms to exclude it from the operation of his settlement in the event which had happened—it passed to the claimant as heir-at-law of James Young *primus*.

At advising,—

LORD PRESIDENT.—The leading questions in this case are—(1) Did the fee of the residue of the trust-estate of James Young *primus* pass to his elder daughter Mrs Moodie by virtue of his testamentary settlement, or did he, in the event which occurred, of Mrs Moodie deceasing without issue, die intestate as regards that residue? (2) If James Young *primus* died intestate as regards the residue, did it (consisting as it did practically of heritage), pass to his eldest son James Young *secundus* as possessing the character of his heir-at-law at the time of his death? and (3) If it passed

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have happened, in no way disposed of his heritable estate, the succession to which therefore falls to be regulated by the law of intestate succession. Now the law of intestate succession looks only to the date of death. It is then, and then only, that the heir falls to be ascertained, and James Young *secundus*, the truster's eldest son, and the claimant's father, was the truster's heir in heritage. No doubt owing to the terms of the truster's settlement the right of James Young *secundus* was subject to the contingency of Mrs Moodie leaving children. But when Mrs Moodie died without children, the contingency was at an end, and it appeared that the beneficial right to the estate had been in James from the date of his father's death, and that the trustees had truly been holding the fee for him.

"The second ground is founded upon a very strict construction of the words of the trust-disposition and settlement left by James Young *secundus*. He there narrates the terms of his father's settlement and what had followed thereon, and he then proceeds: 'Considering that in the event of the said' Mrs Moodie 'deceasing without leaving issue, the whole purposes of the said trust-disposition and codicil will have been implemented, and the residue of the said estate will fall and belong to me or to my children as undisposed of intestate succession of my father. . . . Therefore, in order to provide for the management and disposal of the said residue, in the event of my succeeding thereto,' he disponed and assigned to trustees 'the whole residue of the said estate, heritable and moveable, to which I shall succeed in the event of my being predeceased by the said' Mrs Moodie 'without issue.'

"The argument was rested mainly upon these last words. It was contended that as James Young *secundus* died before Mrs Moodie, nothing could be carried by a conveyance of estate to which he should succeed if he was predeceased by her.

"I do not think that that is a reasonable construction of the settlement. It is plain that what James Young *secundus* was dealing with, and what he intended to convey to his trustees, was any right which he might have as heir *ab intestato* to his father in the event of Mrs Moodie dying without children. The only mistake which there is in the wording of the settlement is that it suggests that the right of James *secundus* depended upon his being predeceased by Mrs Moodie, whereas it only depended upon Mrs Moodie dying without issue. The mistake, however, appears to me to be of the nature of a mere misdescription, which will not be allowed to defeat the plain intention of the testator.

"I am therefore of opinion that, in so far as the succession consists of heritage, the claims for David Guthrie and James Young fall to be repelled, and the claim for Mrs Wyper sustained."

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to James Young *secundus* as intestate heritable succession, did James Young *secundus* die intestate as regards it, in the event which occurred of his predeceasing Mrs Moodie, or was it carried by his testamentary settlement?

James Young *primus*, the truster, died on 8th September 1864, survived by his second wife and by four children, viz.,—James Young *secundus* and Mrs Moodie, who were children of his first marriage, and Margaret Primrose Young and John Primrose Young, who were children of his second marriage.

James Young *primus* left a trust-disposition and settlement, dated 12th September 1861, and relative codicil dated 13th April 1864. By the third purpose of the settlement he provided a liferent annuity of £40 to his eldest son, James Young *secundus*, and by the fifth purpose he directed his trustees to hold and apply the trust-estate for behoof of his younger children, Mrs Moodie, Margaret Primrose Young, and John Primrose Young, and any other children whom he might have, equally among such children, share and share alike, under the burdens and conditions thereinafter mentioned; and he declared that the share falling to Mrs Moodie should be held by his trustees, or invested by them in their name, for behoof of her in liferent during all the days and years of her life, and should belong to her issue in fee, equally among such issue *per stirpes*. He gave similar directions in regard to the shares provided to Margaret Primrose Young and any other daughters he might have, declaring, however, that his widow should have an interest in these shares during her life or until she married. With respect to the shares falling to John Primrose Young and other sons, if there should be any, he directed that as long as his widow remained alive and unmarried the income thereof should be paid to her, and that upon her death or marriage the said share or shares should become vested interests in his said son or sons, and should be payable to him or them on his or their respectively attaining the age of twenty-five years. He farther directed his trustees, in the event of the death of any of his younger children leaving lawful issue, and having at the time of such decease a share or interest in his estate, to pay, assign, or convey such share or interest to the children of such child who should attain twenty-one years of age, and failing such issue attaining that age, he directed and appointed that the share and interest of such of his younger children deceasing should form part of his estate, and should belong to his other younger children, or their issue, attaining that age, equally among them *per stirpes*.

James Young *primus* died in 1864, survived by his widow and his four children—all of whom, however, are now dead. His widow died in 1869, and is represented in this case by the claimant David Guthrie, the judicial factor on her trust-estate. His eldest son, James Young *secundus*, died in 1876, survived by his widow, the claimant Mrs Wyper; Mrs Moodie died in 1899; John Primrose Young died in pupillarity in 1866; and Margaret Primrose Young died unmarried and in minority in 1870.

The first question is whether, under the testamentary settlement of James Young *primus*, a right of fee was conferred upon Mrs Moodie, and I concur with the Lord Ordinary in thinking that this question should be answered in the negative. The direction to the trustees is "to hold and

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apply" the residue of the estate for behoof of the younger children, but no gift of the fee was made to Mrs Moodie either directly or indirectly. The trustees were not directed or empowered to make over any part of the capital to her in any event, nor were they to hold it subject to her disposal, but for her liferent enjoyment only. The case, therefore, does not, in my judgment, fall within the class of those in which there is a gift made to a daughter, either directly or in the form of a direction to pay or convey to her, upon the fulfilment of some condition or upon some event, or in which the trustees are directed to hold for her an interest in fee, subject to some condition which does not occur, so that the right of fee becomes absolute in her person, and may be disposed of by her, or pass to her heirs *ab intestato*. But in the present case there is nothing of this kind.

This is not the first occasion on which the construction and effect of the testamentary settlement of James Young *primus* have been considered in this Division of the Court, a special case, *Moodie* v. *Young*,[1] having been submitted for the purpose of obtaining a judgment as to the disposal of the shares of the two younger children who died without issue. The third question put in that case was,—"(3) Whether, upon a sound construction of the said trust-disposition and codicil, the said shares fall into and become part of the residue of the trust-estate, to be administered and disposed of by the trustees in the manner provided with respect to Mrs Moodie's original share, and, therefore, to be invested by them in their own names for behoof of Mrs Moodie in liferent, exclusive of her husband's *jus mariti*, and of her children in fee," and the Court answered this question in the affirmative. This answer seems to me to involve a decision upon the construction of the truster's settlement, which supports the conclusion at which the Lord Ordinary has arrived.

If I am right in thinking that the residue of the trust-estate was not disposed of in the event which occurred, of Mrs Moodie not having children, but is intestate succession of James Young *primus*, the next question is, who is now entitled to it? It appears that the estate consisted almost exclusively of heritage, and the quality of the estate as heritable or moveable must, for the purpose of this question, be taken to be that which it had at the date of the truster's death, and the person possessing the character of his heir *ab intestato* must be ascertained as at that date—(*Vide Cowan*[2] and *Lord* v. *Colvin*[3]). If this be so, it follows that the right to the heritable residue passed to the truster's eldest son, James Young *secundus*, as his father's heir in heritage. James Young *secundus* died, as already stated, in 1876, and he was survived by a widow, who claims as sole acting trustee under his testamentary settlement, and by a son, James Young *tertius*, who claims as his father's heir-at-law. The legal advisers of James Young *secundus* had foreseen that the residue of his father's estate might not improbably come to him as intestate succession, and it was accordingly declared in his testamentary settlement that, in the event of Mrs Moodie deceasing without leaving issue, the residue of the estate would fall and belong to him, or to his children, as undisposed of intestate

[1] 7 S. L. R. 482. [2] 14 R. 670.
[3] 23 D. 111 and 3 Macq. 1038.

succession of his father; and to provide for the management and disposal of that residue in the event of his succeeding to it, he disponed to trustees "the whole residue of the said estate heritable and moveable to which I shall succeed in the event of my being predeceased by the said Mrs Moodie without issue." It was maintained by James Young *tertius*, the heir-at-law of James Young *secundus*, that his father's testamentary settlement did not take effect upon the residue in question, because he was not predeceased by Mrs Moodie, and that consequently the residue should fall to James Young *tertius* as intestate succession of his father. I concur, however, with the Lord Ordinary in thinking that this is not a reasonable construction of the settlement. It appears to me that James Young *secundus* intended to dispose, and did effectually dispose, of the residue if it should come to him, whether he did or did not survive Mrs Moodie. The only event which could defeat his right to take the residue *ab intestato* was Mrs Moodie having, and being survived by, children, but so long as the estate was not disposed of by the truster's settlement in consequence of this condition not having been fulfilled, and so long as it became intestate succession, it was wholly immaterial whether James Young *secundus* did or did not survive Mrs Moodie. Under these circumstances, I think that such a mistake in the description of the event upon which the testamentary settlement of James Young *secundus* was to take effect should be disregarded, and upon the whole case I am of opinion that the Lord Ordinary's interlocutor should be adhered to.

LORD ADAM.—(After referring to the earlier clauses of Mr Young's settlement, his Lordship proceeded)—Then he goes on to the clause founded on by the factor for Mrs Moodie, which is in these terms,—"it being hereby expressly declared, that the share of any of my younger children so dying leaving lawful issue shall be divided equally among his or her issue attaining the age of twenty-one years, and failing such issue attaining the age of twenty-one years, I direct and appoint that the share and interest of such of my younger children deceasing shall form part of my estate, and shall belong to my other younger children, or their issue, attaining said age, equally among them, *per stirpes*." That is the clause on which the argument was founded, wherein it was said that in the event there mentioned the share of the predeceasing child should belong to the other children. It was founded upon as if it had been a declaration to the effect that the share of any of his younger children dying should belong to the other children. But that is not the proper construction of the sentence, because the share of "such of my younger children deceasing" means the share of "such of my younger children deceasing leaving lawful issue." John and Margaret being both dead without issue in 1870, a special case was brought before this Court to determine what was to be done with their shares. In John's case he never attained the age of twenty-five years; his share was held by the trustees, and never was otherwise than part of the residue, because the contingency on which they were to pay the residue to John never arose, and accordingly it being a gift to John, and there being no further destination, it necessarily remained part of the residue. Margaret's share is different, because it is in precisely the same position as Janet's share. If

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Mrs Moodie ever had a share of the fee of this estate, so had Margaret. Accordingly, it appears to me that the decision of the Court in the special case regarding Margaret's share is exactly applicable to Janet's share, which is now before us. Now, the decision is in these terms:—It was found and declared "that the shares of the residue of the trust-estate of the deceased James Young provided to his son John and his daughter Margaret have, by reason of the death of John in pupillarity, and the death of Margaret without issue, fallen into and become part of the residue of the trust-estate to be administered and disposed of by the trustees in the manner provided with respect to Mrs Moodie's original share." I see the Court have answered the question in the words that were put to them. If I had been selecting words I should not have said that the share had fallen into and become part of the residue by reason of the death of John and Margaret. My view is, that it remained and was held by the trustees as residue all along, and that it was only payable by the trustees in the event which never occurred, namely, that the share of John vested in him and became payable, or that Margaret had children, and the fee became payable to them. Until these events occurred the whole residue remained in the hands of the trustees. But however that may be, the result is exactly the same, and we have now to deal with the whole of the residue of the estate—with John's, Margaret's, and Janet's shares; and the question is, what is to be done with them. Now, the first thing I would point out is, that we cannot sustain the claim of the factor on Mrs Moodie's estate to the whole of the residue except on the ground that the decision was right in the special case, while his own argument proves that it was wrong, and that he is only entitled to one-half, that is, Janet's own share and one-half of John's—while if we only gave him a half, I do not know what would become of Margaret's share, which it is decided her disponees had no right to. I agree with your Lordship that the difficulties which have been mentioned do not occur, because I am perfectly clear with your Lordship that no fee whatever was given to Janet or Margaret of this residue. I have never been able to understand why such a claim was made, because the words of the fifth section are clear. The trustees are told to hold and apply the residue of the estate falling to Janet. They are not to pay it to her, but it is to be held by them for behoof of Janet in liferent during all the days of her life, and then it is to belong to her issue in fee. Now, how it can be held that a fee which the testator says shall belong to her issue shall belong to her, I cannot understand. There is no contradiction of that in the cases referred to, where it is said that a direct gift of a fee was given under conditions. Here we have no direction to pay the share to Janet, or any part of it; she only got a liferent. I think these cases are not applicable. The result is that this is a case of intestacy, and we have to go back to the date of the death of the testator to see who was his heir, and upon that there is no doubt. James, his elder son, was his heir-at-law, and the intestate estate vested in him *a morte*.

The second question in the case is whether that residue estate which vested in him is to go to his heir-at-law, the claimant James Young, or to his disponee, the claimant Mrs Wyper, under a disposition executed by him in favour of trustees. In a question between the heir and the disponee

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the heir must give way to the disponee if the disposition is valid, and the question is whether or no James the elder son's disposition in favour of trustees did carry the estate to his trustees. It is said that it did not carry it to the trustees because it contains this clause. After disponing to trustees it says,—"Whom failing . . . the whole residue of said estate, heritable and moveable, to which I shall succeed in the event of my being predeceased by the said Janet Edmonstone Young without issue." It is said that the estate which was carried by this disposition was the estate to which he should succeed in the event of his being predeceased by Janet Young. It is said that he was not predeceased by her, and that the event did not occur. But that is a mere misdescription of the event in which he should take the estate. In the narrative of the deed, after correctly narrating the past history of his father's trust, he says,—"And that in the event of the said Janet Edmonstone Young deceasing without leaving issue, the whole purposes of the said disposition and codicil will have been implemented, and the residue of the said estate will fall and belong to me or to my children as undisposed of and intestate succession of my father. . . . Therefore in order to provide for the management and disposal of the said residue in the event of my succeeding thereto, for the benefit and behoof of myself and my wife and children, I do hereby assign, dispone, and convey to and in favour of myself," &c. Could anything be clearer as the truster's intention than that? It is in the event which has occurred, and in that event he dispones to trustees for behoof of himself and his wife and children. Can it be doubted, in the face of that, that the words to which I have referred are merely words of description? I do not say that if the clause had run in other terms—if it had said "the whole residue in the event of my being predeceased," there might not have been some strong argument raised. But that is not what it says. He states as a matter of fact,—"The whole residue of said estate, heritable and moveable, to which I shall succeed in the event of my being predeceased by Janet." He does not make it a condition—in that event—and I am of opinion that the residue of that estate was vested in him and should go to his trustees, and the claim of his widow, the sole surviving trustee, be sustained.

LORD M'LAREN and LORD KINNEAR concurred.

THE COURT adhered.

WEBSTER, WILL, & Co., S.S.C.—HENRY ROBERTSON, S.S.C.—W. KINNIBURGH MORTON, S.S.C.—Agents.

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THE LORD ADVOCATE, Pursuer (Respondent).—*Sol.-Gen. Dickson—Dundas, K.C.—Young.*

JAMES BALFOUR-KINNEAR AND ANOTHER (Watherston's Trustees), Defenders (Reclaimers).—*Ure, K.C.—Chree.*

Revenue—Legacy-duty—Legacy free of duty—Agreement to take less than full amount of legacy—Legacy-Duty Act, 1796 (36 *Geo. III. cap.* 52), *secs.* 21 *and* 23.—The Legacy-Duty Act, 1796, sec. 21, provides,—"that if any direction shall be given by any will or testamentary instrument for payment of the duty chargeable upon any legacy or bequest out of some other fund, so that such legacy may pass to the person or persons to whom or for whose

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benefit the same shall be given free of duty, no duty shall be chargeable upon the money to be applied for the payment of such duty, notwithstanding the same may be deemed a legacy to or for the benefit of the person or persons who would otherwise pay such duty."

Sec. 23 enacts that where a legacy shall be released for a consideration or compounded for less than the value thereof, legacy-duty shall be paid in respect of such legacy according to the amount taken in satisfaction thereof.

By certain testamentary writings, a testator provided for the payment of certain legacies, some free of legacy-duty, others not. On the testator's death the estate proved insufficient to pay the legacies in full. Questions as to the validity, construction, and effect of these testamentary writings were settled by all the parties interested executing a deed of agreement and compromise whereby they agreed severally to accept, as in full of their right, from the testamentary trustees, smaller sums than the legacies originally bequeathed, but under declaration that all were to be free of legacy-duty. It was further declared that *quoad* the provisions thus arrived at, the testator should be deemed to have died testate, and *quoad ultra* intestate.

The Crown claimed legacy-duty from the trustees upon the sums paid to the legatees, and on the sums drawn by the trustees from other funds in order to pay duty on the legacies as agreed on, contending (1) that the legatees took solely in virtue of the agreement, and therefore that sec. 21 did not apply, and (2) that the sums paid to the legatees along with the amount of the duty was "the amount taken in satisfaction of the legacy" in the sense of sec. 23.

Held (*rev.* judgment of Lord Stormonth-Darling) that the legatees took the sums as their legacies in virtue of the testamentary writings, the effect of the agreement being merely to restrict them in amount, and that therefore by sec. 21 of the Act no legacy-duty was payable on the sums paid as duty on those legacies which by the agreement were accepted in place of legacies declared in the testamentary writings to be free of duty.

Opinion by Lord Young that the deed of agreement, being a *bona fide* agreement as to the meaning of the testamentary writings, and not being challenged by the Crown as in any way defrauding its interests, came in place of and must be deemed to be the testament of the deceased, and that consequently the provisions of sec. 21 applied to all legacies taken in virtue of it, whether declared free of duty in the original testamentary writings or not.

2D DIVISION. LdStormonth-Darling.

MISS CHRISTIAN ELIZABETH WATHERSTON, of 17 Rothesay Place, Edinburgh, died on 11th January 1898 leaving three testamentary writings under her hand, dated respectively 25th October 1896, 17th December 1896, and 18th January 1897, whereby she bequeathed a number of legacies, some free of duty, and others not. She died possessed of heritable and moveable estate, of which she was the absolute owner, and at the time of her death she was entitled to dispose, by will, of the estate placed in trust by her father's trust-conveyance, dated 27th February 1886, and also of the residue of his estate under his trust-disposition and settlement of 20th May 1895. On Miss Watherston's death the validity and effect of her testamentary writings were challenged by her next of kin and others. Ultimately the questions which were thus raised were settled, all the parties interested having entered into a deed of agreement and compromise, which was recorded in the Books of Council and Session on 28th July 1898. The parties of the first part to the agreement were the deceased's heir-at-law and next of kin, who were also, in the event of her intestacy, entitled as ultimate beneficiaries to the funds under her father's trust of 1886. The parties of the second part were those who, in the case of the deceased's intestacy, were entitled to the

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residue of her father's estate as ultimate beneficiaries under his trust of 1895. The third parties were persons claiming right under the deceased's testamentary writings.

The following narrative of the facts is taken from the opinion of the Lord Ordinary (Stormonth-Darling):—"The late Miss Watherston, who died unmarried on 11th January 1898, left three testamentary writings purporting to deal, not only with the estate strictly speaking her own, but with two large funds left in trust by her father, over which he had given her power to test. Questions arose after her death as to the validity, meaning, and effect of her testamentary writings, and these disputes were all settled by the deed of agreement and compromise set out in the appendix to this record. The first article provided that the said three writings should be construed as if they formed a valid *mortis causa* deed or will, by which Miss Watherston bequeathed legacies of the amounts specified in the article (the amount in each case being, I was informed, about one-half of what the writings bore); and the article closed with the words:—'All of said legacies being free of Government duties of whatever kind, and to be paid as soon as possible, but without any interest thereon.' The second article provided that 'the said Christian Elizabeth Watherston shall be held to have died testate to the effect expressed in the foregoing article, and to have validly exercised the powers of bequest conferred on her by the 1886 trust-deed and the 1895 trust-deed, to the extent of the sums that may be required from the 1886 trust and the 1895 trust, in addition to her own separate estate, to meet the whole of the bequests specified in the preceding article and whole Government duties and expenses.' The third article provided that Miss Watherston 'shall be held *quoad ultra* to have died intestate, and without having exercised the powers of bequest conferred upon her by the 1886 trust-deed and the 1895 trust-deed.' And the sixth article bore that 'the whole parties hereto agree to accept the foregoing division, and the sums thereby falling to each, as in full of all claims competent to them, and each or any of them,' by virtue of the two trust-deeds, or any of the testamentary writings, or through the decease of Miss Watherston or her father.

"The various legatees received the sums agreed upon, free of legacy-duty; and a sum of £3032, 10s. of duty was paid by the defenders to the Crown. This amount was calculated on the sums actually payable to the legatees, without taking into account that the true amount of the benefit taken by each legatee was the sum which he actually received plus the amount applied in payment of duty to the Crown, for which, apart from the agreement, he would have been personally liable."

In June 1900 the Lord Advocate, as representing the Board of Inland Revenue, brought this action against James Balfour-Kinnear, W.S., and George Thomas Balfour-Kinnear, W.S., Edinburgh, Miss Watherston's trustees and executors, for payment of £250, 7s. 6d., being legacy-duty upon the money—£3032, 10s.—which had been applied in payment of the duties on the legacies paid under the deed of agreement, and also for interest thereon at the rate of 3 per cent from the date of the previous payment of duty.

The pursuer averred;—(Cond. 7) "The defenders, as trustees and executors, have failed to pay the full legacy-duty due on account of the legacies in question. A claim for duty arises not only on the

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sums paid over to the legatees according to the terms of the compromise, but also on the money applied in payment of the duties on the legacies." The pursuer founded on sec. 23 of the Legacy-Duty Act.*

The defenders averred (Ans. 3) "that by said deed the true construction and effect of Miss Watherston's testamentary writings was settled for all purposes connected with her succession by all the parties interested in her estate."

On 23d February 1900, before this action was raised, the defenders offered to the Inland Revenue payment of legacy-duty upon the duty in the case of all those legatees whose legacies were not expressly duty free in terms of Miss Watherston's testamentary writings, in full of the claim now made.

Quoad the case of those legatees whose legacies were declared free of duty by the testamentary writings they pleaded;—(2) No legacy-duty being payable on the duty in the case of the legacies in question, the defenders should be assoilzied from the conclusions of the summons.

On 21st December 1900, the Lord Ordinary decerned against the defenders in terms of the conclusions of the summons.†

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* The Legacy-Duty Act, 1796, sec. 21, enacts,—"That if any direction shall be given by any will or testamentary instrument for payment of the duty chargeable upon any legacy or bequest out of some other fund, so that such legacy or bequest may pass to the person or persons to whom or for whose benefit the same shall be given free of duty, no duty shall be chargeable upon the money to be applied for the payment of such duty, notwithstanding the same may be deemed a legacy to or for the benefit of the person or persons who would otherwise pay such duty."

Section 23 enacts,—"Where any legacy or part of any legacy or residue or part of residue whereon any duty shall be chargeable by this Act shall be satisfied otherwise than by payment of money or application of specific effects for that purpose, or shall be released for consideration or compounded for less than the amount or value thereof, then and in such case the duty shall be charged and paid in respect of such legacy or part of legacy or residue or part of residue according to the amount or value of the property taken in satisfaction thereof, or as the consideration for release, thereof, or composition for the same."

† "OPINION.—(After the narrative quoted above)— . . . Now, at first sight, the notion of paying duty upon duty may be a little startling, all the more that, in the ordinary case, no such payment is due to the Crown. But that is by virtue of section 21 of the Legacy-Duty Act, 36 George III cap. 52, which provides that 'if any direction shall be given, by any will or testamentary instrument, for payment of the duty chargeable upon any legacy or bequest out of some other fund, so that such legacy or bequest may pass to the person or persons to whom or for whose benefit the same shall be given free of duty, no duty shall be chargeable upon the money to be applied for the payment of such duty, notwithstanding the same may be deemed a legacy to or for the benefit of the person or persons who would otherwise pay such duty.' Lord President Inglis, commenting upon this section in *Lord Advocate* v. *Miller's Trustees*, 11 R. at p. 1055, said—'There can be very little doubt that, but for this enactment, in every case where a legacy is given free of legacy-duty by the will of the testator, and the executry estate can afford to relieve, and does relieve, the legatee of the amount of the duty by paying the duty out of the executry estate, that portion of the executry estate so applied would itself be subject to legacy-duty.' That is the principle on which the defenders admit that, as regards

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The defenders reclaimed, and argued;—The sole question was as to the legacies taken in place of those which by the testamentary writings were declared free of duty. The legacies were taken in virtue, not of the compromise, but of the testamentary writings. The only effect of the deed of agreement was to restrict them in amount. That being so, the provisions of sec. 21 of the Act applied, and no duty was payable on duty. The provisions of sec. 23 were nothing to the purpose. It provided merely that where a legatee had to take less than the legacy bequeathed, duty was payable on the restricted amount, but did not alter the effect of the original legacy being payable duty free.

Argued for the pursuer;—The legatees took solely under the compromise, and the provisions of sec. 21, which applied only to legacies under a will, did not apply.[1] But, in any event, the legatees had compounded their legacies for less than their value, and by sec. 23, duty was payable on the amount taken in satisfaction, that was to say, the amounts by which the legatees benefited, viz., the amount of the legacies plus the duties payable thereon, which, but for the agreement, the legatees would have had to pay.

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all the legacies whose freedom from legacy-duty arises solely from the deed of compromise, the claim of the Crown is well founded. They concede that, in the case of these legacies, section 23 of the Legacy-Duty Act applies. It provides (taking it shortly) that where any legacy chargeable with duty 'shall be released for consideration, or compounded for less than the amount or value thereof, then, and in such case, the duty shall be charged and paid in respect of such legacy . . . . according to the amount or value of the property taken in satisfaction thereof, or as the consideration for release thereof, or composition for the same.' Applying these words to the case in hand, the defenders concede that, as regards legacies of this kind, 'the composition for the same' accepted by the legatees was not merely the sum which each legatee received into his hand, but included also the amount paid on his behalf to the Government.

"But then, the defenders say, this principle does not apply to the case of the legacies accepted by the legatees in lieu of larger legacies, which the testatrix herself declared to be free of legacy-duty. As regards these, they say, the deed of compromise made no change on the provisions of the will except by reducing the amounts; and they point to the provision of the deed, that the testatrix should be held to have died testate, to the effect expressed in an article which merely reduced the amounts. This is a plausible argument, but I think it is unsound. The question really comes to be whether the legatees in the latter class truly derive their right to have legacy-duty paid for them from the will or from the compromise, because, if they derive it from the compromise, they are exactly in the same position as the other legatees, and section 21 of the statute, which refers solely to directions given by will, can have no application.

"The proper way to test this question is, I think, to consider whether, if the compromise had been silent as to legacy-duty, the legatees in this latter class could have insisted, as against the defenders, that legacy-duty should have been paid for them. Now, I think they could not. The answer by the defenders to such a demand would have been, 'Your right to receive anything at all is due entirely to the compromise; the deed declares that certain specified sums are what you are to receive, that *quoad ultra* the testatrix is to be held as having died intestate, and that the parties agree to

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[1] Lord Advocate v. Miller's Trustees, July 4, 1884, 11 R. 1046; Lord Advocate v. Freckleton's Judicial Factor, March 20, 1894, 21 R. 743.

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LORD JUSTICE-CLERK.—This is a peculiar case. The lady having left certain testamentary documents, it turned out that there would be difficulties in carrying out her testament, or there might be a dispute, and the parties who were interested came to an agreement that she was to be held to have by her testament given legacies of less amount than the actual amount which was stated in figures in her will—that is to say, that the will was to be so read. Now, the original will and the agreement both state that the legacy, whether it was the full amount or the amount that was agreed upon, was to be free of legacy-duty. Accordingly, under section 21 of the Act which has been quoted to us, the amount of the duty being payable out of other estate than that which was handed over to the legatee—the duty which was so paid was made free of paying legacy-duty on itself—if I may so express it—that is to say, the party got the legacy in full, the trustees had to pay legacy-duty on that legacy, and under section 21 they did not before paying that duty require to pay duty upon it. Now, that clause is about as clear a clause as can be. But then the Crown says that this case is taken out of that clause altogether, and is to be dealt with solely under clause 23, because under the arrangement that was made there was naturally less paid to the legatee than the amount contained in the original writings of Miss Watherston. Section 23 appears to me—and I think your Lordships agree—to be intended solely to prevent what would be a gross injustice in those cases in which a legatee, from any cause, was obliged to take a subject or something which was valued instead of the actual thing which was left by the testator. It is provided that where any legacy chargeable with duty shall be released for any consideration or compounded for less than the amount or value thereof, the duty shall be paid according to the amount or value of the property taken in satisfaction or as a consideration for release thereof, or composition for the same. It was to prevent the injustice of charging duty upon the whole that had been left where a person could not recover the whole. I do not think it was for any other purpose, and I do not think it impinges upon the right of a party who, under section 21, is taking a certain sum by agreement or otherwise, directly under the will, or by an agreement by which the will is to be read as bringing this sum to the legatee. In these circumstances, if legacy-duty is not to be paid on the legacy, but the legatee is to receive the money in full, the amount of the duty which is paid out of the rest of the estate is not itself to be charged. I therefore think that the Lord Ordinary's judgment is wrong, and should be reversed.

LORD YOUNG.—I am substantially of the same opinion. The question before us is a question regarding legacy-duty. Now, the existence of a legacy or legacies is absolutely essential to the existence of such a question. There must be legacies here, therefore, in the estimation of the Crown, in order to

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accept these sums as in full of all claims.' With such provisions in the deed I think the demand must have failed; and, if so, the legatees of the one class, just as much as the legatees of the other, owe the benefits which they take entirely to the compromise."

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raise a question about the duty payable to the Crown in respect of them. But in order to the existence of a legacy there must exist a testator, and also a testament. Now, who is the testator here? Miss Watherston. There is no other. And therefore the Crown must regard her as a testator; and, as I said, there must also be a testament in order to the existence of a legacy, and the legacies must be legacies under that testament. She has been dead for some years. She left three documents, and it is stated in the case before us—or rather in the deed of agreement—that if the set of writings were held to be of no effect, and Miss Watherston were held to have died intestate and without having exercised her said powers of bequest,—that is, under her father's settlement,—the first parties are the whole beneficiaries entitled to the 1886 trust funds, and the other parties—there are two sets—would be entitled to the rest of the estate, at least to one part of it. Now, the agreement is amongst those parties who disputed the validity of these instruments and the import and effect of them, for the narrative proceeds,—"And whereas certain questions arose between the parties hereto as to the validity, meaning, and effect of the said writings; and whereas all the parties hereto have agreed to compromise the whole questions between them as to the validity, meaning, and effect of said writings left by the said Christian Elizabeth Watherston in manner after mentioned, therefore the parties have agreed, and agree as follows:—The said three writings shall be construed as if they formed a valid *mortis causa* deed or will, by which she bequeathed," and then the bequests are mentioned. The agreement is that the import and effect of these three deeds is to be so construed; and then it provides that all those legacies to which it is to be construed to apply are to be free of legacy-duty, and the said Christian Elizabeth Watherston shall be held to have died testate to the effect expressed in the foregoing article, and to have validly exercised the powers of bequest conferred on her by her father's settlement. Now, this shews an agreement by all parties interested as to the import, meaning, and effect of the testament left by Miss Watherston. Does the Crown challenge that? It has been observed, more than once, that the Crown is at liberty, and the officers of the Crown are bound in the discharge of their duty, to challenge any settlement of this kind, or of any kind which is detrimental to the interest of the Crown,—that is, to the interests of the public of which the Crown has charge,—or any settlement which is made regarding the testament or will of the deceased which is for the purpose of defeating any legitimate rights of the Crown or reducing the amount of its rights. But we were assured that there was no suggestion that this was other than a *bona fide* arrangement, not detrimental to the interests of the Crown in any respect; and indeed, if this arrangement had not been made that she was to be dealt with as having by these three instruments—the meaning and legal effect of which was in some doubt—made a valid testament, it might well be that the whole estate would have gone—or at least some of it—not to people who were paying 10 per cent as strangers, but to such next of kin as would have merely a nominal sum to pay. But the Crown has not challenged this, and therefore we must take the case on the footing that Miss Watherston died testate, and that this agreement was her testament. Now, the legacies—and the only legacies which we have to deal with—which are pre-

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sented or referred to in the case before us, are the legacies which by this agreement she is held to have left by her testamentary instrument, and these legacies are left free of legacy-duty. That is to say, the amount of the legacy-duty which, without a declaration of "free of legacy-duty," would have been payable by the legatees, is an additional gift to them. That is the meaning of it under clause 21. If there was no such declaration the legatee would have to pay on £500, or £1000, or £10,000, according to his kindred or relationship to the deceased, but it is provided by section 21 that if the testament by which the legacy in question is given declares it to be free of legacy-duty, there shall be no duty payable upon the duty.

Now, is that not the case with reference to every one of the legacies in this deed? The case was opened by Mr Chree on the footing that there was a distinction between those legacies and the legacies in which there was no provision that they should be free of legacy-duty. I do not see any ground for the distinction, and I am somewhat amazed at that having been given up, for the legacies are all by this deed—there is no other. We are not going into those three documents, the meaning and validity and effect of which was in dispute and was settled. We are to take only what the parties legitimately interested are agreed is to be taken as the import and effect of them. Therefore, I take the import and effect that the parties are agreed upon—and we are not concerned with anything else—with respect to all the legacies mentioned, that they are legacies by a testament in these terms—declaring that they shall be free of legacy-duty. And therefore, in my opinion, although it is unnecessary to decide that—the point having been abandoned—the Crown is entitled to no duty whatever upon what is to be paid in order to free those legacies of legacy-duty. I think that is really the whole case.

LORD TRAYNER.—I am of the same opinion. The Lord Ordinary has held that the Crown is entitled to the claim it is now making, on the ground that the legatees who were declared to be entitled to take their legacies free of legacy-duty are taking nothing under the will of Miss Watherston, but are taking what they are getting purely under the rights conferred upon them by the deed of compromise or agreement referred to in the course of the debate. I dissent from that view. The agreement, in my opinion, gives the legatees nothing. It is an agreement between the legatees that the will of Miss Watherston should be construed in a certain manner, but the foundation of any legatee's right is the testamentary bequest made by Miss Watherston. The legacies were to be paid free of duty, and the duty payable is that which effeirs to the actual amount paid to the legatee. That duty must be paid by the trustees out of the other funds belonging to the estate. But on the amount so paid as duty the Crown cannot claim duty. This I think clear on the provisions of the Act of George III., referred to in the debate.

LORD MONCREIFF.—I am also of opinion that the Lord Ordinary's interlocutor should be recalled. With regard to the only legatees with whom we have to deal, I am of opinion that they take under the will of Miss Watherston. They have agreed to treat that as a valid will, but to the

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effect of only getting one-half of what the will gave them. They have agreed to accept half the legacies which they are left by the will, and that is the only alteration which is made by this agreement or compromise upon the will itself. Now, the Crown contends that section 23 applies to the case, and only section 23. In my opinion both sections 21 and 23 apply. Section 23, as I read it, does not add to the Crown's powers or rights in any way; it restricts them. It is a provision in favour of the legatee, and in a case where the legatee does not receive the full sum bequeathed to him, or where he agrees to accept a smaller sum, the Crown is precluded by the terms of the 23d section from claiming duty upon the full sum named in the will, and that I take to be the sole meaning and effect of the 23d section. Accordingly, in the present case, on the one hand the Crown is barred by the 23d section from claiming duty upon any larger sum than those legacies which are received under this will, and on the other hand they are precluded by the 21st section from claiming duty upon the legacy-duty which is to be paid in pursuance of the directions in the will upon those reduced sums.

THE COURT recalled the interlocutor reclaimed against, and in respect of defenders' tender, dismissed the action, with expenses to the defenders.

SOLICITOR FOR INLAND REVENUE—HAMILTON, KINNEAR, & BEATSON, W.S.—Agents.

No. 99.
Mar. 7, 1901.
Dunlop Pneumatic Tyre Co., Limited, v. Rose.

THE DUNLOP PNEUMATIC TYRE COMPANY, LIMITED, Complainers.—*Guy.* MRS M. G. ROSE, Respondent.—*Christie.*

Process—Record—Petition and Complaint for breach of interdict—Amendment.—A obtained an interdict against B on 31st October 1900. On 13th February 1901 he presented a petition and complaint, averring that B had been guilty of a breach of interdict on 1st December 1899, which B in her answers denied. Thereafter, in March, the complainer craved leave to alter the date of the alleged breach by substituting 1900 for 1899, the latter figures having, he averred, been given *per incuriam*. The respondent objected to any amendment, on the ground that the proceedings were of a quasi-criminal nature.

The Court *allowed* the amendment.

1ST DIVISION.

ON 30th October 1900 the Dunlop Pneumatic Tyre Company, Limited, obtained an interdict against Mrs M. G. Rose, cycle agent, West Nicolson Street, Edinburgh, interdicting her, *inter alia*, from infringing certain letters-patent, and from using and vending without consent rubber tyres or metal rims constructed in the manner described in the letters-patent.

On 13th February 1901 the company presented a petition and complaint, in which, after narrating the interdict proceedings, they averred that notwithstanding the interdict Mrs Rose had, in breach of the interdict, infringed the letters-patent. "In particular, the respondent sold, or knowingly allowed to be sold, within her premises at 37 West Nicolson Street foresaid, on 1st December 1899, to one Edward Thomas Cheer, tyre dealer, of 160 Clerkenwell Road, London, E.C., one pair of outer covers 'reconstructed,' said pair of outer covers, either singly or in combination, not having been supplied by petitioners to respondent, nor sold under any consent, licence, or agreement from them to respondent, and being an infringement of said

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letters-patent, against the infringing of which by respondent the petitioners had obtained the said decree."

The petitioners accordingly craved the Court to find that the respondent had been guilty of contempt of Court and breach of interdict, and in respect thereof to inflict upon her such punishment, by way of fine or imprisonment, as the Court should think proper.

The respondent lodged answers, in which she, *inter alia*, stated;—"In particular, the respondent denies that she sold or knowingly allowed to be sold, at 37 West Nicolson Street aforesaid, on 1st December 1899, to the party named in the complaint or to any other person, a pair of outer covers such as are described in the complaint. . . . She is certain that no such transaction took place at or about the date libelled, or at any other time subsequent to the interdict proceedings and prior to the realisation of the business."

Thereafter, on 7th March, the complainers presented a note, in which they averred that in the passage above quoted, the date of the sale complained of had *per incuriam* been described as 1st December 1899, instead of 1st December 1900, and they craved the Court to allow the deletion of the figures 1899 and the substitution therefor of 1900.

They argued that there was obviously a clerical error which could not possibly have misled the respondent.

The respondent argued;—No amendment should be allowed. The proceedings were of a quasi-criminal nature, and the same practice should be followed as in proper criminal proceedings, according to which the amendment would be refused. The error moreover was not merely clerical. It was *in essentialibus* of the complaint, and the answers had been put in on it. The proper course was for the complainers to abandon the present proceedings, and if so advised, present a new petition.

LORD PRESIDENT.—There is no doubt that this proceeding is of a quasi-criminal nature, and if the mistake could have misled the respondent in any way, there would have been a difficulty in not applying the same rule which obtains in proper criminal cases.

But the error is so patent as to amount practically to a clerical error, and no prejudice being alleged, I think that we should allow the amendment subject to the payment of any expenses which may have been incurred by the respondent in consequence of the error.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

THE COURT allowed the petitioners to amend to the effect set forth in the note, and the respondent to amend her answers, if so advised: "Find the petitioners liable to the respondent in the expenses occasioned by the amendments, and remit," &c.

DUNCAN SMITH & M'LAREN, S.S.C.—A. ELLIOT KEAY, Solicitor—Agents.

ROBERT CHISHOLM ROBERTSON, Pursuer.—*Horne.*
JOHN HALL, Defender.—*Hunter.*

No. 100.

Mar. 7, 1901.

Robertson v. Hall.

Process—Jury Trial—Counter Issue—Notice of Trial for Sittings—Postponement of trial.—Circumstances in which the Court granted postponement of a trial on the defender's motion.

1ST DIVISION. LdStormonth-Darling.

IN an action at the instance of Robert Chisholm Robertson, miners' agent, against John Hall, miner, for damages for slander, which was raised in November 1900, four issues and a counter issue were approved on 19th February 1901.*

On 4th March 1901 the pursuer gave notice to the defender of trial at the ensuing Spring sittings commencing on 21st March.

The defender, on 6th March, presented a note praying the Court to postpone the trial of the case in view of "(1) the lack of time between the adjustment of issues and the probable date of the trial, and the difficulty in procuring certain material evidence to meet the defender's said counter issue, the charges referring to periods so far back as the miners' strike of 1894, out of which the present action has arisen; (2) the delicate nature of said counter issue; and (3) the delay which has taken place between the date of the slander said to have been uttered by the defender and the raising of the present action."

The pursuer objected to the trial being postponed.

LORD PRESIDENT.—The issue in this case was only adjusted on 19th February, and the sittings for jury trials begin on the 21st March. On looking at the issues and record it is pretty plain that documentary evidence will be required, and documents must be lodged eight days before the trial. The defender could not get a diligence before the issues were adjusted. The time available for preparation would accordingly be very short indeed, and as counsel tells us on his responsibility that he cannot with justice to the case go to trial at the sittings, it seems to me that we should grant this motion for the postponement. If we declined to do so we might exclude the possibility of the defender proving his counter issue.

LORD ADAM concurred.

LORD M'LAREN.—I am of the same opinion, and would only further observe, that the right of a pursuer to lead in a jury case is not nearly so strong when there are counter issues as when there are issues only at the instance of the pursuer.

LORD KINNEAR concurred.

THE COURT discharged the notice of trial.

JAMES G. BRYSON, Solicitor—D. C. OLIVER, Solicitor—Agents.

* The slanders covered by the issues were alleged to have been uttered in 1898 and 1899, and to impute to the pursuer the dishonest appropriation of funds in connection with a miners' strike in 1894.

The counter issue was as follows:—"Whether, during the year 1894, the pursuer, as agent of the Forth and Clyde Miners' Association, received from the Scottish Miners' Federation sums of strike-money amounting in all to more than £300, of which he dishonestly appropriated the sum of £160 in or about July 1894, and the sum of £140 in or about October 1894?"

No. 101.

Mar. 7, 1901. Maxwell v. Young.

MRS MARY MAXWELL, Pursuer.—*Munro.*
ALEXANDER YOUNG, Defender.—*Hunter.*

Expenses—Husband and Wife—Action by Wife with consent of Husband—Liability of Husband.—In an action of damages for personal injuries raised by a married woman, with the consent and concurrence of her husband, in which she was unsuccessful, the Court decerned against the husband, conjunctly and severally with his wife, for the expenses of process, on the ground that he had by his conduct in the cause identified himself with his wife's claim, and truly been an active litigant.

Opinion reserved by Lord M'Laren on the general question whether, by merely giving his consent and concurrence, a husband renders himself liable for expenses.

1ST DIVISION. Sheriff of Ayrshire.

MRS MARY GILFILLAN OR MAXWELL, wife of and residing with William Maxwell, plumber, Kilmarnock, "with the consent and concurrence of the said William Maxwell as her curator and administrator-in-law," raised an action in the Sheriff Court of Ayrshire, at Kilmarnock, against Alexander Young, concluding for £500 as damages for personal injuries.

She averred that her husband had taken a house from the defender for a year from Whitsunday 1900, that she and her husband were on 28th May removing their furniture into the house, which was entered by a stone stair about 7 feet 4 inches in height, and that while standing on the landing of the stair waiting for her husband to ascend and pass her with some of the furniture she came in contact with the railing, that the railing gave way, and that she fell to the ground and sustained severe injuries.

The pursuer further averred that the railing was rotten, and that the defender was to blame for its defective condition.

The defender denied fault, and stated the following account of the accident:—"The pursuer's husband was carrying up the stairs a large burden wrapped in packing, and containing a wool bed, two pairs of blankets, two bedcovers, six bolsters, and other articles. This bundle, which more than occupied the full width of the stair, was carried by Mr Maxwell on his back. As he ascended the stair the pursuer had commenced to come down, and was on the seventh step. Instead of stepping back into the house, and so allowing her husband to get up without obstacle, she remained on the stair and leaned back over the hand-rail on the right side of the stair. When her husband reached the seventh step the end of his bundle rested on her chest, and the hand-rail, unable to bear the double weight of the pursuer—who is a big, heavy-made woman—and of the husband's bundle, gave way, and the pursuer fell backwards to the ground, a depth of about 5 feet, and sustained injuries."

The pursuer having appealed for jury trial an issue was adjusted,* and the case was tried before Lord M'Laren and a jury on the 11th and 12th January 1901, the pursuer's husband giving evidence in support of his wife's claim. The jury returned the following verdict:—"That in respect of the matters proved before them they—

* The issue was in the following terms:—"Whether, on or about 28th May 1900, the pursuer, while using the stair leading to a house situated behind the premises occupied by the defender at 23 New Street, Stevenston, was injured in her person, through the fault of the defender, to the loss, injury, and damage of the pursuer?"

after having been enclosed for three hours—by a majority of seven to five find for the defender."

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Thereafter the defender moved the Court to apply the verdict, to assoilzie the defender, and to find the pursuer and her husband jointly and severally liable in expenses.

Argued for the defender;—The action would not have been raised if the husband had not given his consent. He was therefore the party who had caused the expense incurred by the defender. His consent was not merely formal. He had given it deliberately in the full knowledge of the whole circumstances, and had further supported his wife's claim in the witness-box. He was in truth an active party to the litigation and responsible for its conduct. He was accordingly liable in expenses.[1] The case of *Whitehead*[2] was very different from the present, for the husband there took no part in the litigation, being furth of Scotland when the action was brought. The rule as to a husband's liability was the same as in the analogous cases of a father consenting to an action by a child,[3] and in the case of persons suing or defending actions in a representative capacity.[4]

Argued for William Maxwell;—The husband was in no sense responsible for raising the action, or for its conduct. That was entirely in the hands of the pursuer. The husband's consent was merely formal, and it was perfectly reasonable that he should give it, for the course of the trial had shewn that the question was a very narrow one. The action might have been raised by the wife alone. A curator *ad litem* would then have been appointed, and no such curator was ever found liable in expenses. The husband was in precisely the same position. There was no precedent for finding a husband liable except in very special circumstances, as in *Macgown*.[1] In *White* v. *Steel*,[5] Lord Adam expressed an opinion that a curator who merely consented to an action was not liable personally. *Whitehead*[2] was a case directly in point and conclusive in the husband's favour. In *Chalmers*[6] the husband's liability was determined by the extent to which his conduct had been vexatious and malicious. There was, and could be, no suggestion of such conduct here.

At advising,—

LORD M'LAREN.—The tendency of the decisions of our time in regard to liability for legal expenses has been to give no effect to the distinction between persons suing or defending in their own right and those who litigate in a representative capacity. It is now settled that trustees, whether representing the estate of an individual or the interest of his creditors in their debtor's estate, are liable personally to indemnify the adverse party for the costs which he has incurred in the vindication of his rights.

I shall say nothing as to the liability of judicial factors, except that in

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[1] Macgown v. Cramb, Feb. 19, 1898, 25 R. 634.
[2] Whitehead v. Blaik, July 20, 1893, 20 R. 1045.
[3] Wilkinson v. Kinneil Cannel Company, Limited, July 1, 1897, 24 R. 1001; Fraser v. Cameron, March 8, 1892, 19 R. 564; White v. Steel, March 10, 1894, 21 R. 649.
[4] Craig v. Hogg, Oct. 17, 1896, 24 R. 6.
[5] 21 R. 649, at p. 654.
[6] Chalmers v. Douglas, 1790, M. 6083, April 6, 1791, 3 Pat. App. 213.

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the latest case raising the question the Judges were divided in opinion, and it was not found necessary to determine it, because we were agreed that on the true construction of the Lord Ordinary's interlocutor the judicial factor had been found liable for expenses only in his representative capacity.[1]

A nearer analogy to the present case is the case of a father who sues or defends in the character of tutor or curator for his child.

In *White* v. *Steel*[2] a father suing as tutor for his infant child was held to be liable for expenses, on the general ground that he and not the child was the party to the cause; and this decision was followed and extended in the case of *Wilkinson* v. *The Kinneil Cannel Company*.[3] In that case the son passed from the status of pupillarity to that of minority in the course of the action, and the father was found liable for so much of the expenses as were incurred while his son was in pupillarity, and liable jointly and severally along with his son for the expenses incurred after his son acquired the status of minority.

The principle underlying these decisions will no doubt be kept in view when the question is raised, whether a husband, by merely giving a formal consent as his wife's curator or administrator to an action at her instance, becomes responsible for the expenses of process. On the one hand it may be said that he is not bound to give his concurrence, and that if he refuses to give it the Court will appoint a curator *ad litem*, who would not in general be liable for costs. On the other side it may be said that the curator *ad litem*, if he did his duty, would inquire into the facts of the case and would put a stop to the action if it was ill-founded. But if the husband gives his consent as a matter of form, and without reference to the merits of the case, it may be said that by doing so he identifies himself with his wife's action, and causes the expense which the adverse party incurs in vindicating his rights. I may also point out that the question is not exactly the same under the present law as it was before the passing of the Married Women's Property Act, 1881. Under the common law a wife's claim of damages fell under the *jus mariti*, and the husband was joined with her in the action not only as her administrator but for his own right and interest. It is not now necessary that a husband should be a party for his own right and interest, but it is easy to see that he may have a substantial interest in the prosecution of his wife's claim.

In the present case I think it is not necessary to consider whether the husband is universally liable for expenses by merely giving his consent to the wife's action, because I think the case may be solved by applying the rule laid down by Lord Thurlow in the case of *Chalmers* v. *Douglas*,[4] where a remit was made to the Court of Session to inquire how much of the sum of expenses of process and extract "had been occasioned by the conduct of the defender (the husband) in the case." That was a case where the husband was called along with his wife as defender in an action of damages in respect of the wife's slander. He was cited as a defender, and it was necessary that he should appear to prevent decree going out against himself. It was therefore necessary to distinguish between the

[1] Craig v. Hogg, 24 R. 6. [2] 21 R. 649. [3] 24 R. 1001.
[4] 3 Pat. App. 213.

expense which might have been caused by the husband's appearance for the legitimate purpose of clearing himself and the expense which he actually caused to the adverse party by identifying himself with his wife's cause in which she was found to be in the wrong.

In the present case there is no room for this distinction. The action is an action of damages at the wife's instance in respect of personal injury, and the question is, whether the husband by his conduct of the cause has identified himself with the wife's claim, in which she has been unsuccessful. The husband was present when the cause of action occurred. He was engaged with his wife in carrying his furnishings and luggage by an outside stair into a house which he had hired for the summer months. The wooden railing attached to the stair gave way, and the pursuer fell to the ground and sustained a fracture of one of the bones of the leg. She sued the landlord, alleging that the stair was insufficiently guarded. The defence was that the spouses came into collision while the husband was going up the stair with a load on his back; that the railing was not designed to be proof against an accident of that nature, but only to serve the ordinary purposes of a staircase railing, for which purposes it was sufficient. The jury accepted the defender's evidence, which must accordingly be taken to be true. Now, the husband being present at the time, and being himself the involuntary cause of the injury complained of, ought not to have given his instance to enable the action to proceed. The impression left on my mind when I tried the case certainly was that the husband was an active litigant, and he supported his wife's claim by evidence which the jury must have disregarded when they considered their verdict. I am therefore of opinion that he is liable in expenses in respect of his conduct as a litigant.

On the general question, whether a husband by giving his consent and concurrence renders himself liable for expenses, I agree with the *dictum* of the Lord President in *M'Gown's* case[1] that this must stand as it does at present on the authorities.

The LORD PRESIDENT and LORD ADAM concurred.

LORD KINNEAR.—I agree, and only desire to add that I think this is a question which the Judge who tried the case is in a much better position to decide than any other. Accordingly, if I had had any doubt upon the point, I should have deferred to Lord M'Laren's opinion, but after hearing his views, I am satisfied that the husband is liable for expenses. I agree that there may be many questions as to the liability of a husband for the expenses of litigations to which he may be made a party, with which we are not concerned at present, and as to which I express no opinion.

THE COURT applied the verdict, and assoilzied the defender, and found the pursuer and her husband "jointly and severally liable in expenses," &c.

ST CLAIR SWANSON & MANSON, W.S.—W. CROFT GRAY, S.S.C.—Agents.

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[1] 25 R. 635.

No. 102.

Mar. 8, 1901. Marshall v. Chisholm.

ROBERT MARSHALL, Petitioner (Reclaimer).—*Baxter —A. M. Anderson.*

JOHN CHRISTIE CHISHOLM, Respondent.—*Guthrie, K.C.— Crabb Watt.*

Judicial Factor—Curator Bonis—Neglect of duty—Removal.—Circumstances in which, on a report by the Accountant of Court imputing to a curator bonis persistent neglect of duty and disregard of the Accountant's remonstrances, the Court (*rev.* judgment of Lord Pearson) *removed* the curator bonis from office.

2D DIVISION. THIS was a petition brought in May 1900 at the instance of Robert Marshall, Hawick, for the removal of John Christie Chisholm, solicitor, Dalkeith, from the office of curator bonis to the petitioner's sister, Mrs Port.

The petitioner averred that there had been various irregularities in the management of the estate by the curator, and that the annual accounts, notwithstanding repeated demands by the Accountant of Court, had never been punctually lodged.

The curator lodged answers opposing the prayer of the petition, in which he denied that there had been irregularities, and pleaded illness and consequent absence from duty to account for any delay.

The petitioner produced and founded on a report by the Accountant of Court made to the Junior Lord Ordinary on 9th February 1899 in consequence of these irregularities, craving the removal of the curator bonis. It appeared that, following on this report, warrant was granted by the Lord Ordinary to serve it on the curator bonis, and an order for answers pronounced, but in respect that the curator bonis thereupon complied with the requisition by the Accountant of Court to lodge accounts, the matter was not further proceeded with.

On 9th July 1900 the Lord Ordinary (Pearson) pronounced an interlocutor remitting to the Accountant of Court to report further regarding the conduct of the curator bonis.

In pursuance of this remit the Accountant of Court, on 9th November 1900, lodged his report.*

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* "In obedience to the foregoing remit the Accountant of Court has to report—

"That the whole process has been laid before him.

"(1) As to the conduct of the curator bonis—

"That the curator bonis was most irregular in lodging his annual accounts.

Factors get one month in which to lodge Account. Section 4 of Judicial Factors Act, 1849.

Requisitions.	Account ending	Due on	Lodged on
	31 Dec. 1893	31 Jan. 1894	1 Feb. 1894
	Do. 1894	Do. 1895	16 April 1895
	Do. 1895	Do. 1896	2 July 1896
4	Do. 1896	Do. 1897	12 July 1897
4	Do. 1897	Do. 1898	12 July 1898
3	Do. 1898	Do. 1899	27 April 1899
	Do. 1899	Do. 1900	21 May 1900

"That, with the exception of the first account, the others were only

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On 15th December 1900 the Lord Ordinary pronounced the following interlocutor:—"Having heard counsel upon the petition and answers, and considered the cause, in respect of the facts disclosed in the report by the Accountant of Court, No. 38 of process, under the remit contained in the preceding interlocutor, disallows the commission due to the curator down to 31st December 1899 to the extent of one-half of the total amount thereof, and instructs the Accountant of Court in his future audit of the curator's accounts to give effect to the said disallowance of commission: *Quoad ultra* dismisses the petition, and finds no expenses due to or by either party, and decerns." *

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lodged after repeated requisitions had been made therefor by the Accountant.

"That the curator bonis was equally remiss in returning the audit reports and in answering the Accountant's audit notes.

	Requisitions.	Audits Issued on	Due on	Returned
Factors get 20 days in which to answer audit notes.		28 Feb. 1894	20 Mar. 1894	6 June 1894
		2 July 1895	22 July 1895	5 Sept. 1895
	3	14 Aug. 1896	3 Sept. 1896	16 Jan. 1897
	3	11 Aug. 1897	31 Aug. 1897	23 Nov. 1897
	4	11 Aug. 1898	31 Aug. 1898	15 Feb. 1899
	5	14 Aug. 1899	3 Sept. 1899	15 Mar. 1900
		20 June 1900	10 July 1900	27 June 1900

"That the audit report, with answers to audit notes, on the account to 31st December 1897 was only returned by the curator bonis on 15th February 1899, after the Accountant had served him, under interlocutor in this process of 9th February 1899, with a copy of his report to the Court on the curator's conduct, and craving his recall. The Accountant was thus enabled to complete the audit, and further procedure was rendered unnecessary. For this the Accountant charged the curator bonis personally £1, 1s., and he has paid said sum.

"That on fifteen occasions he informed the curator bonis that his non-compliance with requests would be reported to the Court.

"That the curator's clerk wrote over twenty letters to the Accountant, giving various excuses for delay in complying with requisitions. This disposes of the allegation by the curator that these were 'overlooked by his assistants.' The curator bonis was in town attending to other duties during the greater part of the time covered by these requisitions. The accounts are of the simplest, and the audit notes, save that referring to the law business account for £78, 5s. 9d., were such that the curator's cashier or senior clerk could have answered in a day or two, whereas from two to seven months was the time taken, except in the last audit, which was returned, with answers, in seven days.

"That the accounts of the curator bonis down to 31st December 1899 are satisfactory save as to the law account p. £78, 5s. 9d., which is disputed, and which is afterwards referred to.

"That, in the Accountant's opinion, the curator bonis, for systematic dilatoriness in lodging his annual accounts and in answering the Accountant's audit notes, and his non-due compliance with the Accountant's repeated requisitions, has not offered, and cannot offer, any sufficient excuse, and that his conduct is deserving of the Court's censure. . . ."

* "NOTE.—I think this is clearly not a case for removal of the curator. The Accountant, who reported the curator in February 1899 as for removal,

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The petitioner reclaimed, and argued;—The case was one for removal.[1] The respondent argued that the Lord Ordinary's conclusion was right in the circumstances, and further offered, at the close of the hearing, to resign office.

LORD JUSTICE-CLERK.—This is a most unusual case. If ever there can be cases, short of conviction for crime, where a person holding such an appointment as that held by the respondent ought to be removed, this is one such. I cannot agree with the conclusion which the Lord Ordinary has arrived at on the facts as stated by him. I think there has been persistent neglect on the part of the curator—neglect which has not been satisfactorily explained. I therefore, without hesitation, move your Lordships to grant the prayer of the petition.

LORD YOUNG.—I must own that when I read the opinion of the Lord Ordinary I was more than surprised at the conclusion he has come to, that, although it was a case for disallowing half the curator's commission, it was not a case for removal. My view is that it is clearly a case for removal. I do not think that any professional man to whom such censure as the Lord Ordinary has expressed is applicable, and I think it is applicable, is fit to remain in office. I agree, therefore, that this is a case for removing the curator from his office, and for finding him liable to the petitioner in the expenses of the petition, and that it should be remitted to the Lord Ordinary to appoint a new curator.

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has examined his conduct down to date, and now reports only for censure; moreover removal—which is the greatest penalty—ought to be reserved for the gravest cases, and this is not one of them.

"I am reluctant even to censure an officer of Court, unless his conduct has either resulted in loss to the estate or discloses some moral obliquity. In this case I understand the estate has suffered no loss, and the curator's conduct, however reprehensible, has not been morally wrong in the ordinary sense of that term, as it might have been if, for example, he had knowingly put himself in a position where his duty and his interest were in conflict.

"But I am bound in some way to mark my sense of the curator's conduct as disclosed by the investigation. I accept the expression of regret made on his behalf (somewhat tardily) at the bar, and I am also disposed to make full allowance for the period during which he was in ill-health. But, when all is said, the facts reported to me disclose a protracted course of contumacy and repeated disobedience to the lawful orders of the head of one of the chief departments of the Court, whose patience in the matter reached the utmost limit.

"In such a case I am disposed to operate upon the curator through his commission, and in the circumstances I think it will be sufficient to instruct the Accountant to disallow one-half of it down to the date of the last audit. I have ascertained that this will be equivalent to a fine of a little under twenty pounds. . . ."

[1] Mackenzie v. Gibson, March 1, 1845, 7 D. 560, 17 Scot. Jur. 270; Accountant of Court v. Jaffray, Dec. 20, 1851, 14 D. 292, 24 Scot. Jur. 95, and Nov. 18, 1854, 17 D. 71, 27 Scot. Jur. 12; Accountant of Court v. M'Allister, Dec. 22, 1853, 16 D. 301, 26 Scot. Jur. 141; Macdonald v. Macdonald, July 8, 1854, 16 D. 1023, 26 Scot. Jur. 561; Lowe, Oct. 19, 1872, 11 Macph. 17, 45 Scot. Jur. 11; Walker v. Buchanan, July 20, 1888, 15 R. 1102; Pupils Protection Act, 1849 (12 and 13 Vict. c. 51), sec. 6; Judicial Factors (Scotland) Act, 1889 (52 and 53 Vict. c. 39), sec. 7.

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LORD TRAYNER.—I am of the same opinion. During the whole course of the curatory the curator has neglected his duties, and has turned a deaf ear to the remonstrances of the Accountant of Court. I think we must express our entire disapproval of his conduct by removing him from his office.

LORD MONCREIFF.—I concur.

THE COURT removed the respondent from the office of curator bonis, found him liable in the petitioner's expenses, and remitted to the Lord Ordinary to appoint a new curator bonis.

CLARK & MACDONALD, S.S.C.—ANDERSON & CHISHOLM, Solicitors—Agents.

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Caledonian Railway Co. v. Magistrates of Edinburgh.

THE CALEDONIAN RAILWAY COMPANY, Appellants.—*Dundas, K.C.*—*M'Clure.*

THE LORD PROVOST, MAGISTRATES, AND COUNCIL OF THE CITY OF EDINBURGH, Respondents.—*D.-F. Asher*—*Cooper.*

Police—Making up private street—Lands and Heritages "fronting and abutting" on street—Railway Line—Edinburgh Corporation Act, 1897 (60 *and* 61 *Vict. cap. xxxii.*), *sec.* 73.—A railway line ran alongside a private street in Edinburgh, on an embankment at a height considerably above the level of the street. The line was fenced from the street by a wall at the bottom of the embankment, built by the railway company on their own ground. The Corporation having served a notice on the company, as the "owner of lands and heritages fronting or abutting" on the street, to make up and complete the street, the company appealed, on the ground that the street was a private street of which they had no beneficial use, and to which they had no right of access. The Court *dismissed* the appeal, *holding* that the railway company being owners of lands which in fact fronted and abutted on the street in question, they were liable to contribute to its construction and maintenance on the call of the Corporation.

1ST DIVISION

THE CALEDONIAN RAILWAY COMPANY are owners of a line of railway (known as the Haymarket Branch), which connects their main line between Glasgow and Edinburgh with their line between Princes Street Station and Granton. About 700 yards from the point where it leaves the Edinburgh and Glasgow main line the Haymarket Branch runs alongside a private street in the city of Edinburgh, known as Wardlaw Terrace.

On 8th January 1901 the railway company received from the Corporation of Edinburgh a notice in the following terms, viz.:—

"Edinburgh Roads Department.

"Notice is hereby given to the owners of the lands and heritages fronting or abutting on the private street of Wardlaw Terrace, from Stewart Terrace northwards to Wardlaw Place, that the Magistrates and Council of the city of Edinburgh call upon them to free the carriageway of the said street from obstructions, and to properly level, make up, construct, causeway, pave, channel, and complete the same, in terms of the specification hereto annexed," with intimation that if the notice was not complied with within two months, the Magistrates would themselves complete the street and charge the cost of so doing to the owner or owners in default.*

* The Edinburgh Corporation Act, 1897 (60 and 61 Vict. cap. xxxii.), sec. 73, enacts,—"Section 33 of the Act of 1891 is hereby repealed and in lieu thereof it is hereby from and after the passing of this Act enacted as follows:—Where in any private street or court houses or permanent build-

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The Caledonian Railway Company appealed, and stated, *inter alia*;—"The appellants . . . maintain in the first place that said notice was improperly addressed to them, in respect that they are not, in the sense of the Act, the owners of 'lands and heritages fronting or abutting on' Wardlaw Terrace, and have no liability for the construction or maintenance thereof. The land occupied by their said Haymarket Branch (in so far as *ex adverso* of said street) was acquired by the appellants for the purpose of constructing their line from William Murray, Esq., of Hinderland, in 1853, but no right or interest of any kind in or over the land which is now the *solum* of said street was granted to the appellants, and the said street was formed without the appellants being informed thereof. Since the date of the disposition the land conveyed has been separated from the ground now forming said street by a wall built and maintained by the appellants, in terms of their statutory obligations for the protection of the adjoining owners or occupiers. The appellants have not, and never had, any right of access to or of passage upon said street, and further a practicable access could not be made opening on said street (assuming the appellants' right) owing to the difference of the levels. The railway at the place in question is carried upon an embankment many feet above the level of the street known as Wardlaw Terrace, upon its eastern side, and the land occupied by the railway does not front or abut upon said street. Upon said eastern side there neither is any building now, nor can there be in the future, owing to the existence of said railway and the unsuitability of the ground otherwise."

The Magistrates of Edinburgh lodged answers. They stated, *inter alia*, that tenements had been erected on the north-west side of Wardlaw Terrace, occupying more than one-fourth of the ground fronting or abutting on that street.

Argued for the appellants;—The railway line no doubt ran alongside the private street. That, however, was not fronting or abutting on in the sense of the 73d section. These words only applied when the owners of the lands and heritages so described had a right of access to and a use of the private street. Here the railway company had and could have no beneficial use of the street in question, and they had no right of access to it. That was conclusive.[1] A right to

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ings have been erected on one-fourth or more of the ground fronting or abutting on the same, or where such ground has been otherwise than temporarily enclosed and laid out to at least the said extent, and where such street . . . is not . . . in a complete and efficient state of repair to the reasonable satisfaction of the Corporation the Corporation may if they think fit by notice call upon the owners of the lands and heritages fronting or abutting on such street . . . to free the same . . . from obstructions and to properly level make up construct causeway pave channel and complete the same to the reasonable satisfaction of the Corporation within a time to be specified in such notice and in case such notice is not complied with within the time so specified therein the Corporation may themselves at any time thereafter cause any such street or court or part thereof and any foot pavements or footpaths of the same to be freed from obstructions . . . and the costs and expenses which may be incurred by them in connection therewith shall be recoverable as a debt from the owner or owners in default."

[1] Magistrates of Leith v. Gibb, Feb. 3, 1882, 9 R. 627; The Great Eastern Railway Co. v. The Hackney District Board of Works, 1883, L. R. 8 App. Cas. 687; Lightbound v. The Higher Bebington Local Board, 1885, L. R. 16 Q. B. D. 577; London School Board v. St Mary, Islington, 1875,

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use a private street could only be acquired by the public by immemorial practice.[1] The wall here was not part of the railway works. It was erected by the company in implement of their statutory obligation to fence. It was to be noted that the primary obligation sought to be imposed on railway companies by the Magistrates was not to contribute to the cost of making up the street, but to enter upon and make it up themselves, a thing they had no right or title to do.

Argued for the Magistrates;—It was enough to fix liability on the railway company that their ground did in point of fact front and abut on the street in question. In the cases relied on by the appellants to the contrary the subjects did not actually touch the street,—some other property intervened. There was no warrant for reading into the Act a limitation which it did not express, and no foundation, therefore, for the contention resting on want of access or of beneficial use. There was no difficulty in obtempering the Magistrates' order. On a strict and very technical view, perhaps, no one but the owner of the *solum* could do what was called for, but no one now pretended that only owners of the *solum* were entitled or bound to put a street in order. If the town had the right to issue the order, they also had the title to enforce it. The railway company, moreover, were not shut out from access to the street. There was no reason why they should not make a gateway in the wall, or remove the wall altogether, provided only they maintained a fence of some kind. Ownership of property fronting or abutting on a street was, however, the conclusive test of liability.[2]

LORD PRESIDENT.—This is a comparatively short question, but it is one of great importance. The facts upon which it arises are very simple. The Caledonian Railway Company are owners of certain land which runs along one side of a street in Edinburgh called Wardlaw Terrace. They acquired that land from the owner at the time when that part of the railway was made, I think we were told about 1850 or shortly thereafter, and no doubt under the ordinary conditions. It happens that this part of the line is constructed on an embankment, and in accordance with the statutory obligation laid upon railway companies, they built a wall at the foot of the embankment. This was in fulfilment of the ordinary obligation upon railway companies to fence off the land which they take from the land which they leave. So long as the place was not urban, the railway company had no right to go beyond the wall, and, within the wall, they could do very much as they pleased so long as they did not violate any statutory provision. I understand that the railway embankment is not to any extent supported by the wall. In other words it is not a retaining wall, and it is not one of the railway works in the sense of works constructed by the railway company for its own convenience in carrying on its business.

In that state of facts we have to apply section 73 of the Act of 1897, which was section 33 of the Act of 1891. That section declares that

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L. R., 1 Q. B. D. 65; Campbell v. Magistrates of Edinburgh, Nov. 24, 1891, 19 R. 159.

[1] Kinning Park Police Commissioners v. Thomson & Co., Feb. 22, 1877, 4 R. 528.

[2] Williams v. Wandsworth Board of Works, 1884, L. R., 13 Q. B. D. 211; London and North-Western Railway Co. v. St Pancras, 17 L. T. (N. S.) 654.

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"Where in any private street or court, houses or permanent buildings have been erected on one-fourth or more of the ground fronting or abutting on the same, or where such ground has been otherwise than temporarily enclosed and laid out . . . the Corporation may if they think fit by notice call upon the owners of the lands and heritages fronting or abutting on such street or court" to do certain things towards putting the street into the condition of a public street. Now, that is certainly a very strong clause, as it empowers the municipal authorities to compel people who do not want a street made,—who at present have no right to go into it, and who do not wish to have anything to do with it,—if one quarter of it has been subjected to a particular treatment, to subject all the rest to similar treatment and make the street public. Though it is a strong clause it appears to me that it is unambiguous. It has not two meanings, and we have no alternative but to uphold the order which has been made. I should have thought that if the language had reasonably admitted of any other interpretation, the railway company would have had a great deal to say, because it undoubtedly is a great hardship to it or to any other person in similar circumstances to be put to great expense to do something which they do not wish to do, and from which, so far as we can see, they are not likely to derive benefit, but I suppose it must be regarded as one of the incidents of urban occupancy. Being of opinion that there is no ambiguity in this provision I think the appeal must fail. I may add that this conclusion seems to me to be in accordance with the decision in the *London and North-Western Railway* case,[1] and not in conflict with any of the other decisions to which we have been referred. It also seems to be in accordance with the views which prevailed in the cases of *Gibb*[2] and *Campbell*.[3]

Lord Adam.—This case relates to urban property, and it seems to me that the subjects in question fall within the codes under the various Police and Municipal Acts regulating the management and administration of urban property. We may think that some of these provisions are somewhat arbitrary, but possibly in their practical working out in urban life they may have a convenience which justifies their apparently arbitrary character. The case we are dealing with now is a case of a private street, and I suppose that private street was duly laid out and sanctioned by the public authorities—I mean as to its lines and levels—after the parties had been consulted regarding it. Now, the street is bounded by the Caledonian Railway on one side, and it is bounded on the other side by property belonging to one or more proprietors, and I suppose that there are houses built on the other side to the extent of at least one-fourth of the frontage of the street. That is sufficient to confer the necessary statutory powers on the Magistrates although the other side be unbuilt on. The Magistrates have now come to think that it is for the benefit of the community to direct that this street, which has hitherto been private, should be made public, and they have power under section 73 of the Act to bring that about. The way in which that is brought about is by serving notices calling upon the proprietors of lands and heritages fronting such street to do certain things. It seems to me that the simple question we have to decide is this,

[1] 17 L. T (N. S.) 654. [2] 9 R. 627. [3] 19 R. 159.

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whether or no the Caledonian Railway Company is the owner of lands and heritages fronting that street. It seems to me to be a very simple proposition at first sight. There is the street; there are the lands and heritages; you are the owner of them, and therefore you are under the Act. I have never been able to see during the discussion what importance attached to the land being enclosed by a wall. I do not think the existence of the wall makes the least difference. The fact that the railway company do not use the street does not make the railway company less or more owners of land abutting on or fronting this street. As your Lordship has said, the Act says—and it is unambiguous—that the owners of land fronting any private street shall be bound to make and complete that street, and if they are in that position they must just submit. The Act does not say that owners having access to or the use of the street shall be bound to do so. It says nothing about that; it simply says that the owners of houses fronting the street shall be bound. It may be, as I said before, rather a hardship on the owners of the street that they have to make it a public street, but no doubt they will have the advantage, when it is put in order, of having it kept at the public expense. But these are all matters with which we have nothing to do. We have simply to ask ourselves whether or not the Caledonian Railway Company's property fronts this street. I cannot in the exercise of my ordinary common reason believe that it does not, and therefore I concur with the opinion of your Lordship.

LORD M'LAREN.—The Caledonian Railway Company are proprietors of a railway embankment which lies on one side of the street in question, and in immediate contact with the street; and it is plain enough that so long as the land is used for the purpose of a railway embankment, part of the permanent way of the railway, the company will derive no benefit from its proximity to this street. The question for consideration was, I think, rightly stated by the Dean of Faculty when he said the question was, whether we could find solid ground for limiting the generality of the 73d section of the Edinburgh Municipal Act of 1897. Well, if it had been intended that the liability to make up a street, or to repay the Corporation in the event of their making it up, was to be confined to proprietors of the *solum* of the street, it would have been very easy to say so. The Act of Parliament would then put the duty on such persons as were owners or part-owners of the street. That has not been done, and accordingly it was not seriously contended that in order that a person should be liable under the statute he must be a *pro indiviso* owner of the *solum* of the street. The argument was rather that the person charged must have such an interest in the street as would entitle him, in association with others, to put the street into proper repair. But the answer, as I think, is conclusive. As the statute has given power to the frontagers, whom failing, the Corporation, to put a street into a state of proper repair, no further title than what the 73d section has itself given is requisite to authorise the execution of the work, whether it is to be executed by the frontagers or by the Corporation. I confess I am unable to see any ground for limiting the generality of the statute, and while we see from the current of the authorities that some exceptional cases have been recognised, I think the exceptions are more

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apparent than real. One of them is a case where there was a proprietor who had a wall interjected between the street and his ground. That is evidently only an apparent exception, because the property of the person sought to be charged did not in fact abut on the street. And then in another case, on the construction of one of the London Metropolitan Acts, while the owner of a field adjacent to the street or road was held exempt, the proprietor of a wall which separated the street from that field was held to be liable. That was certainly a very critical case for testing the generality of the enactment then under construction, and it is a decision entirely consistent with the judgment proposed in this case. I do not think there is any substantial difference in meaning or phraseology between that Metropolis Act and the Act for Edinburgh.

I therefore agree in the opinion that the appeal is not well founded, and that it ought to be dismissed.

LORD KINNEAR concurred.

THE COURT pronounced this interlocutor:—"Refuse the appeal: Find that the appellants are owners of lands and heritages fronting or abutting on Wardlaw Terrace, a private street within the meaning of section 73 of the Edinburgh Corporation Act, 1897, and are bound to carry out the work specified in the notice appealed against, and are liable for the cost thereof in the event of said work being executed by the respondents, and decern," &c.

HOPE, TODD, & KIRK, W.S.—THOMAS HUNTER, W.S.—Agents.

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Forrester & Co. v. M'Callum.

ROBERT FORRESTER & COMPANY, Appellants.—*Campbell, K.C.—Chree.*
MRS CATHERINE M'CALLUM, Respondent.—*Salvesen, K.C.—W. Thomson.*

Master and Servant—Workmen's Compensation Act, 1897 (60 *and* 61 *Vict. cap.* 37), *First Schedule* (1) (*a*) (*i.*)—*Amount of Compensation—Workman less than three years in employment.—Held* that the minimum sum of £150 fixed by section (1) (*a*) (i.) of the First Schedule to the Workmen's Compensation Act, 1897, as the compensation for a deceased workman's dependants applied although the deceased workman had been less than three years in the employment.

Opinions *contra* in *Doyle* v. *Beattie & Sons*, 2 F. 1166, *reconsidered* and *disapproved*.

2D DIVISION. Sheriff of Lanarkshire.

THIS was an appeal in an arbitration, before one of the Sheriff-substitutes (Strachan) at Glasgow, under the Workmen's Compensation Act, 1897. The claimant (respondent in the appeal), Mrs Catherine M'Callum, widow of George Mitchell M'Callum, miner, Fauldhouse, for herself and their pupil children, claimed £150 from the appellants, Robert Forrester & Company, coalmasters, 142 West Nile Street, Glasgow, as compensation on account of the death of George Mitchell M'Callum.

The case stated that the following facts were admitted:—George Mitchell M'Callum was, on 2d July 1900, killed while in the employment of the appellants. He had been in their employment for a part only of two weeks prior to his death. It was not disputed that the respondent was entitled to compensation under the Act.

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M'Callum's average weekly wage was 12s. This multiplied by 156 amounted to £93, 12s. The respondent was wholly dependent on M'Callum at the date of his death.

The Sheriff-substitute held that the minimum sum fixed by section (1) (*a*) (i.) of the First Schedule to the Workmen's Compensation Act, 1897,* was applicable to the case of a workman who had been less than three years in the employment. The Sheriff-substitute accordingly awarded the sum of £150.

The questions of law were:—"(1) Is the minimum of £150, fixed by section 1 (*a*) (i.) of the said schedule, applicable to the case of a workman who has been less than three years in the employment? or (2) Is the average wage, amounting in this case to £93, 12s., the limit of the compensation which can be awarded in such a case?"

The cases noted below were cited at the hearing on the appeal.[1]

At advising,—

LORD JUSTICE-CLERK.—The decision of this case depends upon the interpretation to be put upon head (i.) of subsection (*a*) of the First Schedule of the Workmen's Compensation Act, which settles the limits of compensation which may be awarded to the dependants of a workman who has died in consequence of an injury. That head provides, in the case of a workman who has been three years in the employment, that the dependants shall receive a sum equal to his earnings if they exceed £150, and a minimum of £150 if they do not, but not exceeding a maximum in the first case of £300. It then goes on to deal with the case of a workman who has not been three years in the employment, enacting that "if the period of the workman's employment by the said employer has been less than the said three years, then the amount of his earnings during the said three years shall be deemed to be 156 times his average weekly earnings during the period of his actual employment under the said employer."

In this case the period was less, but the Sheriff-substitute has held that his duty was to multiply the weekly average wages by 156 to ascertain the

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* The Workmen's Compensation Act, 1897 (60 and 61 Vict. cap. 37), First Schedule, enacts:—

"(1) The amount of compensation under this Act shall be—

"(*a*) where death results from the injury—

"(i.) if the workman leaves any dependants wholly dependent upon his earnings at the time of his death, a sum equal to his earnings in the employment of the same employer during the three years next preceding the injury, or the sum of one hundred and fifty pounds, whichever of those sums is the larger, but not exceeding in any case three hundred pounds, provided that the amount of any weekly payments made under this Act shall be deducted from such sum, and if the period of the workman's employment by the said employer has been less than the said three years, then the amount of his earnings during the said three years shall be deemed to be 156 times his average weekly earnings during the period of his actual employment under the said employer."

[1] Doyle v. Beattie & Sons, July 10, 1900, 2 F. 1166; Small v. M'Cormick & Ewing, June 6, 1899, 1 F. 883; Russell v. M'Cluskey, July 20, 1900, 2 F. 1312; Lysons v. Andrew Knowles & Sons, Limited: Stuart v. Nixon & Bruce, L. R. [1900], A. C. 79.

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actual amount, and finding that that amount was less than the minimum of £150 set forth in the earlier part of the schedule, to award £150.

I am of opinion that the decision of the Sheriff-substitute is right. In the case of *Doyle* v. *Beattie & Sons*,[1] which was quoted to us as being contrary to the Sheriff-substitute's judgment, the question which arose was, whether the words in the first part of the schedule, by which the time of the running of the three years must be all before the accident, prevented a claim made under the latter part of the schedule being ascertained on average where the employment was only for one week before the accident but the workman continued in the employment and worked during another week before his injuries took such effect as to cause him to cease working. We held that the two parts of the clause were quite separate, and that the second part gave in that case sufficient means for calculating the average and ascertaining the total, the calculation not being limited to work done before the accident as it was in the first half. I feel bound to confess that in so far as what I said in that case may be construed to mean that the two parts of head (i.) of subsection (*a*) of the schedule were absolutely separable, so that no part of the first was to be read into the second, it cannot be justified upon a closer reading of the schedule. That schedule, I hold, provides that in the case of a death, the claim of dependants, both in the case of a complete three years' service and in the case of a service more limited in time, extends to £150 in any case where either the total wages of the three years' service in the one category, or the multiplication of the average wages by 156 in the other category, bring out a sum of less than £150. That is the case here, and I am of opinion that the Sheriff-substitute has rightly decided that £150 is the sum to which the respondent is entitled.

Lord Young.—I concur. I think that the maximum and the minimum amount of compensation apply to the whole provision, not only to the first branch of it but also to the second.

Lord Trayner.—The question raised by this appeal was incidentally argued and considered in the case of *Doyle*.[1] In my opinion in that case I adopted a view of the meaning and effect of the first part of the First Schedule appended to the Workmen's Compensation Act different from that taken and given effect to by the Sheriff in the present case. I think the part of the schedule to which I have referred admits reasonably of two readings, and in *Doyle's*[1] case I adopted the one which I thought the sounder reading of the two. After hearing the argument in this case, and considering what was said in the House of Lords in the case of *Stuart*[2] I have come to the conclusion (contrary to the opinion I formerly expressed) that the judgment now under appeal is well founded and ought to be affirmed.

Lord Moncreiff.—I think the Sheriff's judgment is right. The province of the latter part of section 1 (*a*) (i.) of the First Schedule appended to the Workmen's Compensation Act is merely to provide a means of fixing the amount of the deceased workman's earnings during the three year-

[1] 2 F. 1166. [2] L. R. [1900], A. C. 79.

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next preceding the injury where he was not in the actual employment of the employer during the whole of the said three years. This is to be done by first ascertaining his average weekly earnings during the period of his actual employment, and multiplying that average by 156, being the number of weeks in a period of three years.

This being the sole purpose of the provision, article 1 (*a*) (i.) amounts to this—Where death results from the injury, and the workman leaves dependants wholly dependent on his earnings, the amount of compensation shall be a sum equal to his earnings in the employment of the same employer during the three years next preceding the injury, or where his employment has been less than the said three years, a sum equal to 156 times his average weekly earnings during the period of his actual employment. But in neither case shall the compensation exceed £300 or be less than £150.

If the latter part of article 1 (*a*) (i.) were to be read as entirely independent of the maximum and minimum fixed in the former part, the result might be that the representatives of a workman who had only been one week in the employment might receive a larger sum than the representatives of a workman who had been in the employment during the whole period of three years. This was clearly not intended.

THE COURT answered the first question in the affirmative and the second in the negative.

W. & J. BURNESS, W.S.—CAMPBELL & SMITH, S.S.C.—Agents.

No. 105.
Mar. 12, 1901.
Lyon v. Lyon's Trustees.

MRS GEORGINA GILCHRIST OR LYON AND ALEXANDER LYON, Pursuers.—*Salvesen, K.C.—A. S. D. Thomson.*
THOMAS MIDDLETON MURRAY AND DUNCAN CAMERON (Lyon's Trustees), Defenders.—*Campbell, K.C.—Blackburn.*

Husband and Wife—Deed by woman before marriage, but after agreement to marry—Revocation—Jus quæsitum—Fraud on Marital Rights—Trust.—A woman before her marriage, but after it had been agreed upon, executed a disposition and assignation in trust of all the means and estate she should acquire during her marriage to trustees therein named. The trustees were directed (1) to pay the annual income of the trust-estate to herself during her life, exclusive of her husband's *jus mariti* and right of administration; (2) in the event of her husband surviving her, and there being issue of the marriage, to pay the annual income to him during the survivance of such issue; and failing issue (3) to pay to him an annuity of £200 a year; (4) on the death of the longest liver of herself and her husband, to pay over the capital to the child or children of the marriage subject to a power of apportionment given to the spouses or the survivor; (5) and failing issue of the marriage, to pay over the capital to her in the event of her surviving her husband, or to such person or persons as she might direct, subject to her husband's annuity in the event of his surviving her. The deed was declared to be irrevocable.

The husband also executed before marriage a bond of annuity for the sum of £200 in favour of his wife. He gave no formal assent to his wife's deed, but he was aware of its intended execution, and made no inquiry as to its provisions.

A child was born of the marriage, and thereafter the trustees entered on the management of certain funds to which the wife had succeeded.

In an action by the wife and husband against the trustees to have the

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wife's deed declared revocable, or otherwise to have it reduced as *in fraudem* of the husband's rights, *held* (1) that it was not revocable; and (2) that it was not reducible.

Watt v. *Watson*, Jan. 16, 1897, 24 R. 330, *distinguished*.

1st Division. Ld. Kyllachy.

Alexander Lyon and Miss Jane Georgina Gilchrist became engaged to be married on 12th March 1883, an ordinary licence for their marriage was granted by the Bishop of London upon 13th April, and they were married in London on 23d April following. On 20th April 1883 Mr Lyon, who declined to make or be a party to an ante-nuptial contract, executed a bond of annuity for £200 in favour of his intended wife. On the morning of her marriage day, and shortly before the marriage, Miss Gilchrist on her part executed a disposition and assignation in trust of the whole means and estate which should accrue and pertain or belong to her during the subsistence of the marriage to and in favour of Frederick William Rose, her brother-in-law, and Thomas Middleton Murray, as trustees. The trust purposes were as follows:—"(First) That the said trustees shall, during all the days of my life, while this trust subsists, pay over to me, the said Jane Georgina Gilchrist, the free interest or annual proceeds of the whole means and estate hereby conveyed, and that exclusive of the *jus mariti*, right of administration, and curatorial powers of the said Alexander Lyon, my intended husband, and not affectable by his debts or deeds, or the diligence of his creditors, discharges by myself alone being a sufficient exoneration in the premises: (Second) In the event of the dissolution of the said intended marriage by my death, and of my being survived by children, or a child, or the issue of a child, born of said intended marriage, the said trustees shall, during the life of such children or child, or the issue of such children or child, make payment to the said Alexander Lyon of the free interest or annual proceeds of the said trust-estate in liferent for the liferent use of the said Alexander Lyon and the maintenance of the said children or child, or their issue: (Third) In the event of the dissolution of the said intended marriage by my death without a child, or the issue of a child, born of said marriage, surviving me, the said trustees shall, after the death of my children or child and their issue, make payment to the said Alexander Lyon during all the remaining days of his life, out of the income of the said trust-estate hereby conveyed, provided there be income therefrom sufficient to yield the same, but in that event only, of a free yearly annuity of £200 . . . (Fourth) In the event of children or a child being born of said marriage, and of such children or child, or the issue of such children or child, surviving the dissolution of said marriage, the capital of said trust-estate remaining in the custody of said trustees shall, on the death of the longest liver of the said Alexander Lyon and me, be paid over to such child or children in such proportions and under such conditions as the said Alexander Lyon and me, the said Jane Georgina Gilchrist, by any writing executed by us jointly, or, failing thereof, as the survivor of us, may appoint, which failing, equally among them, share and share alike, the issue of any child that may have died before the death of the longer liver of us taking the parent's share: (Fifth) In the event of the dissolution of the said intended marriage by the death of the said Alexander Lyon without a child born of said marriage, or the issue of a child surviving him, or, though surviving the said Alexander Lyon, yet all predeceasing me, then, and in either of these events, the trust hereby created shall come to an end, and the

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said trustees shall forthwith account for and pay over the whole means and estate hereby conveyed to me, my heirs, executors, or assignees whomsoever: (Sixth) It shall be in the power and discretion of the said trustees to pay over to me, out of the capital of the means and estate hereby conveyed, a sum not exceeding £1000 sterling, and that, on their receiving a written requisition by me to that effect, which sum, if and after being paid, shall be at my own absolute disposal, freed and disburdened of the purposes of the trust hereby created: (Seventh) In case no child born of said intended marriage, or the issue of such child, shall survive the longest liver of the said Alexander Lyon and me, then, and in that event, the said trustees shall pay over and divide the said means and estate hereby conveyed to such person or persons as I may, by any writing under my hand, direct, and failing such writing, to and among my own nearest heirs, executors, and representatives, but subject always to the annuity payable to the said Alexander Lyon before mentioned."

The deed was declared to be irrevocable.

On the day following its execution the deed was returned by Mr Rose, one of the trustees named in it, to Mr Donald Beith, W.S., who had prepared it, and in whose custody it remained until 1889.

The only child of the marriage, a daughter, was born on 5th June 1885. No property fell under the trust till 1888, when Mrs Lyon succeeded to a legacy of £431, 13s. 3d., and the disposition and assignation in trust was uplifted by the trustees named in it from the custody of Mr Beith on 21st June 1889. In the beginning of July 1889 the trustees accepted office, and on 9th July 1889 the trust-disposition and assignation was recorded for preservation in the books of Council and Session by the law-agent of the trust. Subsequently other legacies amounting to £2644, 4s. 3d., to which Mrs Lyon had succeeded, were paid to the trustees to be held by them under the trust.

On 30th August 1894 Mrs Lyon, with the consent of her husband, executed a deed of revocation of the disposition and assignation in trust, calling upon the trustees then acting under it to convey and make over the trust-estate to her.

The present action was raised in January 1900, at which date the child of the marriage was still surviving, by Mr and Mrs Lyon to have it declared that the trust-disposition and assignation was revocable, and had been revoked by the above deed, or otherwise to have the said deed reduced, and the pursuers restored thereagainst *in integrum*, and for decree against the trustees to hand over the trust-estate to Mrs Lyon.

The pursuers pleaded;—(1) On a sound construction of the said deed, it is revocable by the pursuer, and she is therefore entitled to decree in terms of the first alternative conclusion of the summons. (2) The said deed having been executed on the eve of the pursuer's marriage, as condescended on, and without the consent of her husband, and being *in fraudem* of his rights as husband, the same is void and null, or otherwise should be reduced, in terms of the reductive conclusions of the summons.

The defenders pleaded;—(2) The trust-deed sought to be reduced having been executed in contemplation of marriage, and for the protection of the female pursuer and her issue, now in existence, the same is not revocable by her. (3) The trust-deed being in its nature and terms irrevocable, and having been delivered, registered, and acted upon, decree as concluded for should be refused.

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The pursuers further pleaded that the deed had been granted by Mrs Lyon under essential error, but as the Court were of opinion that this ground of reduction was negatived by the proof, it is not necessary to advert to it further.

On 2d June 1900 the Lord Ordinary (Kyllachy) allowed a proof before answer.*

On a reclaiming note against this interlocutor, the proof before answer was appointed to take place before Lord Adam.

From the proof it appeared that Mrs Lyon had executed the disposition and assignation in trust at the instance and on the advice of her sole surviving parent, Mrs Gilchrist, and with the approval of her brother-in-law, Mr Rose. It was executed in view of the fact that Mr Lyon declined to be a party to an antenuptial contract of marriage, as he did not desire to put any of his property out of his control by a settlement. He was aware of the proposed execution of his wife's deed, but made no inquiries, for the reasons referred to in the Lord President's judgment, as to the nature of the provisions which it was to contain. The bond of annuity executed by him in favour of his wife was prepared by Mr Beith.

After the proof, counsel were heard in the Division.

Argued for the pursuers;—I. The deed granted by Mrs Lyon was gratuitous, and it was granted without her husband's consent after the engagement to marry and after a licence had been obtained for the marriage, and was thus reducible at the husband's instance.[1] The granting of a licence for the marriage in England must be held to be equivalent to proclamation of banns in Scotland, and accordingly the doctrine as stated in *Bute's* case [1] applied, that the deed required the consent of the husband to make it valid. But, further, the deed was *in fraudem* of the husband's rights, and was granted after the engagement to marry had been concluded. Although the rights of a husband were curtailed by the Married Women's Property Act, 1881, he still retained his right of administration, and he was given, in lieu of his former rights, the *jus relicti* in his wife's succession. These had been cut off by the deed in question. The proof only shewed that he had not actively interfered in the matter; it did not shew that he had consented to the invasion of his rights or that he had waived them. II. In any event the deed was revocable by the wife. The character of a deed must be determined as at the date of its execution, and the

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* "OPINION.—I have anxiously considered whether in this case I could at all usefully pronounce a judgment upon the record—a judgment which if affirmed on review, might save the parties an expensive proof; but I am sorry to say, that with every desire to avoid unnecessary procedure, I have not been able to see my way to take this course. Had I thought that the pursuer's case was really ruled by the decision of the seven Judges in the recent case of *Watt* v. *Watson* (24 R. 330), there would have been less difficulty. But to reach that result I should have had to be satisfied of two propositions—(1) that it makes no difference that there is here a child of the marriage born before any attempt at revocation; and (2) that there is no relevancy in the defenders' averments with respect to the husband's deed, and its relation to the trust-deed executed by the wife. I should have required to be satisfied on both of those points, and all I can at present say is that I am not so satisfied. I am afraid, therefore, that the case must take the usual course. I shall allow a proof, of course before answer."

[1] Fraser, Husband and Wife, vol. i., p. 680; Auchinleck v. Williamson, 1667, M. 6033; Bute v. Bute, 1665, M. 6030.

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deed in this case was as at that date plainly testamentary, and not contractual. It was thus revocable although delivered to the trustees.[1] The birth of the child could not change the character of the deed, even if at the date when the deed was sought to be revoked the child had a vested interest. Here the child had no vested interest, but merely a *spes successionis* in the event of her surviving her mother. The fact that the deed was declared to be irrevocable was immaterial.[2]

Argued for the defenders;—I. To justify a reduction of a deed by a wife after the engagement to marry, but before marriage, the granting of the deed must be concealed from the husband in such circumstances as to indicate fraud.[3] In the cases where such a deed had been reduced, the alienation was to a third party and had been made outwith the husband's knowledge. Since the Married Women's Property Act the husband had ceased to have any legal claim upon his wife's estate, and the whole doctrine was obsolete. II. The deed was one of two deeds which constituted a marriage settlement. It could not be maintained that this was a testamentary deed. Even if otherwise ambiguous as to its character, the addition of the clause declaring it to be irrevocable was conclusive against its being testamentary. So also was the claim authorising the trustees to advance £1000 to Mrs Lyon *stante matrimonio*. It was an obvious fallacy to say that the character of the deed was to be determined as at the date of the deed. The words used would have their meaning determined as at that date, but the legal effect of the deed would vary with extrinsic circumstances. Apart from the case of *Watt* v. *Watson*,[4] it might well be held that delivery to trustees to hold for a contingent interest would have made the deed irrevocable, but granting the doctrine of that case that a donation was revocable until the donee came into existence, it did not follow that the deed was revocable after the donee came into existence. On the contrary the donation then became perfect, and the case was the same as if the donee had existed from the first.[5] The fact that the interest of the donee was not vested or was defeasible was no answer to this view.[6] The case was thus distinguished from the case of *Watt* v. *Watson*.[4] Any right the husband now had in his wife's estate was fully compensated by the annuity given to him in the deed challenged. There was thus no injury or loss of which he could complain.

At advising,—

LORD PRESIDENT.—Three questions are raised in the present action,—(1) Whether the trust-disposition and assignation is reducible on the ground that it was granted by Mrs Lyon under essential error as to its tenor and effect? (2) whether it is reducible on the ground that it was granted without the consent of Mr Lyon *in fraudem* of his rights as a husband? and (3) whether it is revocable by Mrs Lyon?

[1] Watt v. Watson, Jan. 16, 1897, 24 R. 330; Murison v. Dick, Feb. 9, 1854, 16 D. 529.

[2] Fernie v. Colquhoun's Trustees, Dec. 20, 1854, 17 D. 233, 27 Scot. Jur. 86; Mackenzie v. Mackenzie's Trustees, July 10, 1878, 5 R. 1027.

[3] Auchinleck v. Williamson, 1667, M. 6033.

[4] 24 R. 330.

[5] Shedden v. Shedden's Trustees, Nov. 29, 1895, 23 R. 228; Smitton v. Tod, Dec. 12, 1839, 2 D. 225, 12 Scot. Jur. 241.

[6] Allan v. Kerr, Oct. 21, 1869, 8 Macph. 34, 42 Scot. Jur. 6.

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(His Lordship, after reviewing the evidence as to the first question, proceeded)—Upon careful consideration of the evidence and the correspondence, I am satisfied that Mrs Lyon was not under any error when she executed the trust-disposition and assignation, and that it is not reducible upon this ground. It was entirely in her interest, and that of her prospective children, that it was executed, and it was at the instance of her mother acting in her interest that it was prepared. Mr Rose, her brother-in-law, shared Mrs Gilchrist's opinion, and all that he did in the matter was also in the interest of Mrs Lyon. There can be no doubt that they both acted rightly in urging that her *acquirenda* should be so protected, and also that Mr Lyon should make some provision for her. I may add that even if I had thought that Mrs Lyon was not so fully cognisant of the nature and effect of the trust-assignation and settlement as I believe her to have been, I should not have thought that any ground for reducing it had been established. There is no suggestion of anything like fraud, misrepresentation, or of impetration, on the part of anyone, and even if Mrs Lyon had chosen to waive examination and inquiry as to the precise terms of the deed, and had signed it without reading it, I do not think that it would have been now reducible at her instance.

The next ground of challenge of the trust-disposition and assignation is that it was granted *in fraudem* of Mr Lyon's rights as Mrs Lyon's intended husband, and I consider that this ground of challenge also fails. Mr Lyon was, prior to the marriage, well aware that a settlement was to be executed by Mrs Lyon, and I think it sufficiently appears that he was quite willing that she should settle her estate as she might think fit, so long as he was not asked to put his estate in settlement. Mrs Gilchrist says that she told Mr Lyon that she wished for some settlement, and that he made no objection. Mr Lyon says, "I had some idea that my wife was making some arrangement, but as I was not making any settlement upon her, I considered it not good form to inquire into what arrangement she was making, and I never did so." Again, when asked whether Miss Gilchrist told him it was proposed that she should grant a deed, he said "I certainly understood some deed was being drawn up. She did not tell me what the terms of it were."

The doctrine laid down in Fraser on Husband and Wife, vol. i. 680, appears to me to have no application to such a case as the present, and the decisions relied upon by the pursuers' counsel, *Auchinleck* v. *Williamson*[1] and *Bute* v. *Bute*,[2] were cases of actual fraud. In the former, the wife was possessed of the liferent of an estate which she, just before her marriage, secretly conveyed to her son by a former marriage, and the assignation was reduced at the instance of the husband; and in the latter, the woman had renounced a liferent in favour of her son by a former marriage. The same remarks apply to the decision in *Strathmore* v. *Bowse*.[3] It is further to be kept in view that the Married Women's Property (Scotland) Act, 1881, makes a material difference upon questions of this class, because marriage no longer transfers the wife's moveable estate to the husband, so that a conveyance of that estate prior to marriage would not deprive him of what he would otherwise have taken. It is true that his right of administration

[1] M. 6033. [2] M. 6031. [3] 1 Ves. jun. 22.

still remains to a limited extent, but in so far as it remains it is in the nature of a trust, which he could not with propriety use for his own benefit, and consequently an exclusion of it could not be properly characterised as being *in fraudem* of his rights. It was suggested in argument that an alienation by the wife might exclude or diminish the *jus relicti* to which he might be entitled at her death, but I think that this would be too remote an interest, looking to the powers which a wife now has of dealing with her moveable estate during the marriage.

The most important question, therefore, appears to me to be the third, viz., whether the conveyance contained in the trust-disposition and assignation is revocable by Mrs Lyon? It was maintained by the defender that it is not so revocable, (1) because it is one of two deeds which in effect constitute a marriage-settlement, the other being the bond of annuity by Mr Lyon. Both of these deeds were executed *intuitu matrimonii*, and each contains a provision by one spouse in favour of the other, so that there is some mutuality between them, and they seem to me to come very near to constituting a marriage-contract. They were prepared by the same agent on the same instructions, and drafts of both were sent together for consideration and revisal by Mrs Lyon, her mother, and her brother-in-law. Mr Lyon does not appear to have seen the draft of the trust-disposition and assignation, but he made material alterations on the draft of the bond of annuity, and effect was given to these alterations. Two deeds became necessary in consequence of the refusal of Mr Lyon to be a party to a settlement, as he desired to retain the control of the property which he had at the time of the marriage, or which he might afterwards acquire. While I think that a marriage-contract might be constituted by two deeds as well as by one, it does not appear to me to be necessary to express an opinion upon the question whether the two deeds in question did or did not make a contract, as I consider that there are sufficient grounds for a decision apart from this point. Mrs Lyon's disposition and assignation was, as already stated, delivered to the trustees, who still hold the property settled under it (except the £1000 withdrawn by her in the exercise of the reserved power to do so), and a child of the marriage is in existence. The trustees are thus holding the fee of the trust-estate under a delivered deed for a person in existence. This, it seems to me, makes an essential distinction between the present case and that of *Watt* v. *Watson*,[1] and the other cases referred to in the argument. Farther, the deed to which the case of *Watt* v. *Watson*[1] related was not declared to be irrevocable, as Mrs Lyon's trust-disposition and assignation is, and in that case no deed was granted by the husband which could introduce the element of mutuality. It was maintained on behalf of the pursuers that the trustees cannot be said to be holding the estate for their daughter, in respect that she has not a vested interest in the settled fund, as she will not become entitled to it unless she shall survive her mother, or at all events the dissolution of the marriage. It is true that she has not as yet an indefeasible right to the fee, but I think that she has such a right as it is not within the power of her parents by any act of theirs to defeat. One of the leading objects of the trust-dispo-

[1] 24 R. 330.

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sition and assignation was to provide for children, and it seems to me that the daughter has at all events a right to have the trust maintained, so that if she shall survive the dissolution of the marriage (and possibly also her mother), the settled funds shall be available to her. I think that upon principle her right is of such a character as to bar revocation of the trust-disposition and assignation, and I am not aware of any authority for holding such a deed to be revocable where (as here) the following conditions exist concurrently—(1) the deed was executed in immediate contemplation of marriage, and for the purposes of the marriage; (2) marriage followed upon it; (3) the deed was declared irrevocable; (4) it was delivered, the estate was handed over to the trustees, and is still held by them; and (5) a child born of the marriage is in existence.

For these reasons I am of opinion that the defenders should be assoilzied from the conclusions of the summons.

LORD ADAM.—I concur in your Lordship's judgment.

LORD M'LAREN.—I also concur in the Lord President's opinion on the various points in the case. As regards the question of reduction on extrinsic grounds, I think there is not the shadow of a case. The husband knew that his spouse had settled her estate, and he acquiesced in her doing so. He did at the same time what he thought was incumbent on him in granting an obligation for an annuity to his wife. The more important question is the question of revocation. As to that, my opinion is that as the trustees were in possession of the trust-estate by the authority of the spouses the effect of the birth of a child was that the trustees then held for the child, and the right of the child was exactly the same as if the child, after birth, had received a disposition of estate through the medium of a trust.

There is no true resemblance between this case and the case of *Watt* v. *Watson*,[1] where the ground of reduction was that the wife was entitled to revoke the settlement of her estate so long as there was no object in existence other than herself who had an interest in it. I may add, although it is perhaps of no great importance, that I do not attach weight to the declaration that the trust is irrevocable, because I think that if any person puts property into the hands of trustees in trust to be held for persons in existence, be they children or strangers, that deed is not revocable, because it amounts to a gift which may or may not take immediate effect, but which cannot be recalled.

LORD KINNEAR was absent.

THE COURT assoilzied the defenders from the conclusions of the action.

MORTON, SMART, & MACDONALD, W.S.—MACANDREW, WRIGHT, & MURRAY, W.S.—Agents.

[1] 24 R. 330.

MRS JANE SHERIFF OR GIBSON, Pursuer (Appellant).—*Salvesen, K.C.* —*Mercer.*
JOHN NELSON WILSON, Defender (Respondent).—*A. S. D. Thomson* —*A. M. Anderson.*

No. 106.
Mar. 12, 1901.
Gibson v. Wilson.

Master and Servant—Workmen's Compensation Act, 1897 (60 *and* 61 *Vict. cap.* 37), *sec.* 1 (1)—*Accident arising out of and in course of employment—Workman going to work.*—A workman employed in the renovation of the interior of a church found the church door locked on his arrival in the morning, and was unable to unlock the door. To gain access to his work he climbed the iron railing of a neighbouring schoolyard, which enabled him to scale the churchyard wall and enter the church by a window. The railing was topped by spikes, one of which pierced his foot, from the effects of which injury he died.

Held (*dub.* Lord Moncreiff) that the accident did not arise "out of and in the course of the employment" of the workman in the sense of section 1 (1) of the Workmen's Compensation Act, 1897.

2D DIVISION. Sheriff of Fifeshire.

IN an arbitration upon a claim under the Workmen's Compensation Act, 1897, in the Sheriff Court at Dunfermline, at the instance of Mrs Jane Sheriff or Gibson, in respect of the death of her husband, Alexander Gibson, against John Nelson Wilson, painter, Inverkeithing, the Sheriff-substitute (Gillespie) refused to award compensation, and, on the crave of the pursuer, stated a case, which set forth, *inter alia*, the following facts bearing on the question decided by the Court:—

"In the summer and autumn of the year 1900, improvements have been in the course of execution on Inverkeithing Parish Church. . . . The respondent is the contractor for the painter work.

"The now deceased Alexander Gibson entered the employment of Mr David Wilson, painter, Dunfermline, the father of the respondent, on Thursday, 2d August 1900. . . . The respondent, on Monday, the 6th of August, got a loan of Gibson's services to work at his job at Inverkeithing Parish Church. The respondent went with Gibson to Inverkeithing Church, and instructed him what to do, viz.,—to paper the ceiling, which he worked at for the rest of that day. An apprentice, the witness Blake, was working alongside of him. On Tuesday morning Blake got the key of the church from Mr Cousin, whose firm had the contract for the mason and joiner work, in order to get into the church. The painters' hour of beginning work was six o'clock, half-an-hour before the other tradesmen commenced. Gibson and Blake arrived at the door of the church that morning, Tuesday, 7th August, at six o'clock. Gibson having got the key from Blake, put it into the lock, and turned the key, but it went round and round without moving the lock. Blake then tried the key, with the same result. The key was in its normal state. It was one of those keys which, if pushed in as far as they will go, as Gibson and Blake pushed it, will not act. If pushed in the right length, there was no difficulty in turning the lock, but neither Gibson nor Blake then knew this.

"After this ineffectual attempt to get into the church, Gibson, followed by Blake, proceeded northwards along the pavement of Church Street, a distance of about 80 feet from the church door, to the iron railing which fences the yard of the infant school from the street. The said railing, which is the property of the School Board of Inverkeithing, is about 5½ feet high from the ground, and has a high and a low upright alternately, each topped by a spike. The schoolyard

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is separated from the churchyard by a wall about 7½ feet high running east and west and joining the railings at right angles. Gibson then jumped on to the parapet wall of the railing, then he put one foot on one of the lower spikes, and then his other foot on the spike of the second long upright from the said wall separating the schoolyard from the churchyard. The spike pierced his foot. He sprung up on the said wall, climbed down into the churchyard, and got into the church by a window. . . ."

The case having stated that Gibson died from the effects of the injury, and that the respondent had no control over and nothing to do with the premises where the accident happened, proceeded,—"On 13th November ult., I pronounced an interlocutor finding in law that the claim fails on two grounds, viz.,—(1) that the accident to the deceased did not arise out of and in the course of his employment; and (2) that the employment was not one to which the Workmen's Compensation Act applies, and, accordingly, I assoilzied the defender, with expenses."

The questions of law were,—"1. Whether the accident by which the deceased Alexander Gibson was fatally injured arose 'out of and in the course of his employment' in the sense of section 1 (1) of the Workmen's Compensation Act, 1897? 2. Whether the said employment was one to which the Workmen's Compensation Act, 1897, applies? 3. Whether the respondent was the employer of the deceased Alexander Gibson within the meaning of said Act at the time of the accident?"

The second and third of these questions are alluded to in the opinion of Lord Moncreiff, but the Court found it necessary to determine only the first.

Argued for the pursuer;—Whenever the workman presented himself at the door of the church he was in the course of his employment. It was not his fault that he could not enter, and it was his master's duty to give him access. The door not being available he was furthering his master's interests in trying to get in elsewhere. The case of *Holness*[1] was a case where a workman was held not entitled to compensation on account of the accident having occurred when he was on his way to his work. But here his employment had begun when he presented himself at the door, and he would have gone on earning wages had he remained there instead of furthering his master's interests by seeking access elsewhere. The fact that the place where the accident happened was not under the master's control was immaterial, it was "about" the building.[2] A workman did not put himself outside the scope of the Act merely by adopting a dangerous method,[3] nor need there be any connection between the circumstances of the accident and the nature of the employment.[4] On the second question the pursuer cited *Hoddinott* v. *Newton, Chambers, & Company*,[5] and on the third question *Mason* v. *A. R. Dean, Limited*,[6] and *M'Cready* v. *Dunlop & Company*.[7]

[1] Holness v. Mackay & Davis, L. R. [1899], 2 Q. B. 319.

[2] Powell v. Brown, L. R. [1899], 1 Q. B. 157.

[3] Durham v. Brown Brothers & Co., Dec. 13, 1898, 1 F. 279; Menzies v. M'Quibban, March 13, 1900, 2 F. 732.

[4] Rees v. Thomas, L. R. [1899], 1 Q. B. 1015; Petrie v. Weir, June 19, 1900, 2 F. 1041.

[5] L. R. [1901], A. C. 49.

[6] L. R. [1900], 1 Q. B. 770.

[7] June 16, 1900, 2 F. 1027.

Counsel for the defender were not called upon.

No. 106.

Mar. 12, 1901. Gibson v. Wilson.

LORD JUSTICE-CLERK.—We have heard a very clear statement from Mr Mercer, but the case seems to me to present no difficulty. On the first question I have no doubt that the Sheriff is right, and it is consequently unnecessary to consider anything else. I am quite unable, on the facts stated, to hold that the deceased in climbing on to this railing in order to get access to the churchyard, and thence to the church, was then in the course of his employment in the sense of the Act. His employment had not commenced. He had not reached the "factory," and was taking his own way of coming to it; the accident could not therefore arise out of and in the course of his employment.

LORD YOUNG and LORD TRAYNER concurred.

LORD MONCREIFF.—I have more difficulty than your Lordships on the first question in the case, and I should have preferred to rest my decision on one of the others. At the same time I am not prepared to differ.

THE COURT answered the first question in the negative, found it unnecessary to answer the other questions, and affirmed the dismissal of the claim.

ALEX. MITCHELL, Solicitor—JOHN VEITCH, Solicitor—Agents.

No. 107.

CHARLES STRAIN, Claimant (Appellant).—*Salvesen, K.C.*—*J. D. Robertson.*

WILLIAM SLOAN & COMPANY, Defenders (Respondents).—*Ure, K.C.*—*Spens.*

Mar. 13, 1901. Strain v. Sloan & Co.

Master and Servant—Workmen's Compensation Act, 1897 (60 *and* 61 *Vict. cap.* 37), *sec.* 7 (2)—*Wharf—Factory—Factory and Workshop Act*, 1895 (58 *and* 59 *Vict. cap.* 37), *sec.* 23—*About a factory—Accident immediately outside wharf.*—In an arbitration under the Workmen's Compensation Act, 1897, the following facts were admitted:—The claimant, employed by the respondents as a quay labourer at a wharf occupied by them, was assisting in removing girders from the street immediately outside the wharf shed to the side of a steamship belonging to the respondents, which was being loaded. The girders were lifted by a hand crane on a hand truck, by which they were conveyed to the ship's side. While removing the hand crane from one pile of girders to another pile, both of which lay in the street immediately outside the wharf shed, the claimant got jammed between the platform of the crane and one of the girders and sustained injuries.

Held (1) that, as one or more of the provisions in sec. 23 of the Factory and Workshops Act, 1895, applied to the wharf, it was a factory within the meaning of the Act of 1897; and (2) that the fact that the accident happened on a public street, immediately outside the wharf shed, did not *per se* exclude a claim for compensation.

Hall v. *Snowden, Hubbard, & Company*, L. R. [1899], 2 Q. B. 136, *disapproved.*

2D DIVISION. Sheriff of Lanarkshire.

THIS was an appeal upon a case stated by one of the Sheriffs-substitute at Glasgow (Balfour), in an arbitration under the Workmen's Compensation Act, 1897, in which he refused to order the respondents, William Sloan & Company, shipowners, Glasgow, to pay compensation to the appellant, Charles Strain, quay labourer, Glasgow, for injuries received in their employment.

No. 107.

Mar. 13, 1901.
Strain v. Sloan & Co.

The case stated,—"The following facts were admitted:—

"First. That on 8th May 1900 the appellant, who is a quay labourer, was in the employment of the respondents at the wharf occupied by them in Clyde Place, Glasgow, and was assisting in the work of removing iron girders from the street immediately outside the wharf shed to the side of a steamship belonging to the respondents, which was being loaded.

"Second. That the girders were lifted by means of a hand crane on to a truck, by which truck they were conveyed to the ship's side.

"Third. That while removing the hand crane from one pile of girders to another pile, both of which lay in the street immediately outside the wharf shed, the appellant got jammed between the platform of the crane and one of the girders, and sustained injuries.

"On these facts I found in law that in accordance with the decision in the case of *Hall* v. *Snowden, Hubbard, & Co.*,[1] the Factory and Workshop Act, 1895, did not apply to the present case, in respect that the accident did not occur on the quay, but on the street, and that no accident occurred on, in, or about a factory within the meaning of the Workmen's Compensation Act, 1897."

The Sheriff-substitute therefore dismissed the application.

The question of law for the opinion of the Court was, Was the Sheriff right in deciding that the Workmen's Compensation Act, 1897, did not apply to the employment at the time?*

Argued for the appellant;—(1) The accident happened "about" a factory, and therefore the Act applied. No doubt the machinery was in the street, but section 23 of the Factory and Workshop

[1] L. R. [1899], 2 Q. B. 136.

* The Workmen's Compensation Act, 1897 (60 and 61 Vict. cap. 37), enacts as follows, sec. 7 (1)—"This Act shall apply only to employment by the undertakers as hereinafter defined on, in, or about," *inter alia*, "a factory. (2) In this Act . . . 'factory' has the same meaning as in the Factory and Workshop Acts, 1878 to 1891, and also includes any dock, wharf, quay, warehouse, machinery, or plant to which any provision of the Factory Acts is applied by the Factory and Workshop Act, 1895 . . ."

The Factory and Workshop Act, 1895 (58 and 59 Vict. cap. 37), enacts as follows, sec. 23 (1)—"The following provisions, namely:—

"(i.) Section eighty-two of the principal Act [of 1878];

"(ii.) The provisions of the Factory Acts with respect to accidents;

"(iii.) Section sixty-eight of the principal Act with respect to the powers of inspectors;

"(iv.) Sections eight to twelve of the Act of 1891 with respect to special rules for dangerous employments; and

"(v.) The provisions of this Act with respect to the power to make orders as to dangerous machines

shall have effect as if—

"(*a*) every dock, wharf, quay, and warehouse, and so far as relates to the process of loading or unloading therefrom or thereto all machinery and plant used in that process; and (*b*) . . .

were included in the word 'factory,' and the purpose for which the machinery is used were a manufacturing process, and as if the person who by himself, his agents, or workmen temporarily uses any such machinery for the before-mentioned purpose were the occupier of the said premises, and for the purpose of the enforcement of those sections the person having the actual use or occupation of a dock, wharf, quay, or warehouse, or of any premises within the same, or forming part thereof, and the person so using such machinery, shall be deemed to be the occupier of a factory."

Act, 1895, which applied to a wharf, made no mention of machinery, and the wharf was therefore a factory in the sense of the Act of 1897, whether there was machinery on it or not.[1] The later case of *Jackson* v. *Rodger & Co.*,[2] and the case of *Flowers*[3] on which it proceeded, were overruled by *Stuart's* case,[4] with the result that now all accidents in the course of loading or unloading to or from a ship by machinery came within the Act whether the machinery was on the wharf or not. (2) The machinery here, being used for the purpose of unloading and loading to or from a wharf was *per se* a factory,[5] and it was not necessary that there should be steam power.[5]

Argued for the respondents;—In the first place, the wharf was not one on which there was any machinery, nor was there any finding that it was a wharf to which any provision of the Factory Acts had been applied, and it was therefore not a factory in the sense of the Act.[6] On the facts, there was no distinction between this case and *Hall's*.[6] The *ratio decidendi* in *Hall's*[6] case was (1) that there being no machinery on the wharf the only provision of the Factory Acts which could apply to it was the provision in section 18 of the Act of 1895 as to notice of accident; but that provision was not applicable to the wharf unless the accident happened upon it, and therefore, as the accident had not happened on the wharf, there was no provision of the Factory Acts which was applicable, and the wharf was not a factory in the sense of the Workmen's Compensation Act; (2) the judgment did not turn on the question whether the accident happened near enough to be "about" a factory, the decision that there was no factory being sufficient to dispose of the whole question. In the second place, even if the wharf was a factory in the sense of the Act, the accident could not be said to have happened "about" it.[7] Further, machinery *per se* could not be a factory, and the work for which it was used here was not loading or unloading between a wharf and a ship, in terms of section 23 of the Factory Act, 1895.[8]

LORD JUSTICE-CLERK.—Having considered this appeal, I think it advisable that the case should be further dealt with in the way of inquiry as to facts. There is no doubt that if we take it upon the admissions and statements made at the bar, the case might be disposed of at once, but then, I think this being a stated case, it is necessary that whatever decision is given should be on the facts as stated in the case. It does not appear to me that we are in a satisfactory position on these facts to dispose of the matter. The Sheriff-substitute has held, on the authority of *Hall* v. *Snowden, Hubbard, & Company*,[9] that as the accident did not occur on the

[1] Jackson v. Rodger & Company, July 4, 1899, 1 F. 1053; Bruce v. Henry & Co., March 8, 1900, 2 F. 717 (Lord President, p. 721).
[2] Jan. 30, 1900, 2 F. 533.
[3] Flowers v. Chambers, L. R. [1899], 2 Q. B. 142.
[4] Stuart v. Nixon & Bruce, L. R. [1900], A. C. 79.
[5] Merrill v. Wilson, Sons, & Company, Limited, L. R. [1901], 1 Q. B. 35.
[6] Hall v. Snowden, Hubbard, & Company, L. R. [1899], 2 Q. B. 136; Jackson v. Rodger & Company, Jan. 30, 1900, 2 F. 533.
[7] Haddock v. Humphrey, L. R. [1900], 1 Q. B. 609.
[8] Laing v. Young & Leslie, Nov. 2, 1900, 3 F. 31; Merrill v. Wilson, L. R. [1901], 1 Q. B. 35 (A. L. Smith, M. R., at p. 41).
[9] L. R. [1899], 2 Q. B. 136.

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quay, but on the street, no accident occurred on, in, or about a factory within the meaning of the Workmen's Compensation Act, 1897. I am not satisfied that that is a sound finding in law. I think the case of *Hall*,[1] which he founds upon, was not a satisfactory decision, and I am not inclined to give weight to it. In any case, I do not think that what was done in that case excludes the operation here of this statute, in the view that if there is a place in which an accident happens which would be followed by inquiry by the Factory Inspector, then it is a place to which the statute of 1897 applies, and that that statute provides that there may be compensation where the accident happens "about" a factory, as well as "on or in" it. I therefore think that the case must go back to the Sheriff-substitute. (His Lordship then read the interlocutor which he proposed should be the finding of the Court.)

LORD YOUNG.—I have no objection to that course being taken, as your Lordship thinks we ought to have some further information on matters of fact than the case as stated by the Sheriff gives us. But my own opinion is that the facts stated by the Sheriff are sufficient for the decision of the case, that is to say, for the decision of the question of law which he says he has decided, and which he says he has referred to us for construction at the request of the party against whom his judgment is expressed. The accident here occurred on the street, immediately outside the wharf shed, and he finds now that there is no liability only in respect that the accident did not occur on the quay but on the street. Now, if we are of opinion—and I am certainly of opinion—that the quay part of the wharf is a factory within the meaning of the Act, then the only question is, whether this case falls within the Act, the accident having occurred in the course of an employment regarding the respondents' business, but having occurred not on the quay, not in or on the wharf itself, but on the street immediately outside the wharf shed. There is no other ground stated or suggested except that —that the accident did not occur on the quay of the wharf, but on the street immediately outside. Differing from the Sheriff, I am of opinion that that is not *per se* a ground for refusing liability. No other ground being suggested, my own opinion is that we might save the expense and delay of the case going back to the Sheriff, except for the purpose of determining the question of damages. That would be a less tedious and a less expensive thing than sending it back with an indication that there is something else for the Sheriff to consider and inform us about. I think myself that there is nothing else.

LORD TRAYNER.—The form of interlocutor which your Lordship has read expresses the view I take of the course that should now be followed. The case must go back to the Sheriff-substitute because we cannot either pronounce findings in fact or fix compensation. The only jurisdiction we have is to decide points of law submitted to us by the Sheriff, and points of law which he has himself decided one way or other. Now, this question has been put to us by the Sheriff—whether he was right in deciding as he has done. I think his decision is wrong. But I think we cannot at once

[1] L. R. [1899], 2 Q. B. 136.

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proceed to find that the pursuer, the claimant, is entitled to compensation, leaving it to the Sheriff merely to ascertain the amount; and for this reason: We are of opinion that the wharf was a factory. To that opinion the Sheriff-substitute must give effect. But then it is plain from the statement of facts before us that the accident did not happen on or in the wharf; and the only way, therefore, in which the appellant can bring himself within the statute is by shewing that the accident happened "about the wharf." The Sheriff-substitute states that the accident happened "immediately outside" the wharf. I do not know what that exactly means. It may mean 5 feet, it may mean 50 feet, it may mean 150 feet according to what the Sheriff's own view of what "immediately outside" is. The case must go back to the Sheriff in order to have that matter of fact inquired into and determined, but with the direction from your Lordships that the mere fact on which he proceeded—that this happened on the street—however near the wharf would not of itself be enough to set aside the appellant's claim. Your Lordships by interlocutor will direct him that that is not so; but it remains for him to ascertain and state what was the relative position of the site of the accident to the wharf, and on that he will determine, and if necessary he will determine whether the accident happened "about" a factory.

Lord Moncreiff.—I am also of opinion that this wharf is a factory in the sense of the Workmen's Compensation Act of 1897. As I read the case, the Sheriff's judgment amounts to this, that following the case of *Hall* v. *Snowden, Hubbard, & Company*,[1] he is of opinion that the wharf is not a factory in the sense of the Act. Now, in the Workmen's Compensation Act the word "factory" is said to include "any dock, wharf, quay, warehouse, machinery, or plant to which any of the Factory Acts is applied by the Factory and Workshop Act of 1895." The 23d section of the Factory Act of 1895 applies a variety of provisions to every dock, wharf, quay, and warehouse, amongst which are provisions in regard to accidents. Now, it was conceded in regard to this wharf that if an accident occurred upon it, the provisions of the Factory Acts would be called into operation and would apply. But then the respondents' argument is that, unless the accident in question—that is, the accident in respect of which this claim is made under the Workmen's Compensation Act of 1897—occurred "on" the wharf, the wharf could not be held to be a factory in the sense of the Workmen's Compensation Act of 1897. We must first ascertain whether the wharf is a factory. We find on looking at the Act of 1895 a variety of provisions, some of which may not apply to a wharf, but some of which undoubtedly do apply in certain circumstances. Thus this wharf is made subject to these conditions, and therefore satisfies the words of the Act of 1897 as being a wharf to which provisions of the Factory Acts are applied by the Act of 1895. That being so, with all deference to the judgment in the case of *Hall*,[1] I am of opinion that the wharf is a factory within the meaning of the Act of 1897.

But that does not end the question, because the accident did not occur actually "in" or "on" the wharf or quay. It is said to have occurred

[1] L. R. [1899], 2 Q. B. 136.

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"about" the wharf, and I certainly should have gathered from the statement of facts in this case that it occurred so close to the wharf as necessarily to be "about" it in the sense of the statute, and in accordance with various decisions on that section. But for two considerations I should have been prepared to decide the case now. In the first place, the case must go back to the Sheriff in order that he may settle the amount of compensation. The other point—and that has weighed a good deal with me—is this, that we are not here dealing with an ordinary process, where we are at liberty to proceed on admissions made at the bar; but we are dealing with a special case, and I should be sorry to introduce a loose practice as to admissions on matters of fact. As the case has to go back to the Sheriff to fix the compensation, I do not think there will be any additional expense or inconvenience in asking him to decide the question of fact as to which we have not information in the case, that is to say, how close to the wharf this accident occurred. It will probably turn out that it happened just at the gate or entrance to the quay, and if so, there can be no doubt on the decisions that it was sufficiently near this "factory" to enable the appellant to recover compensation.

THE COURT pronounced this interlocutor:—"Recall the interlocutor of the arbitrator: Find (1) that the wharf referred to in the stated case occupied by the respondents is a factory within the meaning of the Workmen's Compensation Act, 1897; and (2) that the fact that the accident in question happened on a public street 'immediately outside the wharf shed' does not *per se* exclude the claim of the appellant; and with these findings remit to the arbitrator to proceed with the application as accords."

SIMPSON & MARWICK, W.S.—BOYD, JAMESON, & KELLY, W.S.—Agents.

No. 108.

Mar. 13, 1901.
Halstead v. Alex. Thomson & Sons.

CHARLES HALSTEAD, Claimant (Respondent).—*Salvesen, K.C.—Munro.* ALEXANDER THOMSON & SONS, Defenders (Appellants).—*Watt, K.C.—Cook.*

Master and Servant—Workmen's Compensation Act, 1897 (60 *and* 61 *Vict. cap.* 37), *sec.* 7 (1)—*Building exceeding thirty feet in height—Part of building below ground—Foundations—Question of fact or law—Undertaker.*—A wash-house, built to the order of the Police Commissioners of a burgh, was 30 feet 5½ inches in height above its foundation. Immediately above the foundation was a basement floor 6 feet below the level of the surrounding ground which contained pipes in connection with the wash-house. The floor of the wash-house was 6 feet 4 inches above the basement floor.

Held that the question whether or not a building exceeded 30 feet in height, in proceedings under the Act, was one of fact for the determination of the arbitrator.

Opinions that the building exceeded 30 feet in height in the sense of section 7 (1) of the Workmen's Compensation Act, 1897.

Question whether in estimating the height of a building for the purposes of the Act, the foundations are to be taken into account.

Opinion (*per* Lord Young) that the undertakers of the building in the sense of the Act were the Police Commissioners, and not the tradesmen employed by them.

Master and Servant—Workmen's Compensation Act, (60 *and* 61 *Vict.*

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cap. 37), *sec.* 7 (1)—*Building constructed by a scaffolding—Scaffolding not in use nor erected at time of accident—Question of fact or law.*—In the construction of a building, scaffolding, consisting of trestles and planks, was used from time to time from the beginning to the end of the job. During the construction an accident happened to a workman, at a time when the scaffolding, although its component parts were there, was neither in use nor erected.

Held that at the time of the accident the building was being constructed by means of a scaffolding in terms of sec. 7 (1) of the Workmen's Compensation Act, 1897.

Opinions by the Lord Justice-Clerk and Lord Young and Lord Trayner that, in proceedings under the Act, the question whether or not at the time of the accident the building was being constructed by means of a scaffolding, was one of fact to be determined by the arbitrator.

2D DIVISION.
Sheriff of Lanarkshire.

IN an arbitration in the Sheriff Court at Glasgow on a claim under the Workmen's Compensation Act, 1897, at the instance of Charles Halstead against Alexander Thomson & Sons, masons and builders, Glasgow, the Sheriff-substitute (Balfour) awarded the pursuer compensation.

The defenders obtained a case, which stated:—"The following facts were admitted or proved:—

"1. That the respondent was employed as a watchman during the building, by the Police Commissioners of Glasgow, of a public wash-house in Bain Square, Glasgow, and the appellants were the contractors for the mason and brick work of the building.

"2. That the respondent was in the employment of the appellants, who had a weekly allowance from the Corporation for his services.

. . .

"4. That in the winter of 1899-1900, the Police Commissioners erected the wash-house, which is a building of one flat, with a roof on which there is a large cupola for the purpose of light and ventilation, and that underneath the floor of the wash-house there are conduits or culverts, which contain pipes for carrying steam and water in connection with the wash-house. . .

"6. That the culverts are formed with brick walls and concrete floors, so that men may walk along them to look after the pipes, and that the culverts occupy two-fifths of the area of the ground underneath the floor of the wash-house, and they constitute a separate basement in connection with the wash-house.

"7. That the height of the building without the foundation is 30 feet 5½ inches from the floor level of the subway or culvert to the top of the cupola, consisting of 6 feet 4 inches from the level of the subway to the floor of the wash-house, 15 feet 7 inches from the floor of the wash-house to the roof of the wash-house, and 8 feet 6½ inches from the roof of the wash-house to the top of the cupola.

"8. That the building was being constructed by means of a scaffolding, and the various tradesmen on the job used the scaffolding between May 1899 and July 1900, and that the scaffolding consisted of trestles and planks, and that it was used from the beginning of the job to the end of it by the various tradesmen, including plasterers, engineers, bricklayers, painters, plumbers, and joiners, according to their requirements.

"9. That the scaffolding was used by the appellants themselves prior to the accident, and on various occasions subsequent thereto, down to June 1900, and although the scaffolding was not always in use, and on the day of the accident was not erected, it was always on the ground, and was used from time to time from the beginning to

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the end of the contract, and that it was not removed until July or August 1900.

"10. That there were sundry openings in the floor of the washhouse for the laying of pipes, and on 20th January 1900 the respondent, while crossing one of these openings on planks, fell into the opening and sustained injuries, including a double fracture of his right thigh, from which he has not yet recovered.

"In these circumstances I found that the respondent was engaged in or about a building exceeding thirty feet in height, and which was being constructed by means of a scaffolding, and that he was entitled to compensation from the appellants, and I awarded him a weekly payment of 7s. 6d., commencing as on 3d February 1900, and continuing thereafter till the further order of the Court. I also found the respondent entitled to expenses."

The questions of law for the opinion of the Court were—"(1) Whether the building in question at the time of the accident exceeded thirty feet in height, within the meaning of section 7 (1) of the Workmen's Compensation Act, 1897? (2) Whether it was at the time of the accident being constructed by means of scaffolding, in terms of section 7 (1) of the Workmen's Compensation Act, 1897?"*

Argued for the defenders;—(1) The point to reckon height from was the surface of the ground, and as the culverts were below the level of the ground, the building here was less than thirty feet in height. This question had not hitherto been decided, although it had been raised.[1] (2) The Act inferred liability only when the scaffolding was in use at the time of the accident, just as it limited liability to an accident occurring at a time when a building was more than thirty feet high.[2] But this was not a scaffolding in the sense of the Act. It was merely a collection of materials for a scaffolding, with no cohesion and nothing composite about it, and was no more a scaffolding than a ladder was. Similar trestles and planks had been held not to be a scaffolding in the sense of the Act.[3] In *Hoddinott's* case[1] the question of what was a scaffolding was held to be a mixed one of fact and law.

Argued for the pursuer;—(1) The height of the building was to be measured from the top of the foundation. These culverts, although below the level of the ground, were above the foundation, and were an essential and integral part of the building. The question was one of fact, and the finding of the arbitrator was not open to review. (2) The question whether the building was being constructed by means of a scaffolding was one of fact for the arbitrator, and his finding was not open to review. This had been expressly decided,[4] and the *obiter dicta* in *Hoddinott*[1] did not go against these decisions. (3) It did not matter that the scaffolding was not in use nor erected at the time. The statute was a remedial one, and not to be construed

* The Workmen's Compensation Act, 1897 (60 and 61 Vict. cap. 37), sec. 7 (1), enacts that the Act is to apply, *inter alia*, to employment "on, in, or about any building which exceeds thirty feet in height, and is either being constructed or repaired by means of a scaffolding."

[1] Hoddinott v. Newton, Chambers, & Co., L. R. [1899], 1 Q. B. 1018 (*vide* A. L. Smith, L. J. p. 1021), L. R. [1901], A. C. 49.

[2] Billings v. Holloway, L. R. [1899], 1 Q. B. 70.

[3] Stack v. Coulsell Bros., 1899, 106 L. T. 342.

[4] Ferguson v. Green, L. R. [1901], 1 Q. B. 25; Maude v. Brook, L. R. [1900], 1 Q. B. 575.

strictly against the workman. If it had been meant to limit the application of the statute to cases where the scaffolding was actually in use at the time of the accident, it would have been so expressed.

LORD JUSTICE-CLERK.—I think that the questions before us are questions of fact, and I agree that the Sheriff-substitute has rightly decided them. I only wish to guard myself against being thought to sanction the idea that in all cases the height of a building is to be measured from the actual foundation. I am not at all clear as to that. I have myself seen builings where in order to get a foundation the workmen required to go a great deal further down into the ground than the building was intended to be erected above the level of the ground, and where after the foundations were laid the excavations about them were filled up with soil. In such cases it would be difficult to hold that the height of the building was to be measured from the lowest point at which any building work on the first foundation stone had been placed.

LORD YOUNG.—On the questions put to us I have really no doubt whatever. The Sheriff has decided in point of fact that the building measured from the foundation is over 30 feet in height. So far it is a simple question of fact. The point represented as a point of law is, whether, if the foundation of a building is reached by digging below the ordinary level of the earth, the space so excavated is to be taken into account in measuring the height. I suppose there are very few houses that have their foundations on the natural level of the ground. There is nothing with which one is more familiar than excavating in order to put the foundation of a building below the level of the soil. Very often the foundation itself is made by building, in some cases with which we are familiar in Edinburgh, the foundations of the houses are constructed of wooden piles, and very good foundations they are said to make. But in the present case there is no difficulty, and we do not need to consider whether the artificial foundations of a building are to be included in its height, because in this case it has been ascertained by the Sheriff that the height of the building, without including the foundation, is more than 30 feet.

As to the question about the scaffolding, I agree with the English Judges in the cases referred to by the respondent, that the question is one of fact. The Sheriff-substitute has found, as matter of fact, that the building was being constructed by means of a scaffolding. I have therefore no doubt that we must take it as a matter of fact that this building was being constructed by means of a scaffolding.

I wish to say that I see no ground, and none was stated, for another question not being raised in this case viz.,—Who were the undertakers here in the sense of the Act? In my opinion the undertakers in this case were the Glasgow Police Commissioners. In carrying out the undertaking they had to employ tradesmen, just as a railway company has to employ tradesmen to repair their stations, &c. But the railway company is in such cases the undertaker notwithstanding. I merely notice that in order to guard against it being said hereafter that I concurred in a judgment in which damages under the Act were awarded against tradesmen employed by the real undertakers in the sense of the Act.

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LORD TRAYNER.—In dealing with this case, the difficulty I have experienced is in discovering any question of law raised by it at all. What were termed the questions of law appear to me to be questions of fact. The first is, "Whether the building in question at the time of the accident exceeded 30 feet in height within the meaning of section 7 (1) of the Workmen's Compensation Act, 1897?" Now, I quite understand that a question might arise as to the exact point from which the height of the building was to be measured, and this may admit of different views on the part of the Judges dealing with that matter. But, nevertheless, the question whether a building is or is not 30 feet in height is a question of fact. If, however, any question of law has arisen on which we can give an opinion, I have no doubt that this building was 30 feet high within the meaning of the Act, as it has been found in fact that the height of the building *above* the foundations was 30 feet 5½ inches.

The second question is, "Whether the building was at the time of the accident being constructed by means of a scaffolding, in terms of section 7 (1) of the Workmen's Compensation Act, 1897?" The Sheriff-substitute has held that it was. This question, I also think, is one of fact, but, as far as it may be held to raise a question of law, I think that the Sheriff-substitute's decision thereon is right.

I am not prepared to concur in the view that the Corporation of Glasgow were here the undertakers. But on that question no decision is called for.

LORD MONCREIFF.—The point on which an opinion has been expressed by Lord Young, as to who are the undertakers in the sense of the Act, is not raised in the case before us; and on that matter I reserve my opinion.

Turning to the two questions put to us in the case. I think the first is not a question of law, but purely a question of fact, which, so far as I can judge, was rightly decided. A question of law or construction of the statute may be involved in the second question; because it is found in the case that the scaffolding was not actually erected and in use on the day of the accident. Notwithstanding that, I am inclined to think that the building was at the time of the accident being constructed by means of scaffolding in the sense of the Act. The scaffolding was regularly used from time to time by all the tradesmen engaged in the work during the construction of the building both prior and subsequently to the accident; and it was not removed from the building till six months after the accident.

THE COURT answered the questions in the affirmative, and affirmed the arbitrator's award.

ST CLAIR SWANSON & MANSON, W.S.—CUTHBERT & MARCHBANK, S.S.C.—Agents.

MRS MARY STEWART OR BAIRD, Pursuer.—*Guy.*
S. HIGGINBOTHAM & COMPANY, LIMITED, Defenders.—*Salvesen, K.C.* —*Hunter.*

No. 109.

Mar. 14, 1901.

Baird v. Higginbotham & Co., Limited.

Master and Servant—Workmen's Compensation Act, 1897 (60 *and* 61 *Vict. c.* 37), *sec.* 1 (4)—*Motion to find compensation due under Act in action of damages which had been dismissed.*—Sec. 1 (4) of the Workmen's Compensation Act, 1897, enacts: "If within the time hereinafter in this Act limited for taking proceedings an action is brought to recover damages independently of this Act for injury caused by any accident, and it is determined in such action that the injury is one for which the employer is not liable in such action, but that he would have been liable to pay compensation under the provisions of this Act, the action shall be dismissed; but the Court in which the action is tried shall, if the plaintiff shall so choose, proceed to assess such compensation."

An action by a widow for damages in respect of the death of her husband by accident on 2d January 1900 was raised within two months of the accident. The action was dismissed as irrelevant by the Sheriff on 16th June 1900, and, on appeal, by the Court of Session on 29th November 1900.

On 14th February 1901 the pursuer applied to the Court for a finding that compensation would have been due under the Workmen's Compensation Act, 1897, and to assess the same in terms of sec. 1 (4) of the Act.

The Court *refused* the application.

MRS MARY STEWART OR BAIRD, widow of James Baird, Polmadie, Glasgow, and the four children of the marriage, raised an action in the Sheriff Court at Glasgow, against S. Higginbotham & Company, Limited, Glasgow, for damages at common law, and under the Employers Liability Act, 1880, in respect of the death of the said James Baird by accident on 2d January 1900. This action, which was brought within two months of the accident, was dismissed as irrelevant by the Sheriff-substitute on 16th June 1900, and, on appeal, by the Second Division of the Court on 29th November 1900. 2D DIVISION.

On 14th February 1901, Mrs Baird, as the sole dependent of the deceased, presented a note to the Lord Justice-Clerk in which, after narrating the facts as already stated, and referring to the record in the action (which she stated was still pending), and to section 1 (4) of the Workmen's Compensation Act, 1897,* she prayed his Lordship to move the Court to find that she would have been entitled to compensation under the Workmen's Compensation Act, and to assess such compensation.

Argued for the pursuer;—The Workmen's Compensation Act was a remedial Act, to be construed, if possible, in favour of the workman or his dependants, and there was nothing in the circumstances of this case to exclude the operation of section 1 (4), the terms of which were wide enough to entitle the Court to give the remedy asked.

Argued for the defenders;—Section 1 (4) of the Act contemplated that a finding that a defender would have been liable under the provisions of the Act must precede the dismissal of an action brought independently of the Act in order to entitle a pursuer to the remedy asked for here. Here there had been no such finding. Further, the provisions of the section were not applicable where the Court could not itself proceed to assess the compensation.

* Quoted in the rubric.

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LORD JUSTICE-CLERK.—I am sorry to say that I have no hesitation in holding that the Court, having already pronounced a decree dismissing the action, is not now entitled under section 1, subsection 4, of the Workmen's Compensation Act, 1897, to assent to this demand for an inquiry as to whether the pursuer is entitled to compensation under the provisions of the Act.

LORD YOUNG.—This note was presented on 14th February 1901 in connection with a Sheriff Court action which had been dismissed by the Sheriff on 16th June 1900, and by this Court on appeal from the Sheriff's decision on 29th November last. By this note the pursuer attempts to put forward in this action a claim alleged to be competent under section 1 (4) of the Workmen's Compensation Act. I do not think it is possible. There can be no further procedure in the action. It is too late in the month of February 1901 to propose that a claim under the Workmen's Compensation Act should be inquired into in an action which has been dismissed by the Sheriff in June 1900 and on appeal by this Court in November last. That is sufficient to dispose of this motion.

LORD TRAYNER and LORD MONCREIFF concurred.

THE COURT refused the prayer of the note.

HENRY ROBERTSON, S.S.C.—MACPHERSON & MACKAY, S.S.C.—Agents.

No. 110.

CHARLES C. MACDONALD, Pursuer.—*Clyde.*
JAMES HEDDERWICK & SONS, Defenders.—*Cooper.*

Mar. 16, 1901. Macdonald v. Hedderwick & Sons.

Process—Proof—Diligence—Action of damages for slander—Newspaper—Circulation—Income-Tax Receipts—Defenders' Books.—In an action of damages for slander by a jeweller against the publishers of a newspaper, the pursuer averred, *inter alia*, that the alleged slander had seriously injured his business credit and reputation. *Held* (1) that the defenders were entitled to recover the income-tax receipts of the pursuer for three years, and (2) that the pursuer, while not entitled to recover the books generally of the defenders, or excerpts from any of them, tending to shew the localities in which the newspaper was circulated, was entitled to recover excerpts tending to shew the number of copies in circulation about the date of the alleged slander from the book or books in which the defenders recorded the numbers of the newspapers issued and sold by them.

1ST DIVISION. Lord Low.

CHARLES C. MACDONALD, jeweller, Glasgow, raised an action against James Hedderwick & Sons, proprietors and publishers of the *Glasgow Evening Citizen* newspaper, concluding for £2000 of damages for an alleged slander.

The pursuer averred that the Clan Macdonald Society having resolved to present a sword of honour to Major-General Hector Macdonald, selected a design, and accepted an estimate therefor by the pursuer, that the sword was duly completed and subsequently presented, and that thereafter the defenders, in the number of their newspaper published on 5th September 1900, printed an article containing the alleged slander, representing that the pursuer in the matter of the sword had defrauded the subscribers by dishonestly supplying them with an article of little value, that came to pieces when handled.

The pursuer further averred:—"The publication of the article complained of has inflicted serious injury on the pursuer's reputation and feelings. In the pursuer's business, both wholesale and retail, the absolute confidence of the public, and of his customers, in his

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integrity and honest dealing, is essential. The defenders' newspaper is widely circulated and read by a large section of the public, and the dissemination by its means of the false and slanderous statements complained of has seriously injured the business credit and reputation of the pursuer, besides injuring his feelings."

The defenders admitted that the defenders' newspaper was widely circulated and read by a large section of the public, but denied that the article in question contained any libel on the pursuer.

An issue having been approved for the trial of the cause, the defenders, on 13th March, moved for a diligence to recover, *inter alia*, —"3. The receipts for income-tax paid by the pursuer for the years 1898-1899, 1899-1900, 1900-1901," and cited the case of *Johnston* v. *Caledonian Railway Company*.[1]

The pursuer opposed the motion, and argued that in a case like the present the proper evidence of injury to business was to be found in the business books. There was no precedent for the recovery of income-tax receipts in an action of damages for slander.

LORD PRESIDENT.—There is no doubt that there was at one time a variation in the practice as to granting a diligence for the recovery of income-tax receipts, but for a considerable time it has been settled—and it is very important to adhere to a settled rule of practice—that such a diligence may be granted in actions of damages for loss of business through personal injury. The reason for granting such a diligence must be to enable the jury to compare the earnings of the pursuer before and after the injury, and for that purpose such receipts are often used. A man's books do not form absolute proof of what his profits are, and they may be kept in such a way as not to shew his profits at all. Nor are they in themselves evidence. They require to be proved, and often also explained by witnesses.

Income-tax receipts are more direct as containing a man's own statement, and he cannot complain if he is asked to explain why they shew a different result from the books if they are not in harmony. The pursuer may say that, either through mistake or otherwise, he has returned his income too low, but I can see no difference in principle between an action of damages for loss of business through personal injury and an action for loss of business in consequence of slander.

LORD ADAM.—I am of the same opinion. If a man's books were conclusive evidence of his profits in business, it might be irrelevant to ask for diligence to recover other evidence in order to contradict them. But the books are not conclusive evidence, and they may or may not be the best evidence according to circumstances. They may be kept in such a way as not to be entitled to any credit. I think that the statement which a man gives to the Income-Tax Commissioners as his income is relevant evidence of his profits, and may be better evidence than his books. That shews that these receipts may be of importance with regard to the cardinal fact in question, *i.e.*, what was the amount of the pursuer's profits. I agree that if a man chooses to make a statement of his profits less than he actually earned in his income-tax returns, though it may hurt his feelings to be examined upon them, that is no reason why these receipts should not be used as evidence.

[1] Dec. 22, 1892, 20 R. 222. The case of Christie v. Craik, July 20, 1900, 2 F. 1287, was not cited by either party.

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LORD M'LAREN.—It must be kept in view that while one man may understate his profits for the purpose of paying income-tax on a less income another may overstate his profits, in the case, for instance, when he proposes to take in a capitalist partner, or to turn his business into a company. Neither the books nor the income-tax receipts are evidence until proved, but if the books are proved, by the testimony of the pursuer that they are correctly kept, that would not prevent the other party from leading evidence to contradict them. It seems to me that the reasons for granting a diligence of this kind in accident cases apply, though not, perhaps, in the same degree, to other cases in which the amount of the pursuer's income is an element in the case.

LORD KINNEAR.—I do not see any distinction between one case in which the pursuer complains of loss of business and another. I think the rule must be the same whether the cause of loss be personal injury or slander. I do not at all proceed on the assumption that the income-tax receipts will contradict the pursuer's books, but it appears to me, as your Lordships have explained, that though the income-tax receipts are not evidence they may be made evidence by putting them to the pursuer, and asking him whether these are the sums he paid, because the fact that he paid at a certain rate is an item of evidence tending to shew what the amount of his profit really was. In that respect they stand on the same footing as the pursuer's books; they are neither of them conclusive evidence, but they may be made evidence if the pursuer is properly examined upon them.

THE COURT granted the diligence.

On 16th March 1901 the pursuer moved for a diligence to recover documents in terms of a specification, the first article of which was as follows:—"1. The books of the defenders relating to the business carried on by them as proprietors and publishers of the *Glasgow Evening Citizen* newspaper, including their cash-books, ledgers, day-books, sales-books, balance-sheets, and generally all books and memoranda shewing or tending to shew the number of copies of the *Glasgow Evening Citizen* sold, or circulated, and the places in which such copies were sold or circulated, in the years 1899 and 1900."

The pursuer stated that he was willing to restrict the time to "in or about the month of September 1900."

The defenders opposed the motion, and argued that there was no necessity for leading evidence of any kind shewing the numbers of the newspaper in circulation, for the defenders admitted on record all that the pursuer said on that subject. But in any view the competent mode of proving both the extent and the locality of the circulation was by examining the defenders or their managers and their agents for the sale of the paper. It was out of the question, and altogether incompetent, for the pursuer to recover the books of the defenders "*en bloc*."

LORD ADAM.—My view of this case is that the pursuer is entitled to know the average circulation of the newspaper at the time of the alleged slander. He is not bound to take as sufficient the statement of the officials of the defenders by putting them into the witness-box. To restrict him to that would be against all principle. I mean that it would not do to refuse

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the diligence merely on the ground that the pursuer is able to get the evidence he requires by putting the defender into the witness-box. Accordingly, I think that the pursuer is entitled to some information from the books, but I demur to granting an order in the terms of the specification, viz.:—(His Lordship read the part of the specification which is quoted *supra*). That call is a great deal too wide, and would open up an inquiry into the whole business of the company. If, however, there is a book, or if there are books, in the business which would shew the number of copies printed and issued, then I think the pursuer is entitled to the information that he can get from them. That is a matter probably that can easily be adjusted by the parties.

As to the call for excerpts of entries shewing the particular places where the newspaper was disposed of, I do not think that that is a matter to be granted. That is a question of fact which ought to be ascertained and proved in the usual way, and not by means of entries from the defenders' books. I am for refusing that part of the specification.

LORD M'LAREN.—I think that it is the right of the pursuer to obtain a return of the approximate circulation of the newspaper in question at the time of the alleged libel. The expense of a diligence—in a case like the present—is often obviated by the defender voluntarily giving the information which is sought. As that has not been done here, I think the pursuer is entitled to a diligence. As regards the distribution of the circulation throughout the west of Scotland, I think that that is a fact which is capable of being proved by oral evidence within such limits of accuracy as are required for the purposes of the case, and I agree that this part of the specification ought not to be granted.

The LORD PRESIDENT and LORD KINNEAR concurred.

The specification was then amended at the bar so as to read:—"The books of the defenders relating to the business carried on by them as proprietors and publishers of the *Glasgow Evening Citizen* newspaper containing records of the number of copies printed, issued, sold, or returned, that excerpts may be taken therefrom by the commissioners, shewing the average circulation of the paper for the month of September 1900."

THE COURT granted the diligence for recovery of documents in terms of the specification as amended.

WALTER C. B. CHRISTIE, W.S.—MILLAR, ROBSON, & M'LEAN, W.S.—Agents.

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ALEXANDER COWAN & SONS, LIMITED, Applicants (Respondents).—*Ure, K.C.—Clyde.*

NORTH BRITISH RAILWAY COMPANY, Respondents (Appellants).—*D.-F. Asher—Sol.-Gen. Dickson—G. G. Grierson.*

Railway—Reasonable Facilities—Undue Preference—Private Siding—Railway Commissioners—Jurisdiction—Railway and Canal Traffic Act, 1854 (17 *and* 18 *Vict. cap.* 31), *secs.* 1 *and* 2.—The Railway and Canal Traffic Act, 1854, enacts, sec. 1:—"The word 'railway' shall include every station of or belonging to such railway used for the purposes of public traffic." Sec. 2.—"Every railway company . . . shall, according to

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their respective powers, afford all reasonable facilities for the receiving and forwarding and delivering of traffic upon and from the several railways . . . belonging to and worked by such companies respectively . . . and no such company shall make or give any undue or unreasonable preference or advantage to or in favour of any particular person or company or any particular description of traffic, in any respect whatsoever, nor shall any such company subject any person or company or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

The North British Railway company, which had for many years received and delivered goods for a firm of traders at a siding belonging to the traders, intimated to them that they would no longer deliver coal at the siding. The railway company continued to deliver at the siding all other goods consigned there. In an application by the traders, the Railway Commissioners pronounced an order finding that the railway company in refusing to deliver coal at the junction of their railway with the siding in question, had not afforded to the traders all due and reasonable facilities for the delivery of their coal traffic, and ordering the company to afford such facilities accordingly. In an appeal by the railway company, *held* (by a Court of seven Judges, *diss.* Lord Young and Lord Moncreiff) (1) that the owner of a private siding on a railway had no other right than a right to use the railway as a highway for his own engines and carriages on payment of tolls; (2) that although a railway company had power to receive and deliver goods at a private siding, it was under no obligation to do so; (3) that the fact that a railway company had been in the practice of receiving and delivering goods at a private siding for a series of years created no obligation on the railway company to continue to do so; (4) that a railway company was entitled to deliver certain classes of goods at a private siding without thereby coming under an obligation to deliver other classes of goods; and therefore (5) that as the North British Railway Company was under no obligation to deliver goods at the private siding, the provisions in section 2 of the Railway and Canal Traffic Act, 1854, as to affording all reasonable facilities for the receiving and delivery of traffic, had no application, and that the Railway Commissioners had no jurisdiction to issue the order requiring the railway company to deliver coal at the private siding.

The Railway Commissioners further pronounced an order finding that the railway company in delivering coal at the private sidings of other traders in the neighbourhood, competitors in trade with the applicant traders, and refusing to deliver coal at the applicants' siding, had given to such other traders an undue preference, and subjected the applicants to an undue prejudice, and ordering the railway to desist from so doing.

Held (by the Second Division) that this order was within the jurisdiction of the Commissioners.

2d Division, with three consulted Judges.

Court of Railway and Canal Commissioners.

UNDER the powers of the Penicuik Railway Act, 1870, the Penicuik Railway Company (afterwards amalgamated with the North British Railway Company) constructed a railway from the Peebles branch of the North British Railway Company to Penicuik. At or about the same time Messrs Alexander Cowan & Sons (afterwards Alexander Cowan & Sons, Limited), papermakers, Penicuik, constructed three sidings on their own land, and at their own expense, to connect their mills with the Penicuik Railway. These sidings came into use at the same time as the opening of the railway in 1872, and from that time until 22d March 1900, when the notice after mentioned was sent by the railway company to Messrs Cowan, practically the entire traffic consigned to or sent out by Messrs Cowan was delivered at, or

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uplifted from, these sidings by the railway company. One of the sidings, called the Low Mill siding (to which alone the proceedings now reported related), formed a junction with the Penicuik Railway at a point outside the Penicuik distant signal, twenty-two chains from Penicuik Station.* The incoming traffic at the Low Mill siding consisted chiefly of coal, esparto grass, and rags for Messrs Cowan's paper-mills. The incoming coal traffic averaged about 30,000 tons a year.

In November 1899 Messrs Cowan filed an application to the Railway Commissioners for a rebate on the coal rate charged by the railway company on coal delivered by them at the Low Mill siding, on the ground that that rate included a terminal charge for station accommodation and terminal services, and that the coal did not receive any such accommodation and services at Penicuik Station.

Thereafter, on 10th March 1900 (before the above-mentioned application had been heard), the manager of the railway company sent a notice in the following terms to Messrs Cowan:—"I beg to give you notice that from and after 22d curt. this company will not accept or carry coal for delivery at your Low Mill siding. We are advised that we are under no obligation to stop our trains specially at Low Mill siding to give or take delivery of your traffic, and we have resolved to cease to do so with regard to coal after 22d current. Be so good, therefore, as make arrangements to take delivery of your coal at Penicuik Station, and advise the various collieries from whom you purchase."

On 22d March, accordingly, the railway company ceased to deliver at the Low Mill siding coal consigned to Messrs Cowan at that siding. They continued to deliver at the siding all other traffic so consigned, but the coal they took on to Penicuik Station and tendered delivery there. They offered to allow the waggons containing the coal to be hauled back to the Low Mill siding on payment of 3d. per ton if the haulage was by one of their engines, or of 2d. per ton if the haulage was by Messrs Cowan's engine. Messrs Cowan declined this offer, and for about a week they took delivery of the coal at Penicuik Station, and carted it to their mills. An agreement was then come to by which the railway company resumed delivery of coal at Low Mill siding, without prejudice to the rights and pleas of either party, pending an application to the Railway Commissioners.

In pursuance of this agreement Messrs Cowan, on 3d April 1900, presented the application now reported.† In the application they

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* The two other sidings joined the railway at points within the Penicuik distant signal.

† The following enactments were, *inter alia*, referred to by the parties:—

Railways Clauses Consolidation (Scotland) Act, 1845 (8 and 9 Vict. cap. 33)—

Sec. 69. "That this or the special Act shall not prevent the owners or occupiers of lands adjoining to the railway, or any other persons, from laying down, either upon their own lands or upon the lands of other persons, with the consent of such persons, any collateral branches of railway to communicate with the railway for the purpose of bringing carriages to or from or upon the railway, but under and subject to the provisions and restrictions of" the Railway Regulation Act, 1842, "and the company shall, if required, at the expense of such owners and occupiers and other persons, and subject also to the provisions of the said last-mentioned Act, make openings in the rails and such additional lines of rail as may be necessary for effecting such communication in places where the communication can be

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gave a narrative of the circumstances, out of which the case arose, and averred further:—"8. The respondents deliver coal at the sidings of other papermakers who are rivals in trade with the applicants on the Penicuik Railway, and thus subject the applicants to an undue and unreasonable prejudice and disadvantage. . . . The applicants' siding was made and is kept up and worked at great expense by the applicants; and, by the respondents' refusal to deliver coal at the applicants' siding, and by their proposed extra charge of a toll of 2d. or 3d. per ton as stated, the applicants are not only subjected to an undue and unreasonable disadvantage as compared with other traders, but are put to great loss and inconvenience. 9. . . . The respondents have never, since the sidings were originally constructed in terms of the statutes, in or about 1872, suggested that they were not bound to stop to deliver or receive traffic at the applicants' sidings. On the contrary, the sidings have been in regular use during the whole of that time; and, in consequence of the construction and use of said sidings, the respondents have been enabled to dispense with costly station and terminal accommodation which would otherwise have been necessary at Penicuik Station."

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made with safety to the public and without injury to the railway, and without inconvenience to the traffic thereon, and the company shall not take any rate or toll or other monies for the passing of any passengers, goods, or other things along any branch so to be made by any such owner or occupier or other person; but this enactment shall be subject to the following restrictions and conditions:" The conditions and restrictions were then set forth.

Sec. 85. " . . . Upon payment of the tolls from time to time demandable, all companies and persons shall be entitled to use the railway, with engines and carriages properly constructed as by this and the special Act directed; subject nevertheless to the provisions and restrictions of the Railway Regulation Act, 1842, "and to the regulations to be from time to time made by the company in that behalf hereby and by the special Act conferred upon them."

Railway and Canal Traffic Act, 1854 (17 and 18 Vict. cap. 31)—

Sec. 1. "In the construction of this Act," *inter alia*, "the word 'railway' shall include every station of or belonging to such railway used for the purposes of public traffic."

Sec. 2. "Every railway company, canal company, and railway and canal company, shall, according to their respective powers afford all reasonable facilities for the receiving and forwarding and delivering of traffic upon and from the several railways and canals belonging to or worked by such companies respectively, and for the return of carriages, trucks, boats, or other vehicles; and no such company shall make or give any undue or unreasonable preference or advantage to or in favour of any particular person or company, or any particular description of traffic, in any respect whatsoever, nor shall any such company subject any particular person or company or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; and every railway company and canal company and railway and canal company having or working railways or canals which form part of a continuous line of railway or canal or railway and canal communication, or which have the terminus, station, or wharf of the one near the terminus, station, or wharf of the other, shall afford all due and reasonable facilities for receiving and forwarding all traffic arriving by one of such railways or canals by the other, without any unreasonable delay, and without any such preference or advantage or prejudice or disadvantage as aforesaid, and so that no obstruc-

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The applicants applied to the Commissioners for an order—"(1) Enjoining the respondents to afford the applicants all reasonable facilities for the receiving and forwarding and delivery of traffic upon and from their sidings, and for the return of carriages, trucks, and other vehicles; (2) declaring the arrangements and facilities for such traffic existing prior to the hereinbefore-mentioned date, 22d March 1900, between the applicants and the respondents, to be reasonable; (3) enjoining the respondents to restore, and to desist from again interrupting such facilities, and obstructing the applicants in the exercise thereof; (4) ordering them to desist from subjecting the applicants to an undue or unreasonable prejudice or disadvantage in respect of the use of their sidings, and to desist from giving to other traders or to themselves any undue preference or advantage over the applicants; and (5) that the applicants might have such other relief as the nature of the case may require."

The railway company answered, *inter alia*:—"The application is incompetent. The Court has no jurisdiction. The applicants' averments, . . . so far as material, are unfounded in fact. The respondents are not bound to stop their trains at Low Mill siding to deliver the applicants' coal. In any event the demands are unreasonable. No order should or can legally be pronounced requiring or necessitating the respondents to stop trains at Low Mill siding in order to deliver coal for the applicants there. The application should be refused."

Proof was led. The facts established by the evidence, in so far as not narrated above, sufficiently appear from the opinions of the Commissioners and the Judges.

On 6th August 1900 the Commissioners pronounced the following order:—"This Court doth find and determine—(1) That the railway company in refusing to deliver coal at the junction of their railway with the Low Mill siding have not afforded to the applicants all due and reasonable facilities for the delivery of their coal traffic at the Low Mill siding. (2) That the railway company in delivering coal at the private sidings of other traders near Penicuik, competitors in trade with the applicants, and refusing to deliver coal at the applicants' Low Mill siding, have given to such traders an undue and unreasonable preference and advantage over the applicants, and subjected them to an undue and unreasonable prejudice. And this Court doth declare that the facilities given by the railway company up to the 22d day of March 1900 for delivery of the applicants' coal traffic at the Low Mill siding were reasonable, and such as ought to be

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tion may be offered to the public desirous of using such railways or canals or railways and canals as a continuous line of communication, and so that reasonable accommodation may, by means of the railways and canals of the several companies, be at all times afforded to the public in that behalf."

Railway and Canal Traffic Act, 1894 (57 and 58 Vict. cap. 54)—

Sec. 4. "Whenever merchandise is received or delivered by a railway company at any siding or branch railway not belonging to the company, and a dispute arises between the railway company and the consignor or consignee of such merchandise as to any allowance or rebate to be made from the rates charged to such consignor or consignee, in respect that the railway company does not provide station accommodation or perform terminal services, the Railway and Canal Commissioners shall have jurisdiction to hear and determine such dispute, and to determine what, if any, is a reasonable and just allowance or rebate."

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afforded by the railway company to the applicants. And this Court doth order and enjoin the railway company, their servants and agents, to afford all reasonable facilities for the delivery of the applicants' coal traffic at the Low Mill siding, and to desist from giving to traders, competitors in trade with the applicants, any undue and unreasonable preference or advantage over the applicants in respect of the delivery of coal at sidings not belonging to the railway company, and from subjecting the applicants to undue and unreasonable prejudice and disadvantage in respect of such delivery of coal at the Low Mill siding." *

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* The following were the opinions of the Commissioners :—

"SIR FREDERICK PEEL.—Messrs Cowan are papermakers, carrying on business in the Penicuik district, and have in connection with one of their mills a siding called Low Mill siding. This siding forms a junction with the Penicuik Railway, now North British, 22 chains north of Penicuik Station, and was constructed by Messrs Cowan on their own land and at their own expense at the same time as the Penicuik Railway, and has been in use ever since that railway was opened in 1872. Its incoming traffic consists chiefly of coal from Arniston and other collieries, and of esparto grass and rags from Granton, Leith, and other places, and the total yearly tonnage is very considerable, that of coal alone exceeding 30,000 tons. In November 1899 Messrs Cowan claimed to have a rebate of the company's coal rate, on the ground that it included the Penicuik terminal for station accommodation, or that it did not differ in amount from the coal rate to the station, although in the one case station accommodation was provided, and in the other was not. On 10th of March last, before the above claim could be heard, they received notice from the respondents that from and after 22d of March they would no longer accept or carry coal for delivery at the Low Mill siding, and that Messrs Cowan must make arrangements for taking delivery at Penicuik Station. They stated they were under no obligation to stop trains specially at Low Mill siding, either to give or take delivery of traffic there, and that they had resolved to cease to do so with regard to coal after 22d of March. They have continued to deliver all other traffic as before at the siding. Upon this state of facts, Messrs Cowan apply to us to determine whether, having regard to the obligations as to facilities imposed on railway companies by the Traffic Act, 1854, and to the railway company continuing to carry coal and other traffic to and from the private sidings of other persons, as well on the Penicuik Railway as all over the North British system, they have not a right to require the railway company to deliver coal at the Low Mill siding. Section 2 of the Act enacts that every railway company shall, according to their powers, afford all reasonable facilities for the receiving, forwarding, and delivering of traffic upon and from the railway worked by such company, and Messrs Cowan contend that the refusal of the respondents to deliver coal at the junction of their railway with the Low Mill siding is a contravention of the Act. It is part of the argument for the North British that the word 'railway' is defined in that Act to include stations used for the purposes of public traffic, and that this implies that a railway company is only bound to carry goods to and from stations on the railway. I do not think that section 1 (the interpretation clause) has this effect in determining the liability of a company as to delivery. All that it seems to do, so far as delivery is concerned, is to make a station and station ground a place at which the railway company shall give reasonable facilities for delivering traffic from it. It becomes a company's duty so to act, because a station used for purposes of public traffic is made part of the company's 'railway' within the meaning of the statute; but section 2 applies equally to every part of the railway, and I think that any place on a railway which, though not a station, has been

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The railway company appealed to the Second Division of the Court, and argued;—(1) The Railway Commissioners had no jurisdiction to ordain the company to stop their trains at the Low Mill siding. Stopping the company's trains there was not a reasonable facility within the meaning of section 2 of the Railway and Canal Traffic Act, 1854, and if it was not, the first branch of the Commissioners' order was outwith their jurisdiction. It made no difference that the conduct of the company in not stopping was, in the opinion of the Commissioners, unreasonable. The jurisdiction of the Commissioners did not extend to ordering a railway company to do anything which the Commissioners might consider to be reasonable. The Commissioners' jurisdiction, *quoad* facilities, was limited to such facilities as were facilities within the meaning of the Acts. If the thing craved was a facility in the statutory sense, it was for the Commissioners to determine whether in the particular case it was reasonable; if it was not a facility in the statutory sense the question of its reasonableness was irrelevant. The question was whether "the receiving, forwarding, and delivering of traffic upon and from the several railways belonging

made, by the company's course of dealing with its business, a usual terminus of the transit of particular traffic, is a place where it ought and can be required to deliver. Such a place is in the case before us the junction of the Penicuik Railway with the Low Mill siding. The junction is in a good position for the company's using it, and the siding has been conveniently laid out for exchanging trucks with the railway, and coal has been carried to it uninterruptedly since the railway was opened in 1872. It is not suggested that the safety or convenience of the public affords any reason for a change, and it may be taken upon the evidence that not only is the station unprovided with the accommodation that is wanted for the unloading and other requirements of a coal traffic of the quantity of Messrs Cowan's, but also that the only place at the side of the railway where such accommodation is supplied is the Low Mill siding. Looking at these circumstances, I think it is a reasonable facility within the meaning of the section that the respondents should stop their trains at the entrance of the siding, and deliver trucks intended for it by detaching and depositing them clear of the running line. It makes it, I think, the more reasonable that this facility should be given, that the company has obtained a monopoly of the carrying trade on its railway, and has made it impossible for siding traffic to be worked by the siding proprietors as contemplated by the Act (Railway Clauses Act, 1845), which gives them the right to connect their siding with the railway.

"Messrs Cowan further state that there are other papermakers in the Esk Valley, and that there is a private siding at Esk Mills, half a mile north of Penicuik, and another at Dalmore Mills, two miles from the station, and that at both these places the respondents are still delivering coal, and they complain that in the conveyance and delivery of coal they are subjected to a disadvantage from which other persons under no differing circumstances are exempted, and have not received that equality of treatment to which the Act of 1854 entitles them. The respondents have shewn no good reason to justify the difference complained of, and, I think, they ought to be enjoined to give Messrs Cowan the same facilities in the conveyance and delivery of coal that they give to other traders on the Penicuik Railway." Sir Frederick Peel then dealt with the application for a rebate which was decided by the Commissioners at the same time as the application now reported.

VISCOUNT COBHAM, as regarded the application now reported, stated that he entirely agreed with the views of his colleagues.

LORD STORMONTH-DARLING'S opinion, in so far as directed to the applica-

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to or worked by" the company included the stopping by the company of its own trains at this private siding. It did not, because a private siding was not a part of the railway within the meaning of section 2 of the Act of 1854. "Railway," as defined by section 1 of that Act, included only stations used for the purposes of public traffic, and there was nothing in the Act of 1854, or in any of the Railway Acts, to negative the almost necessary implication from section 1, that sidings like the Low Mill siding, which were the property of private persons, were not in any sense or to any effect part of the railway company's undertaking. The Railways Clauses Consolidation (Scotland) Act, 1845, section 69, gave private owners the right to have junctions formed between their private lines and the lines of a railway company, and section 85 of the same Act gave such a private owner the right to haul his traffic on the lines of the railway company on payment of tolls and subject to regulations; but there was not one word to suggest that the railway company as carriers had any duty in regard to such junctions—in particular there was not one word to suggest that the railway company were under any obligation to stop

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tion now reported, was as follows:—"I shall only add a few words on the questions of law which were raised in the argument. And first, in the application for reasonable facilities under the Railway and Canal Traffic Act, 1854, it is said by the railway company that we have no jurisdiction to compel them to stop their goods trains at Low Mill siding for the purpose of delivering the applicants' coal. This argument is founded mainly on the *Hastings* case, L. R., 6 Q. B. D. 586, and the *Darlaston* case [1894], 2 Q. B. 694.

"Now, I take it that this Commission sitting in Scotland is as much bound by a decision of the English Court of Appeal as if it were sitting in England, when the decision turns entirely upon the construction of a British statute. Accordingly, I accept implicitly the judgments in these two cases. The *Hastings* case lays down the proposition that we have no jurisdiction to order a railway company to make a new railway station, and the *Darlaston* case that we have no jurisdiction to make an order involving the re-erection *ex intervallo* of a station which has been closed. Both proceed upon the ground that there is no obligation upon a railway company to establish a station at any particular place, or, indeed, to work or maintain its line at all. But in the *Hastings* case Lord Selborne was careful to guard himself against any undue limitation of the powers of this Commission. After stating the proposition that a company is not bound to establish a station at any particular place, unless it thinks fit to do so, his Lordship added,—'But when the company has in fact opened a station at a particular place, and actually uses it for the purposes of public traffic, and invites the public to resort to it for the purpose of being received or delivered as passengers to or from trains announced as starting from or stopping at that station, or of having their goods received there for carriage or delivered there after carriage, it is, in my opinion, bound by the Act to afford at that station (to the extent of its powers) all reasonable facilities for receiving, forwarding, and delivering such passengers and goods.' Accordingly, if Lord Selborne had been dealing with a case in which a company refused to deliver a particular description of goods addressed to a particular trader at a public station, which was in full use for goods traffic, I conceive that his Lordship would have had no hesitation in sustaining the jurisdiction of this Commission to pronounce upon such a proposal as unreasonable, unless the company were able to adduce some good reason in support of it.

"Now, of course I am aware that a public station is not the same thing as a private siding. A public station is part of the railway, and a private

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their own trains at these junctions. It was well known, as a matter of railway history, that railway companies were at first regarded as likely to perform two distinct functions, namely, either as the owners of a highway—their railway—or as carriers. The former of these functions had come to be completely overshadowed by the latter, but the distinction was broadly marked in railway legislation, and was vital to the present question. Sections 69 and 85 of the Act of 1845 had to do only with the duties of railway companies as the owners of a highway; and it was not of a violation of these sections that Messrs Cowan complained. Their complaint was against the company as carriers. Now as carriers a railway company had a very large discretion. The exercise by them of their powers as carriers was permissive in this sense, that they were under no obligation to act as carriers at all, and if they did act as carriers they had an absolute discretion as to the places which should be stations for the receiving, forwarding, and delivering of traffic by themselves as carriers. They were not bound to build a station at any particular place,[1] or to rebuild one that had been discontinued.[2] That had been so held in regard to

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siding is not. But this siding was formed and connected with the main line under the provisions of section 69 of the Railway Clauses Consolidation (Scotland) Act, 1845. It was formed by the applicants at a cost (not including land) of over £6000, and their actual outlay in maintaining it is about £500 a year. It is at this moment in full operation, and there is no proposal on the part of the railway company to discontinue its use, except as regards coal. They are still willing to stop their trains there for the purpose of taking up and setting down the large general traffic of the applicants. The practical result of their proposal would often be (as shewn by the figures given in Mr Garden's evidence) that, having a mixed goods train composed of some trucks containing coal for the applicants and other trucks containing general merchandise, they would stop the train, uncouple the one set of trucks, and then carry on the others a quarter of a mile beyond their true destination. There is, therefore, no question of putting the respondents to loss or inconvenience, or of interfering with the legitimate discretion in the conduct of their business. A great deal must always be left to the discretion of a railway company, and, in judging what is a 'reasonable facility,' we are bound to consider what is reasonable in the interests of the company itself, as well as what is reasonable in the interests of the public or of a private trader. But here, if we do what the applicants ask, we shall not be dictating to the company how to marshal their goods trains, or what particular trains they are to stop; we shall only be requiring that they shall continue to deliver the applicants' coal in the same way as they have been doing for more than twenty years, and as they still propose to do in the case of all the applicants' other traffic.

"Accordingly, it seems to me that, although this is a private siding, it falls within the principle laid down by Lord Selborne in the passage which I have quoted. That principle is that, when a railway company has in fact instituted a practice, which it proposed to continue, of receiving and delivering traffic at a particular place on its system, it ceases to be absolute master of the mode in which the traffic at that place is to be conducted, but is bound to afford all reasonable facilities for receiving, forwarding, and delivering it. The owner of the siding has just as much interest to com-

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[1] South-Eastern Railway Co. v. Railway Commissioners (Hastings case), 1881, L. R., 6 Q. B. D. 586.

[2] Darlaston Local Board v. London and North-Western Railway Co., L. R. [1894], 2 Q. B. 694.

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public stations, and the principle applied *a fortiori* to private sidings. If then the company were not, as matter of general railway law, bound to stop at the Low Mill siding, the fact that they had since the opening of their line been in the practice of stopping there made no difference. On the assumption now made the practice was a purely voluntary one on both sides, which might be terminated by either party at pleasure. Nor did the fact that the company proposed to discontinue delivering coal only at the siding affect the question. It might be that railway companies could not arbitrarily refuse to deliver certain kinds of traffic at a public station, while continuing to deliver all other kinds of traffic there, but if their stopping at private sidings was a purely voluntary proceeding on their part, it followed that they were entitled to decline to stop there for the delivery of coal or any other particular kind of traffic, although they continued to deliver other traffic at the siding. (2) The Railway Commissioners had no jurisdiction to find that the company in delivering coal at sidings belonging to other traders near Penicuik, and refusing to deliver coal at the Messrs Cowan's siding, had given an undue preference to such other traders. The prohibition in section 2 of the Act of 1854 against undue preferences was confined to undue preferences in connection with the railway,[1] which, for the reasons already stated, did not include private sidings.

Argued for Messrs Cowan & Co.;—(1) The Railway Commissioners had jurisdiction to determine that the respondents, in refusing to stop at the Low Mill siding to deliver coal consigned there, were refusing reasonable facilities to Messrs Cowan. The case for the respondents was put on the ground that section 2 of the Act of 1854 was confined to the railway as an unbroken line and to public stations. That narrow construction of the statute was erroneous. "Railway" did not necessarily mean an unbroken line; a line of railway might be broken by compliance with a demand by a private trader under section 69 of the Act of 1845 for a junction with his siding. Section 69 gave private persons a right to obtain such a junction, and the junction when formed (although not the siding) became part of the "railway" for the purposes of its traffic; and if it was part of the railway, it was within the jurisdiction of the Railway Commissioners to determine whether the railway company were giving the private person reason-

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plain of any capricious alteration in the *status quo* as the public would have in the case of a public station. And the words of the statute are not limited to delivery at a public station, but extend to delivery from any part of the railway system. It is a different question whether we could compel a railway company to deliver goods at a newly-constructed siding, and I express no opinion with regard to that.

"I am therefore of opinion that our jurisdiction to entertain this application is clear. If so, there can be no doubt that we ought to exercise it, because the railway company has not advanced a single reason in support of their refusal to deliver coal at the siding.

"I propose that we should make an order requiring the respondents to afford the applicants all reasonable facilities for delivering their coal traffic at the Low Mill siding, and declaring the arrangements and facilities for the delivery of such traffic which existed before 22d March 1900 to have been reasonable, and such as ought in future to be afforded."

[1] West v. London and North-Western Railway Co., 1870, L. R., 5 C. P. 622; East and West India Dock Co. v. Shaw, Savil, and Albion Co., 1888, L. R., 39 Chan. Div. 524.

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able facilities in the matter of receiving, forwarding, and delivering traffic at this junction. It might be that a railway company could not be compelled to build a public station at any particular place; if so, the private person had, under section 69 of the Act of 1845, higher rights than the general public. For subject to the conditions of section 69 he could obtain junction with the railway for his siding, and such a junction could not be terminated by the railway company at pleasure.[1] Section 1 of the Act of 1854 no doubt mentioned only public stations, but the verb used was "includes," which did not mean that everything else was excluded; plainly section 1 did not give a definition of "railway." Further, section 4 of the Railway and Canal Traffic Act, 1894, shewed that the reception and delivery of traffic at junctions with private sidings was part of the ordinary business of a railway company; if the respondents' argument was sound that section would be practically nugatory. No doubt it might throw the traffic into confusion if railway companies had to stop their trains at every private siding which the trains passed; but this difficulty did not affect the jurisdiction of the Commissioners, who had to determine what were reasonable facilities—reasonable, that was to say, in the interests of the railway company as well as of the trader. The sound view was that all junctions with private sidings were part of the railway within the meaning of the Acts, it being for the Commissioners to say whether stopping in any particular case was a reasonable facility. Messrs Cowan, however, did not require to maintain this general proposition. Low Mill siding had been recognised as a stopping place by the company since the opening of the Penicuik line, and the company did not even now propose to cease so to recognise it except for the purposes of coal traffic. If therefore the analogy of public stations was in point, there was no question here of compelling the company to open a new station or of prohibiting them from closing an existing station. The Low Mill junction had from the first been, and was still to remain, a place on the company's line for the receiving, forwarding, and delivering of traffic. It might be that the company were under no obligation to make it such a place, and that they might now cease to make it such a place, but so long as they so treated it they were not entitled to close it to certain kinds of traffic, unless they could satisfy the Commissioners that such partial closing was in the circumstances reasonable.[2] (2) Even if the Messrs Cowan had no right under the statutes to compel the railway company to treat the Low Mill junction as a place for the receiving, forwarding, and delivering of traffic, so that the first branch of the Commissioners' order was outwith their jurisdiction, the Commissioners had jurisdiction to determine whether, in delivering coal at other traders' sidings on the Penicuik line, the company were giving such traders an undue preference. That branch of the order under appeal therefore ought not to be interfered with.

On 23d February 1901 the Court intimated that they were of

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[1] Bell v. Midland Railway Co., 1859, 3 De Gex and Jones, 673; Woodruff v. Brecon and Merthyr Tydfil Junction Railway Co., 1884, L. R., 28 Chan. Div. 190; Portway v. Colne Valley and Halstead Railway Co., 1891, 7 R. and C. Traffic Cases, 102.

[2] Darlaston Local Board v. London and North-Western Railway Co., L. R. [1894], 2 Q. B., *per* Lord Esher at p. 699, Lord Justice Key at p. 707, and Lord Justice A. L. Smith at p. 711.

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opinion that the second finding of the Commissioners, and the order following thereon, was within the jurisdiction of the Commissioners, but with respect to the first finding of the Commissioners, and the order following thereon, their Lordships pronounced an interlocutor appointing the cause to be heard before the Judges of the Division, with the assistance of three Judges of the First Division.

The cause was heard accordingly on 6th March 1901.

At advising,—

LORD PRESIDENT.—The applicants are papermakers, carrying on business at Valleyfield, near Penicuik, and the respondents own and work a public line of railway which terminates at Penicuik Station. That line was originally constructed by the Penicuik Railway Company, and opened for traffic in 1872. At or about that time, the applicants, or their predecessors in title, laid down three sidings from three of their mills opening on to the line of railway now belonging to the respondents, and first the Penicuik Railway Company, and afterwards the respondents, since they acquired the line, received and delivered the applicants' traffic at these sidings, until the differences after mentioned arose. The present question relates to one of these sidings—Low Mill siding—which connects with the respondents' line outside Penicuik distant signal, 22 chains from Penicuik Station. This siding has been in use since the railway was opened, the incoming traffic being chiefly coal, esparto grass, and rags for the applicants' works.

In November 1899 the applicants claimed a rebate from the respondents' coal rate upon the ground that it included a terminal charge for station accommodation and terminal services, and that the coal did not receive any such accommodation and services at Penicuik. The respondents then, on 10th March 1900, gave notice to the applicants that from and after the 22d of that month they would not accept or carry coal for delivery at the applicants' Low Mill siding, that they were under no obligation to stop their trains specially at that siding for the purpose of giving or taking delivery of the applicants' traffic, and that they had resolved to cease to do so with regard to coal after that date. They accordingly requested the applicants to make arrangements to take delivery of their coal at Penicuik Station, and to advise the collieries from which they purchased. The applicants then, on 3d April 1900, presented the present application, praying the Railway Commissioners for an order enjoining the respondents, *inter alia*, to afford to the applicants the same facilities at Low Mill siding as they had previously enjoyed. A proof was led, and thereafter the Railway Commissioners, on 6th August 1900, found and determined, *inter alia*, (1) "That the railway company, in refusing to deliver coal at the junction of their railway with the Low Mill siding, have not afforded to the applicants all due and reasonable facilities for the delivery of their coal traffic at the Low Mill siding." The respondents appealed against the findings of the Railway Commissioners, and with reference to the finding and determination above quoted, with which alone we have to deal, the respondents maintain that the Railway Commissioners had not jurisdiction to make it.

It may be convenient to consider the question thus raised under two heads—(1) Whether the Railway Commissioners would have had jurisdic-

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tion to make such a finding if the respondents had not previously received or delivered any traffic at the siding; and (2) Whether, if, upon that state of facts, the Railway Commissioners would not have had jurisdiction, the circumstance that traffic of the applicants has in fact been received and delivered at the siding confers jurisdiction upon them. Under this second head it will be proper to consider, *separatim*, whether if the Railway Commissioners would not have had jurisdiction if the respondents had intimated that they declined any longer to receive or deliver any traffic at the siding, the result is varied by the circumstance that their refusal has hitherto been limited to one particular kind of traffic, viz., coal.

The decision of the question depends upon the construction and effect of certain statutory provisions, to which I shall now advert.

The right of owners of land adjoining a railway to make connection with it by sidings is conferred by section 69 of the Railways Clauses Consolidation (Scotland) Act, 1845, which provides, *inter alia*, that that or the special Act shall not prevent the owners or occupiers of lands adjoining to the railway, or any other persons, from laying down, either upon their own lands, or upon the lands of other persons, with the consent of such persons, any collateral branch of railway, to communicate with the railway for the purpose of bringing carriages to, or from, or upon the railway, and that the company shall, if required, at the expense of such owners and occupiers and other persons, and subject to certain qualifications not material to the present question, make openings in the rails, and such additional lines of rail as may be necessary for effecting such communication. It is plain that this section contemplates that the persons entitled to make the connection shall work it with their own vehicles, and provide their own haulage and servants, no obligation being laid upon the railway company owning the line, except to permit them to enter upon and use it as a road, on payment of tolls, as provided by section 85. In particular the section contains no provision that the railway company shall render any services in working the siding, or that they shall be bound to stop any of their trains for the purpose of receiving or delivering traffic at it.

The next important statute bearing upon the question is the Railway and Canal Traffic Act, 1854. By section 1 of that Act it is declared that the word "railway" shall include every station of or belonging to such railway used for the purposes of public traffic; and by section 2 it is declared, *inter alia*, that every railway and canal company shall, according to their respective powers, afford all reasonable facilities for the receiving and forwarding and delivering of traffic upon and from the several railways and canals belonging to, or worked by, such companies respectively, and for the return of carriages, trucks, boats, and other vehicles. Lord Esher in the *Darlaston* case [1] said, "It seems to me a necessary implication that the word 'railway' in section 2 does not include a station which is not in use for the purposes of public traffic," and this proposition appears to be indisputably correct.

It is, as I understand, upon this section that the claim of the applicants is founded, their contention being that the receiving and delivering of traffic

[1] L. R. [1894], 2 Q. B. 694, at p. 699.

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at the siding are reasonable facilities within the meaning of the section. None of the Commissioners express any opinion as to whether they would (in their judgment) have had jurisdiction under this section to make the finding and determination which they have made if there had not been any previous usage of receiving and delivering traffic at the siding, their decision being (apparently) founded exclusively upon the usage which has taken place; and Lord Stormonth-Darling says in his judgment, "It is a different question whether we could compel a railway company to deliver goods at a newly-constructed siding, and I express no opinion with regard to that." It seems to me, however, to be very essential (or at all events very material), to form an opinion upon this question before proceeding to consider the effect (if any) of the previous course of dealing between the parties.

I am of opinion that the Commissioners have not jurisdiction to order a railway company to receive or deliver traffic at a private siding at which no traffic is being, or has previously been, received or delivered by the company. While section 1 of 1854 declares that the word "railway" shall include every station of or belonging to it, used for the purposes of public traffic, it makes no mention of private sidings, and its language, in my judgment, plainly excludes the idea that such sidings form any part of its undertaking. They are the private property of persons who, by the use of them, obtain access to the railway, and in the absence of any statutory provision that the railway company shall stop its trains at, or serve, such private sidings, I consider that no duty to do so can reasonably be implied. The persons owning the sidings are not bound, apart from agreement, to send their traffic, or any part of it, over the railway company's line, and even if they did so for a time, or as regards some kinds of traffic, they would not be bound to continue to do so as regards any kind of traffic. Again, the Railway Commissioners have no power to enjoin things merely because they may think that they would be reasonable facilities; they are only entitled to administer the existing Railway Acts, and to enforce facilities thereby provided, where such facilities are refused. In the *Hastings* case,[1] Lord Selborne said: "The first observation which arises upon this enactment" (36 and 37 Vict. c. 48, which transferred to the Railway Commissioners the power which had previously been vested in the Court) "is that it does not enable the Commissioners to impose upon a railway company any new duties or obligations depending upon any mere exercise of the Commissioners' own judgment. Their authority is only to inquire into and to prevent particular violations and contraventions of the statute," and no statute has been contravened in this case.

I am therefore of opinion that the first question above stated should be answered in the negative.

The second question is, whether an obligation upon a railway company to receive and deliver traffic at a private siding, not imposed by any Act of Parliament, arises from the fact that traffic has been, for a longer or shorter time, received and delivered by the company at the siding, and whether this creates a jurisdiction in the Commissioners to order the continuance of such reception and delivery, which they would not, apart from

[1] L. R., 6 Q. B. D., 586, at p. 591.

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the prior usage, possess. The Commissioners appear to have considered that this question should be answered in the affirmative, and I gather from their opinions that it is upon this ground alone that they felt themselves warranted in making the finding and determination now under consideration. Sir Frederick Peel says,—"I think that any place on a railway which, though not a station, has been made, by the company's course of dealing with its business, a usual terminus of the transit of particular traffic, is a place where it ought and can be required to deliver. Such a place is, in the case before us, the junction of the Penicuik Railway with the Low Mill siding." And Lord Stormonth-Darling, after referring to the *Hastings*[1] case and the *Darlaston*[2] case, says that it seems to him that although this is a private siding, it falls within the principle laid down by Lord Selborne in the passage which he quotes, adding,—"That principle is that when a railway company has in fact instituted a practice, which it proposes to continue, of receiving and delivering traffic at a particular place on its system, it ceases to be absolute master of the mode in which the traffic at that place is to be conducted, but is bound to afford all reasonable facilities for receiving, forwarding, and delivering it. The owner of the siding has just as much interest to complain of any capricious alteration in the *status quo* as the public would have in the case of a public station." Lord Cobham does not deal expressly with the question, but he agrees with his colleagues upon all the points considered by them.

I am not sure whether the Commissioners mean that where traffic has been, for a longer or shorter time, received and delivered by a railway company at a private siding, the company would not be entitled, after due intimation, to cease to receive or deliver any traffic at it, but would be bound to go on receiving and delivering traffic as before, or whether they only mean that so long as the company receives or delivers any kind of traffic at a private siding, it is bound to receive and deliver all kinds of traffic there, and I shall therefore deal with both views.

It appears to me that the first view is at variance with the principle on which the decision in the *Darlaston*[2] case proceeded. It was there held that a railway company is not bound to make, or to continue, a station at any particular place, although where it has elected to make a station and to keep it open for traffic, it is bound to give reasonable facilities at it, because it is part of the railway within the meaning of the Act of 1854. I think the same considerations apply, *a fortiori*, to prevent a company from being required to continue to receive and deliver traffic at a private siding where it has done so voluntarily (practically by agreement), so long as the terms given by the traders for its voluntary services were satisfactory. As I have already pointed out, private sidings are not parts of the railway within the meaning of the Act of 1854, or of any other Act, and consequently to require the company to receive and deliver traffic at a private siding would be to require it to give facilities not imposed upon it by any statute. The sidings are private property, not falling within the definition of railway, and they are places at which a railway company is not, in my

[1] L. R., 6 Q. B. D. 586.

[2] L. R. [1894], 2 Q. B. 694.

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judgment, bound to stop its trains, and to which it is not bound to send its locomotives, waggons, or servants, unless the Commissioners are right in holding that the effect of usage is to compel them to do so. Further, it appears to me that it would not be reasonable to hold that the mere circumstance of parties, *ex hypothesi* of this part of the argument, not under statutory obligation to do so, having found it to suit their mutual convenience, on terms mutually satisfactory, to receive and deliver traffic at a private siding, reared up a permanent obligation against one of them (the railway company) to continue to do so when the terms offered were no longer satisfactory to the company. In this case the applicants altered the *status quo* by claiming a rebate on coal traffic in respect that it did not receive station accommodation or terminal services at Penicuik, and it appears to me that the respondents were just as well entitled to say that they would no longer receive and deliver traffic at the siding as the applicants were to say that they declined to pay a rate which they considered excessive. In other words, the effect of the applicants terminating, as they were quite entitled to do, the tacit agreement under which the siding had been served was, in my judgment, to remit the parties respectively to their original positions, so that the question must now be determined in the same way as if the respondents had never rendered any services at the siding. If I be right in thinking, for the reasons already given, that in their inception the services rendered by the respondents at the siding were voluntary, I can see no reason why they should not be at least as well entitled to cease altogether to serve the siding as a company is to pull down or close one of its public stations. I do not suppose that the fact of an owner of adjoining land having made a siding and used it for receiving and delivering traffic from and to the railway as long as it suited him to do so would bind him to send his traffic over the company's line by that siding in all time coming, and if the one party to the voluntary dealing is not bound to continue it in perpetuity, neither should the other, in the absence of any statutory obligation, be held bound to do so.

It is a different question whether, so long as a company continues to serve a siding as to some kinds of traffic, it is thereby bound to serve it as regards all kinds of traffic. In this part of the argument, I assume, for the reasons already given, that the service by the respondents at the siding was in its inception voluntary, and I can see no reason why they should not have been entitled at the beginning of the dealing to express their willingness to receive and deliver some kinds of traffic, while refusing to receive and deliver other kinds. If this be so, I have equal difficulty in seeing any good reason why, if it no longer suits their interests or convenience to receive and deliver some kind or kinds of traffic at a siding, they should not be entitled to cease to do so. The Commissioners assimilate the case to that of a public railway station, but the two cases appear to me to be essentially different. The public station is part of the company's undertaking, which the private siding is not, and the statutory obligations applicable to the one are not applicable to the other. It might well be held that by opening a station for public traffic, a company professes, or holds itself out as being ready, to accept all kinds of traffic (or at least all kinds which it can accom-

modate), and that therefore it could not arbitrarily refuse some particular description of traffic, but these considerations have no application to the case of a private siding, as to which the company makes no profession, and does not hold itself out as willing to do anything. In expressing the opinion that the fact of a railway company serving a private siding as to some kinds of traffic does not raise an obligation to serve it as to all kinds of traffic, I of course leave out of view any question of undue preference or unequal treatment, our opinion not being asked upon these questions. The questions with which we have to deal must be considered as if there were no other papermakers, and no other private sidings than those belonging to the applicants, in the Penicuik district.

I quite recognise that service by a railway company which is in its origin voluntary, may, so long as the company continues to give it, be subject to regulation by the Railway Commissioners in some cases and in some respects. Thus railway companies are not bound to collect and deliver traffic outside the limits of their undertaking, but if they choose to do so, they may be subject to regulation as regards rates and equality of treatment. Thus it is provided by the North British Railway Rates and Charges Act, 1892, section 5, that the company may charge for the services therein mentioned, when rendered to a trader at his request or for his convenience, a reasonable sum by way of addition to the tonnage rate, and that any difference arising under the section shall be determined by an arbitrator appointed by the Board of Trade, and two of the services mentioned are "services rendered by the company at or in connection with sidings not belonging to the company," and "the collection or delivery of merchandise outside the terminal station"; but I do not understand that there is any obligation upon the company to render these services at all, unless it holds itself out as willing to do so. These are all services either prior or subsequent to conveyance, but if they are offered and given by the company and accepted by the trader, it is not unreasonable that the rate to be paid for them should be subject to independent regulation, in view of the practical monopoly of the business of carrying enjoyed by railway companies in many places. Again, by the Railway and Canal Traffic Act, 1894, section 4, it is provided that where merchandise is received or delivered by a railway company at any siding or branch railway not belonging to the company, and a dispute arises between the railway company and the consignor or consignee of such merchandise as to any allowance or rebate to be made from the rates charged to such consignor or consignee in respect that the railway company does not provide station accommodation or perform terminal services, the Commissioners shall have jurisdiction to hear and determine such dispute, and to determine what, if any, is a reasonable and just allowance to make, and I understand the applicants to suggest that this implies the existence of a legal obligation on the part of a railway company to receive and deliver traffic at private sidings. It does not, however, appear to me that any such implication can reasonably be derived from it. Where an authorised rate contains a charge for terminal services at both ends, and terminal service is only rendered at one end, it is reasonable that a deduction should be allowed, but this does not, in my judgment, imply any obligation upon a railway company to give services at

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private sidings. The only enactment is that, if they choose to do so, the rates shall, like the rates for collection and delivery of traffic by cartage in a town, be subject to regulation. The considerations of policy which warrant the regulation of the charges to be made for services which are voluntary, are very different from those applicable to the question whether the fact of siding services having been voluntarily rendered for a time authorises the Commissioners to order that they shall be given in perpetuity, or to the question whether the fact of some kinds of traffic being received or delivered by a railway company at a private siding, warrants the Commissioners in ordering the company to receive and deliver all kinds of traffic there. I am not aware that it has ever been held that if a railway company desired to cease to collect and deliver goods and parcels by carts outside of its undertaking, or to provide private omnibuses for the use of passengers, it would not be entitled to do so.

For these reasons, I am of opinion that the fact of the respondents having for a time voluntarily served the siding on terms satisfactory to themselves does not give the Commissioners jurisdiction to compel them to continue to serve it upon terms which they do not regard as satisfactory, and that the fact of their receiving and delivering some other kinds of traffic at the siding does not empower the Commissioners to order them to deliver coal there.

LORD JUSTICE-CLERK.—By the determination of the Railway Commissioners which is under consideration, the North British Railway is found to be refusing to afford reasonable facilities to a trader for delivery of goods at a place called Low Mill siding. That siding is not part of the company's system, but is a siding made by the private trader, under the powers of the Railways Clauses Act, under which any citizen who desires to have a siding in communication with a public railway line is entitled to make such a siding, and to call upon the company, at his expense, to put in the necessary railroad junction, so that the siding may be utilised for goods in bulk in waggons that can run upon the line being taken into or removed from the siding. The statutory provision by which a citizen can have a connection established with the public railroad was part of the railroad scheme of the time at which the Act was passed, viz., that the citizen should have a right to use the road with his own haulage and waggons on paying the proper tolls to the railroad company. That was the purpose of conferring on him the right to have a siding. He had no right to require the company to haul to his siding and deliver there, or to call at his siding to take up waggons. In course of time, and as railway traffic developed, it became more convenient for both parties for the railway companies to do all the haulage work by arrangement with the citizen, the railway company carrying traffic to their stations, and where the company and the citizen could agree upon terms for bringing goods to or from private sidings, the company finding the haulage and service for that work also. Accordingly, in the past, similar traffic to that which the company now refuse to deliver at the siding in question has been carried there, and removed from there by them. Messrs Cowan & Company having raised a dispute as to what they were to pay for the service, the railway company have intimated the

intention to discontinue hauling Messrs Cowan's goods to this siding and delivering them there, the practical result of which is that Messrs Cowan must either arrange to haul them to the siding on payment of tolls, or to take delivery of them at the company's public station. The practical question is—Have the Commissioners in the circumstances the power to decide that what Messrs Cowan ask is a reasonable facility under the statute which the company are bound to grant?

I see no ground for holding that the mere fact that a trader makes a siding, and compels a connection to the company's line under his statutory right, confers upon him the further right of demanding that the company shall deliver to, or take up goods for him by their own haulage, and by stopping their trains for that purpose. The siding is not the property of the company, and is not in any sense opened as a station on the line. It is not part of their railway, and Messrs Cowan could remove it at any time. Lord Stormonth-Darling in his judgment states that he gives no opinion as to whether the Commissioners could compel a company to deliver goods at a newly-made siding of this description, or as to whether it would be a refusal of reasonable facilities to decline to do so. But it is said that the company have been in the practice of delivering, and that they are continuing to do so as regards certain goods, and that therefore they must continue to do so as regards coal traffic. I am unable to see why, if the railway company have under a special bargain consented to bring goods for a time to that siding, they can be compelled to continue to do so, if they do not choose to renew the bargain upon the same or any other terms. The company must convey the trader's goods on their line as long as they work the line, and give facilities at any place which they open and keep open for reception or delivery. That is their duty as carriers, and they cannot escape from it. That the company do not dispute, but they maintain that the stations they provide for such purposes are to be provided as may to them seem suitable, and that they can neither be required to open a station at any particular place, nor to keep open a station at any particular place, unless they consider it to be in the interest of the company to do so. These propositions are clearly stated in the cases quoted to us (*Hastings*[1] case and *Darlaston*[2] case), and his Lordship does not dispute the soundness of either proposition. But he quotes a passage from Lord Selborne's opinion in the *Hastings*[1] case, to the effect that when the company has in fact opened a station at a particular place, and actually uses it for the purposes of public traffic, and invites the public to resort to it for traffic, they are bound by the Act to afford at that station (to the extent of its powers) all reasonable facilities for receiving, forwarding, and delivering, &c. No exception can be taken to that proposition of Lord Selborne, and indeed the source from which it comes gives it the greatest claim to acceptance; but when Lord Stormonth-Darling proposes to apply that *dictum* to the present case, I confess I am unable to follow him. The company in this case are not carriers to this siding. They have not invited the public to resort to this siding as a station. They are not entitled to use this siding as a station for their own purposes, or for receiving or delivering public

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traffic. They have no right to put anything on to it or take anything off it, unless asked to do so by the private company whose property it is. While they can close any station, they cannot interfere with this siding. Thus their position as regards it cannot be tested by any *dicta* regarding a station which forms part of the railway company's line, and to which the public is invited to come with or for goods. I am therefore quite unable to agree with his Lordship's view that Lord Selborne's opinion in the *Hastings*[1] case affords any ground for holding that in this case the company can be interfered with, if they decline to stop their trains at a siding which is private property, and which they have neither provided nor used as part of their public system for their traffic.

As regards the fact that at present they are willing to deliver, on a bargain with the Messrs Cowan, certain classes of goods, while they decline to deliver others, that does not, I think, make any difference. If they are not under obligation under the reasonable facilities clauses to deliver any goods by their own train service at such a siding, I cannot see that the fact that under agreement satisfactory to themselves they undertake certain traffic deliveries for the Messrs Cowan, can be held to place them under obligation to deliver all. If in the interests of their own business they see fit to agree to terms for delivering all or any part, they can do so. I cannot see any reason why they may not, like any other trader, reject what they consider not sufficiently advantageous, and accept what they see fit to accept, unless by statute they are deprived of their liberty in this matter. If, as I hold, they are not bound to deliver goods by their own haulage and servants at that siding, then they can, I think, only be bound by, and to the extent of any bargain they may be willing to make with the trader to whom it belongs.

On these grounds, I concur in the judgments which your Lordship proposes.

Lord Young.—Since the year 1872 the traffic of the respondents intended for use at their mill, called the "Low Mill," and forwarded on the appellants' railway, has been addressed to them at the "Low Mill siding," and there delivered by the appellants. The siding was made by the respondents on their property for the purpose of facilitating this delivery, both to the appellants in giving, and to the respondents in receiving it—the traffic being of a kind which could be delivered at a siding only. For twenty-eight years it has been used for this purpose and no other. In giving delivery the appellants have, during this long period, used the siding by hauling (or shunting) on to it trucks containing the traffic so addressed, the respondents in receiving it making the only possible corresponding use of the siding.

On 10th March last (1900) the appellants' manager wrote to the respondents intimating that, after 22d curt., the appellants "will not accept or carry coal for delivery at your Low Mill siding," and requiring them to "make arrangements to take delivery of your coal at Penicuik Station." There has been no proposal to make a change as to the place and mode of

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delivery of any traffic addressed to the respondents at their Low Mill siding other than coal. The dispute immediately before us thus regards the delivery of coal only, though it seems plain that any legal question must be the same with respect to coal and other traffic.

The appellants' intimation of 10th March was acted on for a brief period, but, with seeming good sense, discontinued on an arrangement that the question of the existence or not of the right claimed by the appellants to make the intimated change against the will of the respondents, and whether their consequent refusal to deliver coal traffic at the siding in question was consistent with their duty and the respondents' corresponding right under the provisions of the Railway and Canal Traffic Regulation Act, 1854, should be submitted to the Railway and Canal Commissioners, as it was by the proceedings now before us on appeal against the Commissioners' judgment. That judgment is adverse to the appellants, being in substance that the facilities afforded by the appellants for delivering by them and receiving by the respondents of the coal traffic in question from 1872 to 22d March 1900 were, according to their powers, &c., reasonable, and there being no reason for a change, ought to be continued.

No dispute seems ever to have arisen as to details—such as the time of delivering at the siding—with respect to days or hours or frequency, or the distance into the siding that trucks should be hauled or shunted, or whether hauling or shunting was most convenient and reasonable. There seems never to have been any conflict between the parties regarding convenience in such matters.

If the Railway and Canal Traffic Act, 1854, is applicable to the respondents' Low Mill siding, the contention of the respondents and the judgment of the Commissioners in their favour seem to me to be obviously right.

There is no suggestion by either party that the siding in question is peculiar or anywise distinguishable from other sidings belonging to manufacturers and traders in every variety of business who send or receive merchandise or traffic forwarded to or from them by the railways with which they are connected by sidings formed for the purpose of such sending and receiving. The vast number of such sidings which exist, especially in the vicinity of large towns and of railway stations (although outside station limits), and their manifest trade importance, render the questions now raised of considerable public interest. All sorts of factories, mills, distilleries, breweries, &c., are attracted to such positions by the facilities there afforded for receiving, forwarding, and delivering traffic upon and from the railways by means of sidings in all respects exactly such as that now in question. Generally the railways have attracted the factories. Here it is (no doubt truly) explained that the factories (the respondents' three mills) attracted the railway by the prospect of large traffic, for the receiving and delivering of which, upon and from the railway, a siding convenient to each of the three mills was constructed, contemporaneously with the construction of the railway itself.

The contention of the appellants, if I rightly apprehend it, is that they are not bound, and cannot be required to deliver traffic at a private siding, although it may be, and indeed admittedly is, according to their powers to do so, and indisputably reasonable that they should. If this is a true proposition, there is no answer to their case; and if not, they have, as I

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think, no case which calls for an answer. The argument used and pressed by their counsel was, that if bound to deliver at one private siding they would be equally so at any other, and indeed any number of others, and might thus be required to stop their trains every half mile, or at most ridiculously short intervals of space and time. The answer to this seems to be that the Act of 1854, like the common law applicable to common carriers, requires no more than sweet reasonableness. That it is according to their powers to deliver traffic at the respondents' private siding would seem to be indisputable by the appellants, who have been doing so for twenty-eight years as to all the respondents' traffic, and state their intention to continue it as to all except coal. It would not have occurred to me as even stateable that what the appellants did in the past was other than affording, according to their powers, reasonable facilities to the respondents for receiving delivery of traffic from the railway on the siding constructed by them for its reception, and connected with a railway by a junction arranged with the railway company as convenient for the purpose. I have already observed that hitherto there has been no dispute as to details, such as time, frequency, or distance on the siding from the point of junction, and certainly no dispute of that kind is indicated in the proceedings before us. The Commissioners have therefore, in my opinion, rightly assumed that what was so long and uninterruptedly done to the satisfaction of both parties was "reasonable," if nothing was shewn or even suggested to the contrary.

We must determine the legal question submitted to us on the footing that what the respondents desire and the Commissioners have ordered is as matter of fact reasonable. The law which we administer is always applicable to facts, so that any legal dispute cannot be determined by us otherwise than with reference to the facts on which it arises, and to which it is to be applied. Now, the question of law in dispute before us is, in my opinion, not whether the appellants are bound and so may be compelled to deliver traffic at any private "siding" constructed anywhere by an owner of traffic forwarded by the railway, but only whether they may be required to deliver at a siding in such a place, and so constructed that delivery there is according to their powers, and a facility for the reception of the traffic by the owner, which it is reasonable the company should give, or continue to give, as they have in fact been doing to their own profit as carriers for twenty-eight years.

It may be questionable whether a railway company may be required to begin or continue to use a private siding for the "receiving" or "delivering" of traffic of the siding owner upon and from their railway. That question is not before us, and I abstain from indicating an opinion upon it. We must deal with the law in the case before us on the footing that the appellants are now in fact using the private siding in question in the conduct of their business as railway carriers, receiving from the forwarders traffic of a kind of which they have had experience for a quarter of a century addressed to be carried there and there delivered, and carrying and delivering it accordingly as matter of common contract of carriage; that there is no question now before us as to their right to abandon this part of their carrying business, such abandonment never having been proposed;

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and that the legal question regards only the right which they claim to separate coal from the other traffic and to decline to deliver it as heretofore, and as they continue to deliver the other traffic forwarded by the same trains, and so stopt, as the other traffic is, at this siding. I do not enter upon the reason, or I should rather say the motive, of the appellants for their conduct, which is plain enough upon the statements, correspondence, and evidence before us.

I cannot regard the respondents' traffic forwarded to them on the appellants' railway by those who supplied it as other than public traffic received and carried by the appellants as common carriers. It is private property *in transitu*, as most if not all merchandise carried by common carriers is. Passengers are within the statutory definition of "traffic," though usually private individuals, who when travelling by trains or other public conveyances are regarded as common passengers—the travelling public. The merchandise of which the respondents' traffic consists is sent to the railway by the merchants from whom it is purchased, and it was, I think, stated to us that coals were so sent from the collieries with which the appellants dealt in the coalmasters' trucks, in which they were also carried on to the respondents' siding.

When the learned counsel for the respondents called our attention to section 4 of the Railway and Canal Traffic Act, 1894, it appeared to me that it had an intelligible, and not unimportant, bearing on the argument, shewing, as it seemed to me to do, that the Legislature regarded the reception and delivery of merchandise at private sidings ("not belonging to the company") as part of the common and familiar business of railway companies, and for which accordingly it was proper that any legislative provision should be made which experience had shewn to be needed, or likely to be useful to the railway company and the consignors or consignees of such merchandise. The language of the clause indicates that disputes had arisen "as to any allowance or rebate to be made from the rates charged to such consignor or consignee, in respect that the railway does not provide station accommodation or perform terminal services," and shews distinctly that the Legislature thought it fitting to give the Railway and Canal Commissioners jurisdiction to hear and determine such disputes. The Railway and Canal Traffic Act, 1854, confers on certain specified Judges jurisdiction to enforce its provisions as to receiving and forwarding of traffic, which jurisdiction is by section 9 of the Act of 1888 transferred to the Railway and Canal Commissioners, and the Act of 1894 (the 4th section of which I have just cited) provides (section 5) that it shall be read with the Act 1888. Reading section 2 of the Act 1854, section 9 of the Act 1888, and section 4 of the Act 1894, as when read together expressing the intention of the Legislature, I am disposed to conclude that the intention was to confer jurisdiction regarding disputes as to any allowance or rebate from rates charged on goods received or delivered "at any siding or branch railway not belonging to the railway company" upon the Railway and Canal Commissioners as being the tribunal having jurisdiction to determine any dispute as to reasonable facilities for the receiving, forwarding, and delivering of traffic at such sidings or branch railways. I put it no higher than this—that it favours the construction of which I think section 2 of the Act of

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1854 admits, and which I certainly prefer, by shewing probably, though not certainly, that such was the intention of the Legislature. I may also point out, that in the view that it is absolutely in the power of the railway company to decline to deliver or receive merchandise at a siding not belonging to them, except on their own terms "as to any allowance or rebate," and as to affording or refusing "reasonable facilities for the receiving and forwarding and delivering of traffic" at any such siding, clause 4 of the Act of 1894 is an absurdity.

Before concluding, I desire to call attention to the fact that the Judges of the Second Division were unanimously of opinion that the enactment of section 2 of Act 1854 regarding the giving by a railway company of any unreasonable advantage, applied to "receiving, forwarding, and delivering of traffic at any siding or branch railway not belonging to the company," and consequently that the Commissioners rightly held that it applied to the private sidings referred to in their judgment. I cannot reconcile that view, in which I concurred, with the notion that the first and leading enactment in the clause has no application to such sidings.

With respect to the cases of *Hastings*[1] and *Darlaston*,[2] I concur in the opinion of the Commissioners that they are inapplicable to the question before us. I think they only decide that the Railway Commissioners have no jurisdiction to order a railway company to construct a station or to reopen or reconstruct a station which they had closed or destroyed.

LORD ADAM.—I have had an opportunity of reading the opinion of the Lord President, and I concur therein.

LORD KINNEAR.—I have found this question to be attended with very considerable difficulty, but on the best consideration I have been able to give to it, I have come to the same conclusion as your Lordship in the chair, and for the same reasons. I do not, therefore, think it necessary to repeat what has been already said, but concur in the proposed judgment.

LORD TRAYNER.—The first question which we have to decide under this appeal is whether the applicants are entitled to demand that the respondents shall afford them facilities for receiving, forwarding, and delivering their goods at the Low Mill siding, and whether the Railway Commissioners can order this to be done. In dealing with this question it appears to me to be immaterial, if not irrelevant, to consider that the respondents have for twenty-eight years or more both received and delivered the goods of the applicants at that siding. The respondents in doing so were acting under agreement with the applicants, or if not in execution of an express agreement, were acting voluntarily; it was not matter of obligation on the one side and of right on the other. But if the respondents were not bound so to deliver or receive goods, they may cease to do so when they please, and parties must then betake themselves to their respective legal rights. It is equally irrelevant, in my judgment, to urge (as the applicants have done) that the agreement or arrangement heretofore observed is a reasonable one, and that it would be unreasonable to depart from it. I am

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afraid that neither the Railway Commissioners nor we have any right to order either the applicants or the respondents to be reasonable in their demands respectively; but what the one party is bound to give and the other party entitled to demand—that we can and must order to be given.

The applicants represent that what they ask an order on the respondents to do is what the respondents are legally bound to do, and may be compelled to do under the provision of the 2d section of the Act of 1854. In that I think the applicants are wrong. The only facilities for receiving, delivering, and forwarding traffic there provided for are such as can and must be afforded by a railway company at any station used for the purposes of public traffic, but nowhere else. I regard this as already judicially determined in the *Hastings* [1] and *Darlaston* [2] cases. Low Mill siding is not a station used for public traffic—it is the private property of the applicants, and used for no traffic but their own, and therefore, in my opinion, is not a place at which the applicants can insist on having the facilities they ask. If the respondents can be ordered to stop their trains at the Low Mill siding for the purpose of receiving or delivering the goods of the applicants, they may equally be ordered to stop and receive or deliver goods at any and every siding on their line. Under such an order the inconveniences arising in the course of working the railway would or might be such as to prevent the fair working of the railway altogether. The ground of my judgment, however, is that the applicants cannot, in respect of the provision of the 2d section of the Act of 1854 demand the facilities here prayed for, and that it is *ultra vires* of the Railway Commissioners to grant their application.

As regards the rest of the order appealed against, I think the appeal should be dismissed. If the respondents receive and deliver goods to other traders at their private siding, they must do as much for the applicants. Otherwise the respondents would be conferring an undue preference or advantage in favour of those whom they so distinguished, to the disadvantage or prejudice of the complainers, and such a proceeding is forbidden by the section of the statute I have already referred to.

LORD MONCREIFF.—The order of the Railway Commissioners complained of has two branches:—

First. They declare that the facilities given by the railway company up to 22d March 1900 for delivery of the applicants' coal traffic at the Low Mill siding were reasonable, and such as ought to be afforded to the applicants; that since that date the railway company have not afforded due and reasonable facilities for delivery of the coal; and they order and enjoin the railway company to afford such reasonable facilities in the future.

Secondly. The Commissioners find that the railway company, in delivering coal at the sidings of other traders near Penicuik, competitors in trade with the applicants, and refusing to deliver coal at Low Mill siding, have given such traders an undue and unreasonable preference over the applicants; and they order them to desist from giving such traders any such undue and unreasonable preference.

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If the first order is legal and is obeyed, the second, forbidding a preference, is of comparatively little importance, because the applicants are, I understand, quite satisfied with the facilities afforded up to 22d March 1900. But if it is held that the first order is *ultra vires* of the Commissioners, it will be necessary to consider whether the second order is legal and can stand by itself. If it is legal, the railway company must continue to afford the same facilities to the applicants, unless they are prepared to abandon their present system of delivering goods at all other sidings; and thus the result will be the same as long as the company continues its present system.

Your Lordships are at present only asked to consider the validity of the first order. At the same time, the fact that the company still continues to give such facilities may, as I shall shew, have a bearing on the validity of the first order.

What we have to decide is not whether the order of the Commissioners is reasonable—we must assume that it is reasonable if legal; but whether it is within their power to make such an order in any circumstances. But in considering this question of law we are entitled to consider the proved or admitted circumstances in which the application is made; and we are empowered to draw all such inferences as are not inconsistent with the facts, and are necessary for determining the question of law submitted to us. (Railway and Canal Traffic Act of 1888, sec. 17 (4)).

The facts are not in dispute. They are simply these: Since the formation of this line in 1872, when this siding was constructed at a cost of £6000, the railway company have been in use to deliver at the siding large quantities of coal and other goods; and the same system has been pursued in regard to coal and other commodities consigned to other traders who have sidings on the line. Since 22d March 1900, however, the railway company have refused to deliver *coal* at Low Mill siding, and have requested the applicants to take delivery of such coal at Penicuik Station. At the same time they continue to deliver other goods at the siding; and they also continue and intend to continue to deliver coal and other commodities as before at the sidings of the other competing traders in the neighbourhood.

It will thus be seen that the history of this line has been that the company's uniform mode of dealing with siding traffic has been to take and give delivery of goods at the private sidings all along the line. But the railway company maintain that, without reason assigned, they are entitled, while continuing to deliver as before at other sidings, and even to deliver all other commodities at Low Mill siding, to refuse to deliver *coal* there. This contention is rested on the construction which the railway company put upon section 2 of the Railway and Canal Traffic Act, 1854, coupled with the definition of the word "railway" in the first section, viz., that the provisions of that section as to the duty of a railway company to afford all reasonable facilities for the receiving, forwarding, and delivering of traffic upon and from their railway is confined entirely to their own line of rails and the public stations thereon; and does not extend to a private siding. They maintain that the trader's right is simply to obtain access from his siding to the company's line, and that the company are not bound to take

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or give delivery of goods consigned by or to him there, or to deal with it at all except at their public stations.

I am of opinion that this contention which, as far as I know, is now advanced for the first time, involves too narrow a construction of the clause. The material words of the second section are these: "Every railway company, canal company, and railway and canal company shall, according to their respective powers, afford all reasonable facilities *for the receiving and forwarding and delivering of traffic upon and from the several railways* and canals belonging to or worked by such companies respectively." The question is whether traffic brought from or to a railway line is not traffic delivered upon and from a railway in the sense of the statute. I do not think that the definition of "railway" affects the question. It runs thus: "The word 'railway' shall include every station of and belonging to such railway used for the purposes of public traffic." In the first place the definition does not profess to be exhaustive; and in the second place it may have been thought necessary in the case of a station, because a station might not be considered to be part of the line. I am content to take the argument upon the terms of the second section. The private siding itself is no part of a railway—that was never contended; but the junction of a private siding with the main line cannot be ignored in considering what constitutes traffic delivered upon or from a railway. Siding traffic—that is, traffic taken from or to private sidings—is a distinct and recognised part of a railway company's public traffic (for it is public traffic), which they are bound to forward and deliver upon and from their railway, "according to their powers." No doubt it was originally contemplated that the trader should simply have access to the main line and right to use it for his own purposes with his own engines, on payment of tolls and subject to bye-laws and regulations. But in practice, and in particular on this line, that mode of disposing of siding traffic (which is open to manifest objections) is not adopted, and the railway company, for their own convenience and profit, give and take delivery of the trucks at the junctions with the sidings. On the faith of this system, much money has been expended on the formation and upkeep of the sidings, which doubtless would not have been incurred if it had been known that the company considered themselves entitled arbitrarily to discontinue the practice. For instance, the upkeep of Low Mill siding costs the applicants £500 a year; its formation cost £6000. We are now asked to find that it is so entirely within the right of the railway company to deliver or not to deliver goods at private sidings, that the Commissioners have no jurisdiction in regard to the regulation of such traffic beyond the limited jurisdiction conferred upon them by the 4th section of the Railway and Canal Traffic Act, 1894, to determine what is a reasonable and just rebate where merchandise is received or delivered by a railway company at any siding, &c., not belonging to the company. I may observe in passing that this is a statutory recognition of the existence of the practice; and also that if a railway company could always meet a demand for rebate by a threat to discontinue the traffic, the enactment would be comparatively useless.

I am not prepared to adopt that view. Looking to the existing practice of this company on the Penicuik line, and especially to the fact that they

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still deliver other goods at Low Mill siding, I am of opinion that it is not *ultra vires* of the Commissioners to consider whether the railway company's refusal to deliver coal at this one siding is not in violation or contravention of the second section of the Act of 1854.

I do not think that there is anything in the two cases which were pressed upon us, viz., the *Hastings*[1] case and the *Darlaston*[2] case, which necessarily conflicts with the view which I have indicated.

The *Hastings*[1] case is relied on by the railway company mainly for the sake of Lord Selborne's *dictum* on p. 592: "With respect to stations, there is no obligation to establish them at any particular places or place, unless the company thinks fit to do so. The railway, as interpreted by the Act, *only* includes existing stations used for the purposes of public traffic." I may observe in passing that the word "only" is Lord Selborne's word; it does not appear in the statute. I assume for the purposes of this argument that a railway company is under no obligation to establish a station at any particular place, and, although this is not so clear, that they are entitled without reason assigned to discontinue an existing station if they think fit. But there are passages in Lord Selborne's opinion, both before and after the one which I have quoted, which apply closely to the present case. "A company may carry or not upon its own line as it thinks fit, and if it does so, may undertake that business under various conditions and limitations. But if and so far as it does undertake so to carry either passengers or goods traffic, it comes, in my opinion, under the obligation to afford for the purposes of that traffic the facilities required by the first branch of the second section of the Act." Now, assuming that a junction with a siding is to be regarded as a station, the railway company have not closed Low Mill siding; they are still delivering other goods there, and they are bound to continue to give facilities at it as before, and are not entitled to exclude any particular class of goods.

But further, private sidings, or rather, the junctions of the sidings with the company's line, are not stations belonging to the company which they can open or close at their pleasure; and the only question is in what way shall the traffic which the traders are entitled to give and receive at their sidings be regulated. We are not here dealing with an extreme case. It is not in my opinion necessary to consider what would be the rights of the railway company or the powers of the Commissioners if the railway company decided to discontinue in all cases and as to all goods their present system of dealing with siding traffic, or even if a trader proposed to make a new connection with the company's line. We have to deal with the existing state of matters on the Penicuik line. We find that the railway company have been in use since the formation of the line to give and take delivery at all the sidings upon it. These are the facilities which they have been in use to give and are giving except in the case of the applicants as to one commodity; and it is in their power to continue to give such facilities. They have deliberately ignored the alternative mode of dealing with siding traffic, viz., letting the traders bring their own engines on to the main line. I therefore think that the Commissioners were called on to deal

[1] L. R., 6 Q. B. D. 586.

[2] L. R. [1894] 2 Q. B. 694.

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with an existing practice, and existing facilities, and that therefore they had jurisdiction to consider whether those facilities should be continued or not.

In regard to the *Darlaston*[1] case, it is sufficient to say that although at one time there was a station at Darlaston, it was closed and demolished five years before an application for its restoration was made. The case therefore decides no more than this, that where there is no existing station, and the railway company do not profess at the time of the application to receive passengers or goods at the place where members of the public desire that a station should be placed, it is beyond the jurisdiction of the Commissioners to interfere with the discretion of the railway company by making an order upon them to establish a station at such a place.

On these grounds, I am of opinion, with Lord Young, that the first order of the Commissioners was within their powers.

THE COURT pronounced the following interlocutor:—"The Lords of the Second Division of the Court, along with three Judges of the First Division, having heard counsel for the parties in this appeal, in conformity with the opinion of the majority of the Judges present at the hearing, sustain the appeal to the effect of recalling, and hereby recall, the deliverance or order of the Railway and Canal Commissioners, dated 6th August 1900—(1) in so far as the said deliverance or order finds that the railway company, in refusing to deliver coal at the junction of their railway with the Low Mill siding, have not afforded to the applicants all due and reasonable facilities for the delivery of their coal traffic at the Low Mill siding; (2) in so far as said deliverance or order declares that the facilities given by the railway company, up to the 22d day of March 1900, for delivery of the applicants' coal traffic at the Low Mill siding were reasonable and such as ought to be afforded by the railway company to the applicants; and (3) in so far as the Railway and Canal Commissioners by said order and deliverance did order and enjoin the railway company, their servants and agents, to afford all reasonable facilities for the delivery of the applicants' coal traffic at the Low Mill siding: *Quoad ultra* dismiss the appeal, and find no expenses due."

MENZIES, BLACK, & MENZIES, W.S.—JAMES WATSON, S.S.C.—Agents.

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PARISH COUNCIL OF THE PARISH OF RUTHERGLEN, Pursuers (Appellants).—*Mackenzie, K.C.—Deas.*
PARISH COUNCIL OF THE PARISH OF GLASGOW, Defenders (Respondents).—*Shaw, K.C.—R. B. Pearson.*

Poor—Settlement—Capacity of deserted wife to acquire a settlement—Poor-Law (Scotland) Act, 1898 (61 *and* 62 *Vict. cap.* 21), *sec.* 1.—*Held* by a Court of seven Judges (*diss.* Lord Young) that a wife, when deserted by her husband, has capacity to acquire a parochial settlement, the husband, so long as the desertion lasts, being regarded as dead.

A wife who had been deserted by her husband maintained herself for three years in the parish of R., and subsequently obtained relief from that parish. During the first of the three years four pupil children of the marriage were boarded out and maintained by G. the parish of the

[1] L. R. [1894], 2 Q. B. 694.

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husband's settlement, under an arrangement between it and the husband, who agreed to make certain weekly payments. At the end of the first year the husband ceased to make any payments for the children, and disappeared, but G. continued to maintain them as before without making any claim against the wife.

An action of relief was brought by the parish of R. against G. on the ground that before the wife had completed her three years' residence in R. she had become a pauper through the relief given to her children by G. G.'s defence was that as the wife was not on its roll of paupers, and as no claim had been made upon her for the support of her children, she had capacity to acquire an industrial settlement, and had done so in R.

Held by a Court of seven Judges (*diss.* Lord Young and Lord Moncreiff) that, in the circumstances, the relief given to the children was not, within the meaning of the Poor-Law (Scotland) Act, 1898, sec. 1, relief "received" by the mother, and that the wife had acquired an industrial settlement in R.

2D DIVISION, with three consulted Judges. Sheriff of Lanarkshire.

In July 1899 the Parish Council of the Parish of Rutherglen raised an action in the Sheriff Court at Glasgow against the Parish Council of the Parish of Glasgow, for relief of advances made and to be made by the pursuers to or on account of Catherine Mechan or Faulds, Rutherglen.

The pursuers averred:—

(Cond. 1) "Catherine Mechan or Faulds, residing at 6½ Farme Loan Road, Rutherglen, was on or about 13th March 1899 found by pursuers to be in ill-health, destitute, and without sufficient means of support, and being a pauper and a proper object of parochial relief, she became chargeable to said parish, and has from said date received parochial relief from pursuers. Notice of chargeability was on said date sent to defenders, and said notice was followed on 20th March 1899 with statement of particulars and claim."

(Ans. 1) "Admitted."

(Cond. 3) "The said Catherine Mechan or Faulds, born at Shettleston, and now aged thirty-seven years or thereby, was married to Alexander Faulds, now aged thirty-six years or thereby, a miner at Shettleston, on the 15th of September 1882. The birth settlement of both husband and wife was the late Barony Parish, now part of defenders' parish. Of the said marriage there were born five children, viz.—Catherine, born 17th June 1883; Robert, born 10th June 1885; Mary Ann, born 30th July 1887; William, born 28th July 1888; and Alexander, born June 1890."

(Ans. 3) "Admitted. Explained that the late Barony Parish was incorporated by the Secretary for Scotland, under the Local Government Acts, with the late City Parish to form the parish of Glasgow, in November 1898."

(Cond. 4) "The said Alexander Faulds deserted the said Catherine Mechan or Faulds and the said children on or about 16th October 1893, and he was convicted on or about 26th October 1893, under section 80 of the Poor-Law Act, 1845 (8 and 9 Vict. cap. 83), and was sent to prison for sixty days."

(Ans. 4) "Admitted."

(Cond. 5) "From 16th October 1893 or thereby to 31st January 1894, the defenders' predecessors, the Barony Parish of Glasgow, maintained the said wife and children. From 31st January 1894 the defenders or their predecessors have maintained and are still maintaining the said children, except Catherine."

(Ans. 5) "Denied as stated. Explained that after his liberation

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from prison, the said Alexander Faulds, on 17th January 1894, signed an obligation to the defenders' predecessors, the Barony Parish Council, in the following terms:—'I, Alexander Faulds, miner, on consideration that the Inspector of Poor of the Barony Parish relieve me of the responsibility of providing for my four children, named respectively Catherine (11), Robert (9), Mary Ann (7), and William (5), do hereby bind and oblige myself to pay the sum of five shillings weekly, first payment to be made on Monday, 29th January 1894. This I promise faithfully to implement and make regular payment, as witness my hand this 17th January 1894.—ALEX. FAULDS. Wm. Cumming, *witness;* John Morison, *witness.*' The defenders have maintained said children, except Catherine, since the date of said desertion, by boarding them out in the country, and the said Alexander Faulds continued to contribute towards their maintenance small sums in partial fulfilment of his obligation until 12th May 1896, since which date he has ceased to contribute; and while he is known to be alive, his whereabouts is unknown to both pursuers and defenders and his said wife, although every endeavour has been made to trace him."

(Cond. 6) "After his release from prison the said Alexander Faulds sent his wife a small sum for a few weeks, and contributed to the defenders or their predecessors, towards the maintenance of the children, small sums up to 12th May 1896, since which date he has ceased to make any contributions for his wife or his children, and his whereabouts have to his wife, the defenders and their predecessors, and the pursuers, been unknown. She is therefore the deserted wife of the said Alexander Faulds."

(Ans. 6) "Denied as stated. Explained that the said Alexander Faulds at the date of said desertion refused, and subsequently has continued to refuse, to contribute any money to support his said wife, he being able to do so, and he concealed his movements and address from her and from the defenders. The said Catherine Mechan or Faulds left defenders' poorhouse with the daughter Catherine on 31st January 1894, and maintained herself until she became chargeable to pursuers' parish on 13th March 1899, without having applied for or received parochial relief for herself, and without having had recourse to common begging."

(Cond. 7) "At the time of his desertion the said Alexander Faulds had a settlement also by residence in the defenders' parish."

(Ans. 7) "Admitted. Explained that the said children, except Catherine, have since 16th October 1893 been, and are still being maintained as above set forth by defenders. The said Catherine Mechan or Faulds, after leaving defenders' poorhouse on 31st January 1894, resided chiefly in pursuers' parish, and had, prior to her chargeability on 13th March 1899, been continuously resident therein for three years and ten months, a period more than sufficient to acquire a settlement therein under the Poor-Law (Scotland) Act, 1898."

The pursuers pleaded;—(1) The pursuers are entitled to decree as craved, as the parochial settlement of the said Catherine Mechan or Faulds is in defender' parish, in respect that (1) her husband's settlement was at the time of desertion in that parish, and has not been lost; and (2) her husband's settlement was at the time of desertion in that parish, and her children having since continually been relieved, she could not acquire another settlement. (2) The defences are irrelevant.

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The defenders pleaded;—(1) Mrs Faulds being at the date of her chargeability a deserted wife, and her children being dependants of their father, she was capable of acquiring, and did so acquire, a settlement for herself in Rutherglen Parish by continuous residence therein for the statutory period. (2) Mrs Faulds having continuously resided as a deserted wife in Rutherglen Parish for the statutory period, without having applied for or received parochial relief or having had recourse to common begging, thereby acquired for herself a residential settlement in Rutherglen Parish.

On 13th November 1899 the Sheriff-substitute (Strachan) pronounced this interlocutor:—"Having heard parties' procurators on the closed record, finds that Alexander Faulds deserted his wife, Mrs Catherine Mechan or Faulds, and their five children, on or about the 16th October 1893, and was convicted on or about the 26th October 1893, under section 80 of the Poor-Law Act, and sentenced to sixty days' imprisonment: Finds that he had then his settlement in the Barony Parish of Glasgow, the predecessors of the defenders: Finds that on being liberated from prison an arrangement was entered into between him and the Barony Parish, whereby, on consideration of said parish relieving him of the responsibility of providing for four of the children, he bound himself to pay to them the sum of 5s. weekly: Finds that from 16th October 1893 the said parish has maintained four of the children, and are still maintaining them by boarding them out in the country: Finds that the said Alexander Faulds made certain payments in partial fulfilment of the said obligation until 12th May 1896, since which date he has failed to contribute anything, and his whereabouts since then have been unknown: Finds that the said Mrs Catherine Mechan or Faulds received no support from her said husband, and has been deserted by him since October 1893: Finds that she left the defenders' poorhouse in the month of January 1894, and went thereafter to the pursuers' parish, and has continued to reside there until she became chargeable as a pauper on 13th March 1899: Finds that she continuously resided in the said parish, and supported herself by her own industry there for a period of three years and ten months prior to her becoming a pauper: Finds that during her residence in the pursuers' parish she was not burdened with the support of the said children, and never applied for or obtained parochial relief either for herself or them, and was not on the roll of paupers: Finds that at the date of becoming chargeable as a pauper she had lost her husband's settlement in the defenders' parish, and had acquired a residential settlement in the pursuers' parish in her own right: Finds that the pursuers' parish, and not the defenders', is liable for her support: Therefore assoilzies the defenders from the conclusions of the action, and decerns."

The pursuers appealed to the Court of Session.

Thereafter the parties, by a joint minute, made the following admissions:—

"1. Catherine Mechan or Faulds, the pauper, continuously resided in Rutherglen for three years and ten months prior to 13th March 1899, and during said period had not recourse to common begging and made no application to the Inspector of Poor, Rutherglen, for parochial relief for herself or her daughter Catherine, and her other children were, during said period, supported by the parish of Glasgow. The correspondence printed in the appendix hereto, containing letters between the defenders and Mrs Faulds, and the defenders and her

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husband Alexander Faulds, and the note of payments made by the latter for the maintenance of the children, are admitted;* and the statements of fact in the defenders' letters are held as correct. The said payments were made on the dates and from the places set forth in the statement. The defenders' record relative to their roll of paupers contains an entry in the following terms, viz.:—'6/8/95. Alex. Faulds, 2 Westmarch, Paisley, called at the office and stated he had been idle for two weeks, and was unable to pay the 5s. weekly, but promised to repay the money as soon as possible.'

"2. The said Alexander Faulds has since 16th October 1893—the date of desertion—made no contribution towards the maintenance of his wife, and since 12th May 1896 has made no contributions for his

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* The list of payments made by Faulds to the defenders on account of his children bore that the first payment, being a payment of 5s., was made on 29th January 1894, and that the last payment, being a payment of 2s., was made on 12th May 1896. The list shewed that down to September 1895 the stipulated payment of 5s. a week was made with fair regularity, after September 1895 the payments were irregular, and were always less than 5s. The list shewed the earlier payments to have generally been made from Baillieston, Shettleston, or Paisley, but after September 1895 "no address" was the usual entry.

The letters from Faulds to the Inspector of Barony (Glasgow), set forth in the appendix, chiefly contained excuses for non-payment or short payment; sometimes they contained inquiries as to his children. The letters from the Inspector to Faulds were either threats of legal proceedings if regular payment was not made, or information as to the children.

The correspondence between Mrs Faulds and the Inspector of Barony, printed in the appendix, contained, *inter alia*, the following:—

Letter, Inspector of Barony to Mrs Faulds, dated 17th March 1894.

This letter informed Mrs Faulds that her four younger children "are going to be boarded out in the country on Monday first 19th inst. If you wish to see them, be good enough to be here, on that date, at 3 P.M."

Letter, Inspector of Barony to a Mrs Aitken, on behalf of Mrs Faulds dated 29th March 1894.

"Referring to yours of 25th inst., please inform Mrs Faulds that her children have been placed together in the one house. The husband and wife being good and trustworthy people, I am also sure they will take great interest in the children's welfare.

"Regarding their address I think it advisable to withhold the same, at least for a few months, as I have found from experience that communications from the parent so recently after separation prevented the children from settling down in their new home, and did more harm than good. I will, however, be pleased to give Mrs Faulds at any suitable time all information regarding their health, &c."

Letter, Inspector of Barony to Mrs Faulds, dated 12th May 1894.

After giving information as to the health and progress of the children. "Regarding your question as to whether your husband is still paying for them, I must decline to answer the same."

Letter, Inspector of Barony to Mrs Faulds, dated 29th June 1894.

"Referring to your call, in the meantime I can make no arrangements whereby your children can be brought to Glasgow, or you to visit them. To do so in either way would only be incurring unnecessary expense, and do no good." Then followed information as to the health and progress of the children.

There was nothing in the correspondence printed to suggest that the defenders or their predecessors, Barony Parish, ever called on Mrs Faulds to support, or to contribute to the support of the four younger children.

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children. It is not known whether the said Alexander Faulds is now alive. He was last heard of in Paisley about 25th August 1896, since which date his whereabouts and circumstances have been and are still unknown to the defenders, their predecessors, the pursuers, and his said wife, although every endeavour has been made to trace him.

"3. The excerpts from the defenders' register, and from the list of children boarded with guardians, all also printed in the appendix hereto, are admitted, and production of the principals dispensed with.* It is admitted that the said children, although dismissed from the poorhouse in 1894, when they were boarded out, remained paupers."

After a hearing before the Second Division, the cause was appointed to be heard before the Judges of the Division with the

* The following were the excerpts from the defenders' books as printed in the appendix, certain columns and other information not material to this report being omitted :—

"Register of Poor of Barony Parish who have been ordered into the Poorhouse, and of their Admissions and Dismissals.

"1893.

Name.	Age.	Settlement.	Birthplace.			Chargeability.		Cause of Dismissal.
			S.	E.	I.	Admission.	Dismissal.	
Faulds' wife, Alex.	34	Barony	1	...	...	Oct. 16	...	...
,, Catherine,	10 3/12	,,	1	...	...	,,	...	..
,, Robert,	8 3/12	,,	1	...	...	,,	...	..
,, Mary,	6 3/12	,,	1	...	...	,,	...	...
,, William,	5 3/12	,,	1	...	...	,,	...	...
,, Alexander,	3 4/12	,,	1	...	...	,,	...	...

"1894.

Faulds' wife, Alex.	34	Barony	1	...	...	Oct. 16	Jan. 31	Per order comm.
,, Catherine,	10 3/12	,,	1	...	...	,,	...	With mother.
,, Robert,	8 3/12	,,	1	...	...	,,	Mar. 20	Boarded out.
,, Mary,	6 3/12	,,	1	...	...	,,	...	Do.
,, William,	5 3/12	,,	1	...	...	,,	...	Do.
,, Alexander,	3 4/12	,,	1	...	...	,,	...	Do.

"Excerpt from Book containing List of Children boarded with Guardians by the Barony Parish for 1898.

Name of Child.	Age.	Condition.			Monthly Aliment.	Date when Boarded out.	Remarks.
		Oph.	Des.	Sep.			
Robert Faulds,	12 1/12	...	...	1	12/	20/3/94	Father living in cohabitation with another woman. Mother unfit to support.
Mary ,,	10 10/12	...	...	1	12/	,,	Do.
William ,,	9 10/12	...	...	1	12/	,,	Do.
Alex. ,,	7 1/12	...	...	1	12/	,,	Do.

"*Note.*—Entries in similar terms appear in the Barony Parish's list of children boarded out for the years 1895, 1896, and 1897."

assistance of three Judges of the First Division, and was heard accordingly. No. 112.

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Argued for the pursuers and appellants (Rutherglen);—In questions of parochial relief the rule was settled that the desertion by a husband of his wife and children was, during the period of desertion, equivalent to the husband's death.[1] Pupil children, if either of their parents was alive, had no claim to relief in their own right. Their only claim was through their father if he was alive, and failing the father the claim was through the mother. The principle was that the family was as far as possible to be kept together.[2] Here the father having deserted was, for the purposes of parochial relief, dead; consequently the mother, as the head of the family,[3] was liable to support all her children, and therefore the relief given by Glasgow to the four younger children was relief "received"[4] by the mother, and pauperised her.[5] If the defenders, when giving the relief to the children, had known nothing of the existence of the mother, and she had lost all knowledge of the children, there might be some ground for saying that the relief to the children was not relief to the mother. No such case was presented by the facts here. The mother left her four younger children in the poorhouse when she herself went away from it, and she knew that they had been boarded out; while the defenders knew her address, communicated with her, refused to let her know the address of the children, refused to tell her whether her husband was continuing to contribute to their support, and entered her in their books as "unfit to support" the children. In such circumstances it was impossible to take it from the defenders that the mother, who ultimately proved unable to support herself and her daughter Catherine, was able to support her whole children until she applied for relief to the pursuers. It was said that the mother had never been entered on the defenders' roll, and that the only test of pauperism was entry on the roll and receipt of parochial relief. Strictly speaking that was not true, for she admittedly was on the defenders' roll from 16th October 1893 to 31st January 1894, and received relief during that period. But throwing that out of account, and assuming that when she left the defenders' poorhouse she had capacity to acquire a settlement in her own right on the principle that she was a deserted wife, nevertheless the argument that she could not have been pauperised as her name had not been entered on the roll did not avail the defenders. So long as the father made payments towards the support of the four children whose names were on the defenders' roll, it might be that they could not be regarded as burdens on the mother to the effect of pauperising her; but the last of these payments was made on 12th May 1896, and the father had not been heard of since 25th August 1896. After the latest of these dates, at all events, to whom was the relief to the children given in law? Not to the father, for he, having deserted the children, was to be regarded as dead. Not to the children, for their mother was alive, and was known by the defenders to be alive. There remained only the

[1] Greig v. Simpson & Craig, May 16, 1876, 3 R. 642.

[2] Adamson v. Barbour, May 30, 1853, 1 Macq. 376, 15 D. (H. L.) 46, 25 Scot. Jur. 419.

[3] Carmichael v. Adamson, Feb. 28, 1863, 1 Macph. 452, 35 Scot. Jur. 286.

[4] Poor-Law (Scotland) Act, 1898 (61 and 62 Vict. cap. 21), sec. 1.

[5] Greig v. Adamson & Craig, March 2, 1865, 3 Macph. 575, 37 Scot. Jur. 286.

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mother, to whom consequently, whatever the form of the entry in the books might be, the relief must be held to have been, in law, given. Failing the father it was the mother's duty to support her children if she could, and the defenders, who could not have been ignorant of that duty, must be held to have relieved the children, because they knew that she was unable to fulfil it. That being so, they ought not to be allowed to plead their own books so as to free themselves from liability.

Argued for the defenders (Glasgow);—The only proof of pauperism was admission to the roll, and the receipt of parochial relief.[1] Here during the period necessary for the mother to acquire a settlement in the pursuers' parish, her name had not been on any parochial roll. The names of the four children had been on the defenders' roll, but they were no longer to be considered members of her family, so that relief to them was not in law relief to her. A pupil child might obtain relief in its own right.[2] From the time that the mother left the defender's poorhouse in January 1894 she and the four children had separated. The arrangement then come to was that she should support herself and her daughter Catherine; while the father agreed with the defenders as to the support of the other children. The father admittedly deserted his wife then, and so far as her capacity to acquire a settlement was concerned, it was just as if he had deserted taking the four children with him; his fortunes and their fortunes alike ceased to affect her. The defenders relieved the four children, in virtue of the contract between the defenders and the father. The children, therefore, were not burdens on the mother, and relief to the children did not pauperise her. She knew of the contract, and was entitled to assume that it was being carried out until she was informed that it was not; and relief given to the children under the contract was not relief to her until she was called on to support the children, and this whether the father was fulfilling his part of the contract or not. A husband might acquire a settlement in a parish by industrial residence therein, although during part of the period of residence his wife, whom he had deserted, had been receiving relief from another parish.[3] The entry in the defenders' books to the effect that the mother was unfit to support the children probably had reference to her circumstances when they first were admitted to the roll. It could not be held to prove that she continued unfit to support them. There was nothing in the admitted facts to prove such inability. In the whole circumstances, the wife having been deserted by her husband had capacity to acquire a settlement, and had acquired a settlement in the pursuers' parish, not having received relief either for herself or through her children during the three years necessary for the acquisition of a settlement.

At advising,—

LORD PRESIDENT.—I have had an opportunity of reading and considering Lord Trayner's opinion in this case. I entirely concur in that opinion, and

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[1] Turnbull v. Kemp, Feb. 27, 1858, 20 D. 703, 30 Scot. Jur. 370; Parish Council of Falkirk v. Parish Council of Govan and Stirling, June 12, 1900, 2 F. 998.

[2] Beattie v. Mackenna and Wallace, March 8, 1878, 5 R. 737; Poor Law (Scotland) Act, 1845 (8 and 9 Vict. cap. 83), sec. 80.

[3] Wallace v. Turnbull, March 20, 1872, 10 Macph. 675, 44 Scot. Jur. 373.

as other members of the Court also concur, Lord Trayner will now read his opinion.

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LORD TRAYNER.—The facts of this case are somewhat peculiar, and I know of no case which can be cited as a direct authority or precedent for its decision. There are, however, some principles well settled in reference to cases under the poor-law, which, applied to the facts we have here to deal with, aid in the determination of the question now to be decided. The principles I refer to are these—(1) that a deserted wife during desertion is in the same position as a widow; (2) that consequently during the desertion she is *sui juris;* and (3) that during desertion she may acquire for herself a residential settlement if she complies with or fulfils the statutory requirements, namely resides in a parish for the statutory period (now three years) without applying for or receiving parochial assistance, and does not during that time have recourse to common begging.

The pauper in this case was deserted; she resided in the pursuers' parish for more than three years, during which time she neither asked for nor got parochial relief, and did not beg, and consequently (if there was nothing more in the case) it would follow necessarily that she had acquired a residential settlement in the pursuers' parish. It would follow also that when the pauper became a proper object of parochial relief it was the pursuers' parish that was bound to give it. The pursuers, however, object to the conclusion I have drawn from the premises stated, on the ground that the minor premise is not true. They say that during the three years' residence of the pauper in their parish she was obtaining parochial relief, in respect that four of her children were at that time being supported by the defenders' parish (in which their father had his settlement), and that such relief to the children was in fact and law relief to her, she being bound during desertion to maintain her children. Now, I admit the obligation on the part of a widow or deserted wife to maintain her pupil children in family with her, and that if she cannot do so without parochial relief she becomes a pauper. The law on this matter cannot be better stated than in the words of Lord Deas in the case of *Greig* v. *Adamson*[1]—"The principle is not to be gone back upon,—that when a widow left with pupil children does her best to maintain them as members of her family, but finds her efforts inadequate, the burden of their maintenance (different from the case of an able-bodied man) constitutes her disability, and entitles her to relief as a pauper, although but for the burden thus resting upon her she could not have been regarded as a pauper at all." I understand the pursuers to refer to the passage I have just read as supporting their contention, but I do not think it does. The conditions to which Lord Deas refers, and on which his opinion proceeds, are not the conditions of the present case. Just mark the difference. In the case supposed by Lord Deas there is a widow (1) with her pupil children in family with her; (2) she is unable to support them, and in consequence (3) is entitled to parochial relief as a pauper. In this case (1) the children are not in family with their mother; (2) she is not *de facto* called on to

[1] 3 Macph. 575, at p. 579.

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maintain them, and her ability to do so without relief is not therefore tested, and her inability to do so certainly not established; and (3) therefore she was not in the circumstances entitled to parochial relief as a pauper. In short, the basis of Lord Deas' opinion that the widow in the case dealt with by him was a pauper was the fact that she was not only entitled, but had asked for and got parochial relief. That essential fact is wanting here. I say essential fact, because in the case of *Turnbull*[1] it was so described by the Lord Justice-Clerk (Hope). He said—"I cannot take anything as proof of pauperism except actual admission to the roll. . . . The question, in my opinion, always is, Did the person *de facto* get relief as a pauper?" Now, that question must here (according to admission) be answered in the negative. The view of the Lord Justice-Clerk just quoted has been followed ever since it was expressed, and was treated as a settled rule in the *Falkirk*[2] case in June last year.

The pursuers further urge that the mother being under obligation to maintain her children, and having allowed them to be maintained by the defenders, thereby accepted parochial relief for them, which must be regarded (according to the law laid down in *Greig* v. *Adamson*[3]) as relief given to herself. This conclusion appears to me to be erroneous. The facts do not support it. The children were not maintained after October 1893 by the defenders at their mother's request or on her application. They were so maintained under an arrangement with the father of the children, who was primarily liable for their support, directly made by him with the defenders, and, so far as appears, the mother never was informed that the father had failed to obtemper the arrangement he had made. It is certain that the mother never was called on, in respect of her husband's failure, to support or aliment the children herself, and if she was unaware that such an obligation had devolved upon her, how could she be pauperised by an unfulfilled obligation, the existence of which was never brought to her knowledge?

Again, the mother never having been asked to support her children, how can it be said that if called upon to do so she could not have done it? She and her one daughter living in family with her certainly supported themselves; they might for anything that appears have been able to support the others. To say that they could not is only a gratuitous assumption. And it is deserving of remark, in passing, that what reduced the mother ultimately to pauperism was not the burden of children she could not support, but the destitution which followed upon ill-health.

Upon the grounds I have stated I am of opinion that the pauper acquired a residential settlement in the pursuers' parish, that the pursuers are themselves liable for the relief afforded to her, and have no claim to be relieved thereof by the defenders.

I think therefore that the appeal should be dismissed.

LORD JUSTICE-CLERK.—I am of the same opinion as Lord Trayner, and I have nothing to add.

LORD YOUNG.—The question which we have to decide regards the

[1] 20 D. 703, at p. 710. [2] 2 F. 998. [3] 3 Macph. 575.

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parochial settlement of a woman called Catherine Faulds. She was born in the parish of Glasgow, and in 1882 was married to Alexander Faulds, a miner, who was also born there. They lived together till October 1893, when their family consisted of five children. On the 26th of that month he was convicted by the Sheriff at Glasgow under section 80 of the Poor-Law Act, 1845, and sentenced to sixty days' imprisonment, which he underwent in Glasgow Jail. The offence under the Act of which he was convicted was—that being a husband and father he did, on 16th October 1893, "desert or neglect to maintain" his wife and children, "being able so to do," "whereby" they became "chargeable" to the parish of Glasgow, whose Inspector of Poor was the statutory prosecutor. The wife and children who thus became chargeable to Glasgow on 16th October were then received by the parish authorities into their poorhouse and maintained there out of the rates. Faulds was liberated on 25th December 1893, when the sixty days terminated, and the Glasgow authorities seem to have lost no time in making inquiry, as was their duty, about his ability to relieve the parish of the burden which his misconduct had thrown upon it. The result of this inquiry (and some personal communication with himself) was the agreement of 17th January 1894 between him and the Inspector of Poor, as representing the parish, cited on record. The terms of it import that the parish was satisfied that Faulds was then unable to relieve it of the burden of maintaining the children, or to contribute more to their support than 5s. a week. It makes special mention of the four children then in the poorhouse, including Catherine the eldest, but no mention of their mother, who was then also in the poorhouse, maintained as a pauper with the children.

On 31st January 1894 the mother left the poorhouse taking her daughter Catherine with her. Neither of them thereafter received parochial relief from Glasgow. Where they went, or where or how they lived from that time till the year 1895, we have no information. The children, other than Catherine, were removed from the poorhouse on 31st January 1894, and thereafter boarded with guardians chosen by the parish authorities, who continued to maintain them as paupers (see joint minute of admissions, art. 3), their father contributing to their support as agreed on (or substantially so) till 12th May 1896. Between 29th January 1894 and 12th May 1896 the Glasgow Inspector of Poor received sixty post-office orders from him, generally, though not quite regularly, weekly. The list of these post-office orders (as given in appendix to joint minute of admissions) may be important as noting where they came from, and taken in connection with the sender's letters given in the same appendix, shewing where he was living and working.

The concluding information regarding Faulds is in the second article of the same minute of admissions, and is to the effect (*first*) that since 16th October 1893 he made no contribution towards the maintenance of his wife, or since 12th May 1896 of his children; and (*second*) that he was last heard of in Paisley about 25th August 1896, and that it is unknown whether or not he is now alive.

Regarding his wife and eldest daughter, from 31st January 1894, when they left the Glasgow Poorhouse till they went to Rutherglen in 1895, we

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have, as I have stated, no information. The first and indeed only information we have about them after January 1894, we get in the admission (article 1, joint minute) to the effect that the wife "continuously resided in Rutherglen for three years and ten months prior to 13th March 1899" (*i.e.* from 13th May 1895), "and during said period had not recourse to common begging, and made no application to the Inspector of Poor, Rutherglen, for parochial relief for herself or her daughter Catherine." That on 13th March 1899 she became chargeable as a pauper and received relief from Rutherglen is the common case of both parties.

I have stated the facts of the case, I trust accurately and as fully as needful, on which the questions of law in dispute must be determined. The ultimate question of law to which any others can only (more or less usefully for its decision) lead up, is whether or not Mrs Faulds acquired a settlement in Rutherglen by her admitted residence there from 13th May 1895 till 13th March 1899, when she became chargeable. Rutherglen maintains that being a married woman she could not so acquire a settlement. Glasgow answers that although a married woman once she lost her husband and became in legal estimation a widow on 16th October 1893, this being by the common law of Scotland the effect or consequence of the offence which her husband then committed, or if not, that his conduct subsequently in living apart from his wife without contributing to her maintenance, and ultimately absconding, as he did in August 1896, imported in legal estimation his decease and her widowhood.

The judgment of the Sheriff before us on appeal is—"that at the date of becoming chargeable as a pauper she (Mrs Faulds) had lost her husband's settlement in the defender's parish (Glasgow) and had acquired a residential settlement in the pursuers' parish (Rutherglen)." The Sheriff's findings in point of fact are necessarily founded on what he thought the record shewed to be agreed upon by the parties—for he had absolutely nothing else before him. The joint minute of admissions to which I have made reference was arranged and lodged when the case was in this Court on appeal, so that we have it (and its appendix) as well as the record to proceed upon, but nothing else as regards facts.

It is the case of both parties that on 16th October 1893 Alexander Faulds had a settlement in Glasgow (Cond. 7 and Answer). Both parties on the record, when referring to his conduct on that day, use the word "desert," which is used in section 80 of the statute on which he was prosecuted—"desert or neglect to maintain" being the expression there used. I read the words "or neglect to maintain" as exegetical of "desert," so that nothing more was required to constitute the offence than neglect to maintain, "being able so to do," whereby a burden was thrown on the prosecuting parish. The statutory offence is nothing more than this. There is no admission, or indeed averment, of any desertion or neglect to maintain before 16th October. If this is an omission—and it looks rather like it, the wife and children having become chargeable to the parish and been received into the poorhouse on that day—the omission cannot be supplied now. But even on the supposition that the culpable neglect of which Faulds was convicted commenced some days, or even weeks or months, before 16th October, I could not hold that Faulds' settlement in Glasgow

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ended on that day, either for himself or others taking their settlement derivatively through him. Accordingly on that very day his destitute wife and family admittedly became chargeable to Glasgow as the parish of his settlement and theirs derivatively through him. The question, then, comes to be, whether anything occurred subsequent to 16th October 1893 to relieve Glasgow of this burden and put it on another parish. Taking it to be conceded, or too clear to be disputed, that as regards the children nothing occurred to relieve Glasgow and burden another parish, the question is, did anything occur which so operated as regards the wife, and if so, when and what was it. No transgression is imputed to Faulds committed subsequent to his liberation from prison and prior to his alleged (and it may be reasonably presumable) absconding in August 1896, for although he did not during that period maintain his wife and family, it is not admitted or otherwise proved that he was "able so to do." The bare fact that he and his wife did not after his liberation live together—and we have no more than the bare fact—is not sufficient ground for imputing blame to him. For a period of six weeks after his liberation the wife remained in the parish poorhouse with the children. She was indeed their proper guardian, and might have insisted on remaining with them though requiring and receiving maintenance from the parish while neither their father nor herself was able to support them. She was destitute and chargeable exactly as the children were, and to the same parish, from 16th October to 31st January, and during that period nothing occurred to affect her right or the duty of the parish to satisfy it. She was, of course, at liberty to go away, taking one of the children with her, leaving the others in charge of the parish authorities, but she did so of her own free will. I infer from the letters of the inspector of poor that he approved of her leaving. On 29th March 1894 he wrote that he thought it advisable to withhold from her the address of the people with whom he had boarded the children (Joint Minute), and on 12th May 1894 he declined to inform her whether her husband was still paying for them (Joint Minute). I also infer from the inspector's letters that he knew when she left that she had no intention of going to live with her husband. We have no facts admitted or proved on which we can judicially affirm that she was desirous or even willing to live with him, joining her fortune with his, and contributing her own and Catherine's services or earnings for the common support and comfort, or that he was not willing and desirous to live with her. We cannot, in my opinion, affirm as a fact admitted or proved that after the wife voluntarily left her children on 31st January 1894 one of the spouses, specifying which of them, deserted the other.

I trust that what I have said sufficiently expresses and explains the grounds of my opinion that down to 25th August 1896 Alexander Faulds retained his settlement in Glasgow, available to himself if he became chargeable as a pauper at or prior to that date, and to his wife derivatively through him if she became chargeable.

But the question remains, what is the effect of what occurred on or immediately after 25th August 1896? From the facts agreed on by the parties, as stated in article 2 of the joint minute, I think it reasonable to infer that Faulds then absconded by going into hiding, from which he has not emerged,

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and that this amounts to desertion, which must be attended with all the consequences thereby resulting to his deserted wife, including the right, or rather capacity, to acquire a residential settlement for herself—if that be one of them. Whether or not it is one of them may be a difficult question. Before expressing my opinion upon it I think it is desirable to call attention to the fact that Mrs Faulds became chargeable on 13th March 1899, and that the period from 25th August 1896 to 13th March 1899 is five months short of three years, and therefore insufficient for the acquisition of a residential settlement. It is essential to the respondents' (Glasgow's) case, as presented and argued, to shew that the pauper's widowhood commenced at least three years before 13th March 1899, when her industrial residence in Rutherglen ended, that is to say, not later than 13th March 1896.

The respondents (Glasgow) must therefore, as the condition of success, establish these propositions:—1st, that by a rule of the common law a deserted wife is capable of acquiring for herself a settlement by residence although her husband not merely may have been, but certainly and admittedly was, resident in Scotland during a part or even the whole period of such residence by her; and 2d, that the wife, whose settlement is here in question, was so deserted as to make this rule applicable to her residence in the parish of Rutherglen.

After stating what I thought the import of the facts agreed on by the parties as stated in article 2 of the joint minute of admissions, regarding Faulds' disappearance in August 1896, I observed that the question whether or not capacity to acquire a residential settlement for herself was one of the rights resulting to a wife in consequence of desertion by her husband—might be a difficult one, I should rather have said was found to be so, and dealt with accordingly when it was first presented to this Court for judgment. That was in the case of *Gray* v. *Fowlie*.[1] The rubric of the report is—*Held* "that though a husband desert his wife and go abroad, she cannot (until the dissolution of the marriage) acquire a settlement in any parish different from that in which his settlement was at the time he left the country." The action was one of declarator in this Court. The Lord Ordinary decided in favour of the capacity, and the Judges of the First Division, where the case went by reclaiming note, being equally divided in opinion, sent it to the whole other Judges for their opinions, with the result that of the consulted Judges two agreed with and seven differed from the Lord Ordinary, and the Judges of the First Division adhering to their opinions, the consequence was the judgment stated in the rubric carried by a majority of nine to four.

Lord Moncreiff, one of the minority, says at the commencement of his opinion, that the case appeared to be, "as far as I have observed, in a great measure if not entirely new. The question raised in it does not appear to have been settled by any former decision, and I do not think that it is precisely reached by any principles correctly deduced or authoritatively delivered in judgment." I quote this only to shew that the question was in 1847 regarded as new by this observant and experienced Judge. I will not

[1] March 5, 1847, 9 D. 811, 19 Scot. Jur. 363.

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quote from any of the very interesting and instructive opinions of the Judges, whether of the majority or minority, but only state that I concur in the opinions expressed by the nine Judges who constituted the majority, and refer to them as in my judgment assigning satisfactory, indeed strong, reasons for the answer which they give to the question then for the first time presented for decision. I would only further observe, that none of the Judges, either majority or minority, state any practice in the matter in question as having come anyhow to their knowledge or under their observation. Of course such knowledge or observation would be valuable only if positive, *i.e.*, of actual recognition of settlements as having been acquired by deserted wives. So far as I know there is no instance down to this year 1901 of the recognition of a settlement so acquired. In the case of *Carmichael* v. *Adamson*,[1] Lord President Inglis (then Lord Justice-Clerk) thus notices the decision in *Gray* v. *Fowlie*[2]—"I think there is," his Lordship observes, "very high authority for saying that desertion by the husband will not give the wife any capacity in the matter of settlement; for in the case of *Gray* v. *Fowlie*,[2] which was considered by the whole Court, it was deliberately adjudged that when a husband with a Scotch settlement by birth deserts his wife and goes abroad she cannot while the marriage remains undissolved acquire a settlement by industrial residence for herself, but necessarily follows or retains her husband's settlement." I take this as a distinct expression of Lord President Inglis' opinion in 1863 that this question was well decided in *Gray* v. *Fowlie*,[2] and that up to that time (1863) there had been no decision to the contrary. Certainly we have been referred to none such of either prior or subsequent date. The question in *Carmichael* v. *Adamson*[3] regarded the settlement of a four-year-old child, to be determined on the facts, which are distinctly and accurately stated by Lord Cowan thus—"That Michael Philips, an Englishman, with no parochial settlement in Scotland, deserted his wife and child in March 1855; that she supported herself and child until September 1857, when she was seized with small-pox; that she became chargeable on Kilpatrick Parish, to which she had removed on 28th September, and died there on the 3d October 1857; and that, subsequent to the death of the mother, the child was put on the roll of paupers in January 1858. The pursuer, as inspector of Kilpatrick, claims relief from one or other of the defenders as representing the parishes respectively of the birth of the mother and of the child."

The question on these facts was, whether the child should be burdened on the parish of its own birth or on that of its mother. It was not suggested that the mother had (and the child could not possibly have) a residential settlement. It is at all events clear that the mother could not have acquired one between her husband's desertion in 1855 and her chargeability and death in 1857, *i.e.*, by a residence of two years. There was, indeed, so far as I can see, no question in the case, the decision of which could be influenced by the judgment in *Gray* v. *Fowlie*[2] as a precedent in point, or the decision

[1] 1 Macph. 452, at p. 460.
[2] 9 D. 811.
[3] 1 Macph. 452, at p. 462.

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of which either way could either increase or diminish the authority of *Gray* v. *Fowlie*[1] on the question there decided, or the value of the expression by Lord President Inglis (although it may be thought superfluous) of his estimation of it as a leading and subsisting authority on the question there decided.

The counsel for the respondent referred to the case of *Greig* v. *Simpson*,[2] not for any thing there decided, but for some *obiter dicta* to the effect that (I quote from the opinion of Lord President Inglis)—"It has been decided that in a question as to parochial relief of the wife and family, the desertion of the husband is equivalent to his death." I think it may be taken that this has been decided in the sense and to the effect that on the desertion of the husband at any date, parochial relief for the wife and family is to be taken derivatively through him from the same parish as it would have been had he died at that date. There is no decision which goes beyond this, and in the only case in which the Court was asked to go further and decide that a deserted wife was *sui juris* with capacity to acquire a residential settlement, the request was refused and the contrary "deliberately adjudged," to use the Lord President's language.

The report of this case of *Greig* v. *Simpson*[3] bears that in the course of the argument by counsel, when the return of the deserting husband was suggested as possible, the Lord President interposed with the question, "Has it not been settled that a wife deserted by her husband is in the same position as if he were dead?" The only point of the question, so far as I can see, is the suggestion which it implies that if there be a rule of law which in disregard of fact holds that a deserting husband is dead, the same rule of law to be consistent must with similar, certainly not greater, disregard of fact hold that he cannot return, so that an argument, on the assumption that he possibly may, must be rejected. In delivering judgment the Lord President says that the deserting husband may return, and with important legal consequences, which indicates some difference in law as well as fact between desertion and death. I will not pursue this topic further, but think it proper to notice the case of *Beattie* v. *Greig*,[4] which the Lord President is reported to have cited as deciding "that a wife deserted by her husband is in the same position as if he were dead." In that case the deserting husband was an Englishman who never had a settlement in Scotland. The deserted wife was a native of Edinburgh City Parish, who never had a residential settlement in any parish. Her husband on 5th February 1869 deserted her in Barony Parish, leaving her there destitute, and from that date till her death on 18th November 1871 she received relief from Barony Parish. The only specialties in the case were (1st) that in May 1869 the husband returned to his wife in that parish, and lived with her there till his death on 19th January 1870; and (2d) that notice of the husband's death was not sent to Edinburgh till 24th August 1870. The question in the case was whether Barony Parish had a good claim against Edinburgh City Parish for repayment of the aliment supplied by it during the whole period of the wife's chargeability. The decision was that

[1] 9 D. 811.
[2] 3 R. 642, at p. 644.
[3] 3 R. 642.
[4] July 9, 1875, 2 R. 923. See 3 R. at p. 643.

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the claim was good for the period between the husband's desertion on 5th February 1869 and his return in the following May, and again from 24th August 1870, when the Barony sent notice to Edinburgh of his death, till the pauper's death in 1871. I see no reason to doubt the soundness of this decision, but neither do I see anything in it bearing on the question whether there is any, and if so, what distinction between the death and desertion of a husband with respect to the parish bound to support his wife when she becomes destitute, or her capacity to acquire a settlement by residence.

I have thought it proper to refer as I have done to the case of *Greig* v. *Simpson*[1] only because the *obiter dicta* made in it were so much founded on in the argument, and to the case of *Beattie* v. *Greig*[2] only because of the reference which was made to it by the Lord President as establishing a general proposition. The other decided cases to which we were referred by the respondent's counsel I think it unnecessary to notice, for reasons which I hope what I have already said will sufficiently suggest.

In the case of *Adamson* v. *Barbour*[3] Lord Cranworth states and explains very instructively the principle of the common law of "derivative" as distinguished from "original" settlement in parishes, viz., that as regards parochial relief "the wife must be with her husband, that the children must remain with their father, and that any settlement gained by him was gained not for himself alone but for all his family"; and also points out "that great difficulty must arise in the application of the principle if it is not followed through all its consequences." This common law principle of derivative settlement influenced and indeed guided the majority of the Judges in the case of *Gray* v. *Fowlie*[4] in 1847 exactly as it did Lord Cranworth in *Adamson* v. *Barbour*[3] in 1853. It was the same, and applicable and applied in the same way in both cases, though the one related to derivation by marriage and the other to derivation by parentage, and in both there was the same necessity of following it through all its consequences, the principle, as stated by Lord Cranworth, being that "the wife must be with her husband," that is, be a burden on his parish of settlement, should she ever become chargeable, and "that children must remain with their father," that is, be a burden on his parish of settlement, should they ever become chargeable. It was in both cases obvious to the Judges that (as Lord Cranworth expressed it) "great difficulty must arise in the application of the principle if it is not followed through all its consequences."

I hope to be excused for dwelling a few moments longer on derivative as distinguished from original settlement. The former applies only to a family and its members so long as they continue so. The wife continues a member certainly while the marriage subsists undissolved—and I should think after its dissolution if she remains unmarried—and each child does so till forisfamiliated. The common law of derivative settlement gives one and the same settlement, viz., that of the head of the family to each mem-

[1] 3 R. 642.
[2] 2 R 923.
[3] 1 Macq. 376, at p. 378.
[4] 9 D. 811.

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ber of it, and rests on the principle that this unity is expedient and has long existed with the approbation of the country. The principle includes the necessity of rejecting the law of original settlement as applicable either to a wife or to children not forisfamiliated, as this Court recognised in the case of a wife in *Gray* v. *Fowlie*,[1] and the House of Lords in the case of children in *Adamson* v. *Barbour*,[2] reversing the judgment of this Court, which had put the burden of each child upon its original settlement—that is to say, on the parish in which it happened to be born. That a widow is *sui juris* with capacity to acquire an original settlement for herself separate from that of her children (not forisfamiliated) is a proposition unsupported, so far as I know, by any authority.

It seems to me that the case we are now dealing with, having regard to the facts of it, illustrates very strikingly indeed the difficulties that must arise in the application of this principle of derivative settlement if not followed through all its consequences.

From his birth till 25th August 1896, Faulds, the husband, lived in Scotland. Assume, nevertheless, that in October 1893 he deserted his wife and family, and has ever since remained in desertion in the sense that he has not lived with them or maintained them. Assume, also, that so long as his children were maintained as paupers by the parish of his settlement at the date of his desertion, he was incapable of acquiring a residential settlement in another parish. On these assumptions his wife also (the mother of the pauper children) was, I think, incapable of acquiring a residential settlement in another parish. The proposition that a wife is *sui juris* with capacity to acquire a settlement when her husband (a resident Scotchman) is not, is startling. The consequence of affirming it would of course be to allow her to destroy the derivative settlement she had in Glasgow Parish (probably quite unintentionally, having no interest to do so), and thereby to relieve that parish of the burden of maintaining her if she became chargeable, and impose it on Rutherglen or any other parish, while her husband and children remained burdens on Glasgow, and could resort to no other parish for relief should they become chargeable.

One of my assumptions was that the husband was pauperised in consequence of the relief given to his destitute children by the parish of his settlement, and so incapable of acquiring a settlement in another parish, and I think this is the sound view. But assume that Faulds was not thus incapacitated, and that he could and did acquire a settlement in another parish—not Rutherglen. On this assumption, would the children remain burdened on Glasgow, or be transferred to their father's newly acquired parish of settlement? In the one view the family would, with respect to settlement, be divided into three parts (1, husband; 2, wife; 3, children), and in the other into two parts, each with a different settlement from the others. And the possibility of such results is suggested by the fact that a settlement can be acquired in three years by mere "haunting and resorting" without public begging or receiving parochial relief. I have pointed out these possible and indeed probable results as illustrating the soundness of the views, and the principles on which they were founded, of the majority

[1] 9 D. 811. [2] 1 Macq. 381.

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of the Judges in the case of *Gray* v. *Fowlie*,[1] also of the opinion expressed by Lord President Inglis in the case of *Carmichael* v. *Adamson*,[2] that there is "no principle of the common law which will justify the position that a married woman deserted by her husband is by reason of her desertion restored to the legal capacity of an unmarried woman," and the necessity in the application of the principle of derivative settlement of following it through all its consequences.

With the opinion which I have, I trust intelligibly, expressed and explained, I have doubted whether I ought to state my views regarding the validity of an argument against the respondents' case urged by the appellants on the assumption (not admission) that the respondents had satisfactorily established these propositions—(first) that Faulds, on 16th October 1893, so deserted his wife as in law to import his death and her widowhood; (second) that this desertion and consequent widowhood continued down to 13th March 1899, so that during the time she resided in Rutherglen she was in legal estimation not a wife but a widow; and (third) that a widow, though only so in legal estimation by her husband's desertion, is *sui juris* and capable of acquiring a settlement. My opinion, and the authorities to which I have referred, being distinctly adverse to these propositions, I have, I say, felt doubtful whether I ought to state my views regarding the argument in answer made on the assumption that they have been established. It is perhaps best that I should, and I will endeavour to do so briefly.

The argument is that the whole case of the respondents (Glasgow) being based on the soundness of the propositions which I have just stated, without which it has, indeed, admittedly, no basis, it is only reasonable to consider whether there is not a good answer to the case on the assumption (not admission) that they are sound. The argument is, *esto* that the propositions are sound, it follows that on 16th October 1893, when Mrs Faulds and her pupil children became chargeable to the respondent's parish, she was in legal estimation a widow and the surviving parent of her fatherless children. Who, then, the argument proceeds, was, in legal estimation, the pauper to whom relief was given by the maintenance provided by the parish to the destitute widow and children from 16th October onward so long as it was continued?—the answer in the argument being, of course, the widow. The conclusion of the argument is, that so long as either she or her children were continued on the roll and received parochial relief from Glasgow, she was a pauper, and incapable of acquiring a settlement in another parish.

I think the argument is sound. Two answers were made to it. The first was that Mrs Faulds could not be made a pauper otherwise than by actual admission to the roll or actual receipt of relief, and that there is no evidence of such admission or receipt. But this is inaccurate in fact. The excerpts from the defenders' (the respondents') books printed in the appendix to the Joint Minute, and the admission of their accuracy in article 2 of the minute prove that mother and children were on 16th October 1893 entered in the "register of poor of Barony Parish who have been ordered into the poorhouse," and that they remained in the poorhouse

[1] 9 D. 811.

[2] 1 Macph. 452, at p. 460.

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till 31st January 1894. The mother's history thereafter I have already noticed, and need not repeat. I have also referred to the admitted facts regarding the boarding out and continued maintenance of the children by the respondents, and need not repeat them. The only other answer was to the effect that Mrs Faulds was never called upon by the respondents to relieve them of the burden of supporting her children by taking it upon herself, and that, for anything that appears, she was able to support them, and would have done so had she been asked. This seems a strange answer to be made on behalf of the respondents (Glasgow), whose duty undoubtedly was to make from time to time due inquiry as to the condition of a parent on whose behalf, as being the legal pauper, they were maintaining her children, and her ability to relieve them of the burden by taking it on herself, and is only made a little more extravagant by the remark in their list of children boarded with guardians for 1898, recorded opposite the names of Mrs Fauld's children,—"Mother unfit to support."—(Appendix to Joint Minute.)

I therefore repeat that I think the appellants' argument with which I have been dealing is sound, and the answers to it not so.

I desire, however, to be understood as putting my judgment in the case on an absolute negation of the soundness of the respondents' propositions, and not upon the argument of the appellants on the supposition or *esto* that they are sound, favourably as I regard it.

LORD ADAM.—I concur in the opinion of Lord Trayner.

LORD KINNEAR.—I also concur in the opinion of Lord Trayner, and I should only desire to add, that in proceeding upon the footing his Lordship explains, that Mrs Faulds is to be regarded as a wife who was deserted by her husband, I proceed upon the admissions on record, and on those only, although I add that I find nothing in the minute of admissions to suggest any modification of the explicit statements and admissions on record.

The fourth article of the condescendence says,—"Alexander Faulds deserted Catherine Faulds on or about 16th October 1893," and the answer is "Admitted." I therefore take it that this man deserted his wife at that date, and there is nothing on record or in the minute of admissions to suggest that he ever returned to his wife or family or supported her from that time onwards.

The parties do not know whether he is now dead or alive, but however that may be, there is nothing to suggest that he has ever returned or that he is alive. I take it, therefore, upon the footing that our judgment is asked by both parties on the ground that the woman was deserted on 16th October 1893 and has continued in desertion ever since. If that be adopted, I concur with Lord Trayner in holding that it is settled now in law that the desertion by a husband of his wife is the death of the husband, and that the desertion by the husband puts the wife in the position of earning a residential settlement for herself, because it enables her, or compels her, to earn her own living, and to earn her own living as if she were an unmarried woman or a widow. In this case it is admitted that the woman lived in the parish of Rutherglen for the statutory period and earned her own living, and that accordingly she acquired a residential

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settlement in that parish, unless it could be shewn against her that she obtained parochial relief or obtained relief by begging during that time, and again, I take it to be admitted that was not alleged against her, and she obtained no parochial relief for herself.

I must say, if the question were whether it has been proved that she was able to support the whole family, I might have come to the conclusion that she was not in any sense able to support the children who were in Glasgow, but that is not the question. She did not herself obtain parochial relief, and I take it to be settled in *Turnbull* v. *Kemp*[1] that the poor-roll is conclusive on the question whether a particular person is a pauper or not. I do not think that the conduct of the defenders' parish of Glasgow can raise any plea in bar which will enable them to make a pauper of the woman who is now in Rutherglen. I do not think their treatment of the children, whether with or without the mother's knowledge, can pauperise her. They made no claim upon the mother to support the children. I think it is an extremely important thing in a case of this kind, where the question is, which of two parishes is to bear a particular burden, that we should follow rules which have been once laid down and fixed by decision. That is of more importance, because it tends to a more just distribution of liabilities that a rule once fixed should be uniformly adhered to, than that it should on its own original ground commend itself to one's own mind as being in accordance with principle. I think the case of *Turnbull* v. *Kemp*[1] is a perfectly sound decision, but if it were not we should be bound to follow it, because perpetual variation of rules on which questions of relief are to be settled is much more injurious to competing parishes than any particular decision can possibly be.

LORD MONCREIFF.—I am of opinion that the pursuers are entitled to decree. The broad outlines of the case, which, in my opinion, are conclusive, can be shortly stated. The defence to the action on the part of the parish of Glasgow is that when the pauper, a deserted wife (whose settlement when deserted was in Glasgow), became chargeable to the pursuers' parish of Rutherglen on 13th March 1899, she had acquired a residential settlement in the pursuers' parish by continuous residence there for upwards of three years prior to that date, during which she had "maintained herself without having recourse to common begging, either by herself or her family, and without having received or applied for parochial relief"—61 and 62 Vict. cap. 21, sec. 1.

Being a deserted wife, the pauper could have acquired a residential settlement provided that the statutory requisites were complied with. But, in point of fact, during the whole of the three years in question, although she maintained herself and one child in the pursuers' parish, four of her children were maintained as proper objects of parochial relief by the defenders' parish. Therefore in the absence of exceptional circumstances in the case it necessarily follows that she was incapable of acquiring a settlement in the pursuers' parish.

There is no dispute as to the general law that when a husband deserts his

[1] 20 D. 703.

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wife and family, desertion, in a question as to parochial relief, is equivalent to death—*Greig* v. *Simpson and Craig*.[1] As long as desertion continues, the deserted wife is regarded as the head of the family, and the children as burdens upon her; and if regular parochial relief is given either to them or to herself she is thereby pauperised and incapable of acquiring another settlement by residence. The only peculiarity of this case is that although the husband in 1893 deserted his wife and family, who (that is, the wife and five children) were all admitted to the defenders' poorhouse, he was shortly thereafter compelled by the defenders' parish to enter into an arrangement to contribute to the support of four of his children whom the Glasgow Parochial Board agreed to continue to maintain. He continued to contribute small sums under this arrangement until the beginning of 1896, and thus up to that time these four children may be held not to have been burdens upon the deserted wife.

But in 1896 the husband finally ceased to contribute, and disappeared; and it is matter of admission that "since 25th August 1896 his whereabouts and circumstances have been and are still unknown to the defenders, their predecessors, the pursuers, and his said wife, although every endeavour has been made to trace him." Thus the temporary arrangement came finally to an end. That being so, matters stood thus—The parish of Glasgow knew at latest in 1896 that the husband had deserted his wife and family. I do not do them the injustice to suggest that they did not know the legal consequences of desertion, viz., that the children were burdens upon the deserted wife, and that she was bound to support them if she could. They continued, nevertheless, to maintain the four children as before, admittedly on the footing that they were proper objects of parochial relief; and, again, I do not do the defenders the injustice to suppose that they would have done so had they not been satisfied that the deserted wife, whose residence they knew, was unable to support them. There is not a suggestion in the case that she was able to support them, and, in point of fact, as the event proved, she was not in the end able to support herself and one child.

It is pleaded, on the authority of *Turnbull* v. *Kemp*,[2] that the mother cannot be held to have been the pauper, because she was not entered in the defenders' roll as such. In my opinion this is not a defence which is open to the defenders. The four children were all entered in the roll throughout, and the defenders well knew that, being pupils, the children could not be paupers in their own right, and that they being proper objects of parochial relief, the mother in the eye of the law was the pauper—*Greig* v. *Adamson and Craig*,[3] *per* Lord Deas and the majority of the Court. In my opinion they cannot be heard to say that she was not on the roll. If the defenders are successful in the present case, the result will not only be that they will not be liable for the support of the pauper and the child who lives with her, but they will be freed from liability in future for the support of the four children whom they are at present maintaining. There is therefore all the more reason for looking with some jealousy on the defence which is now urged on their behalf. Now, the relief which they gave to the children was not temporary or casual relief such as was given in *Turnbull* v. *Kemp*.[2]

[1] 3 R. 642. [2] 20 D. 703. [3] 3 Macph. 575.

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The children were entered and kept on the roll for years as paupers entitled to permanent relief, and if the mode in which their names were entered in the defenders' books was erroneous (which in the circumstances is by no means clear), the defenders are not entitled to found on their own mistake for the purpose of throwing the burden on another parish. The same remark applies to the defenders' refusal to let the mother see her children. It is not unimportant to observe in passing that she took them to the defenders herself in 1893, and therefore, of course, knew the footing on which they were supported.

I therefore cannot agree with the Sheriff-substitute. His view is, that during the three years' residence in the pursuers' parish the pauper was not burdened with the four children because they did not reside in family with and were not supported by her. He would have been right if they had been supported by a friend or relative out of charity; but, as I have shewn, this was not so. They were maintained by the defenders simply on the legal ground that the mother's settlement was in the defenders' parish, and that in the defenders' opinion she was unable to support them. This, accordingly, was relief "received" by the mother, which prevented a change of settlement.

The case of *Palmer* v. *Russell*[1] is not in point, because relief given to a lunatic child is regarded as exceptional, and does not pauperise the parent.

On these grounds I am of opinion that the appeal should be sustained and judgment given for the pursuers.

THE COURT pronounced this interlocutor:—"The Lords of the Second Division of the Court (along with three Judges of the First Division) having heard counsel for the parties in the appeal, in conformity with the opinion of the majority of the Judges present at the hearing, dismiss the appeal: Find in fact and in law in terms of the findings in fact and in law in the interlocutor of the Sheriff-substitute of Lanark, dated 13th November 1899, appealed against: Therefore of new assoilzie the defenders from the conclusions of the action, and decern."

H. B. & F. J. DEWAR, W.S.—CHARLES GEORGE, S.S.C.—Agents.

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WALTER POLLOCK, Pursuer (Reclaimer).—*Sol.-Gen. Dickson*—*Watt.* NORTH BRITISH RAILWAY COMPANY, Defenders (Respondents).—*Ure, Q.C.*—*G. G. Grierson.*

Railway—Accommodation Works—Damages for failure to provide accommodation works timeously—"Forthwith"—Road—Farm Road—Level Crossing—Interference by railway company with level crossing—Servitude—Railways Clauses Consolidation (Scotland) Act, 1845 (8 *and* 9 *Vict. cap.* 33), *secs.* 46, 48, *and* 60.—The Railways Clauses Consolidation (Scotland) Act, 1845, sec. 46, enacts, that "if in the exercise of the powers by this or the special Act granted, it be found necessary to cross, cut through, raise, sink, or use part of any road . . . either public or private, so as to render it impassable for or dangerous to passengers or carriages, or to the persons entitled to the use thereof, the company shall, before the commencement of any such operations, cause" a sufficient substituted road to be made.

Sec. 48 enacts that "if any party entitled to a right of way over any road so interfered with by the company shall suffer any special damage by reason

[1] Dec. 1, 1871, 10 Macph. 185, 44 Scot. Jur. 110.

* Decided June 15, 1900.

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that the company shall fail to cause another sufficient road to be made before they interfere with the existing road, it shall be lawful for such party to recover the amount of such special damage" from the company by action.

Sec. 60 enacts that the company shall make and at all times thereafter maintain such accommodation works, including bridges, as shall be necessary for the purpose of making good any interruptions caused by the railway to the use of the lands through which the railway shall be made; "and such works shall be made forthwith after the part of the railway passing over such lands shall have been laid out or formed, or during the formation thereof."

A railway company, under the powers of their special Act passed in 1878, acquired in property the *solum* of a portion of a farm road which connected the north part of the farm with the south, and laid their rails on the portion so acquired. Compensation for lands taken and for severance was paid to the proprietor on the footing that a level crossing was to be provided at the point where the railway intersected the road, and a level crossing was provided accordingly. The railway, as originally constructed, was a single line with a local traffic only, but under the powers of an Act obtained by the railway company in 1893, the line was doubled and extended so as to form part of a main line, with a large traffic, including express trains. In June 1896 (before the doubled and extended line was opened for traffic) the proprietor and the tenant of the farm presented an application, under section 60 of the Railways Clauses Consolidation (Scotland) Act, 1845, for an accommodation bridge in lieu of the level crossing, on the ground that the increased traffic consequent on the doubling and extension of the line would make the level crossing useless for the purposes of the farm. The railway company disputed liability, but in July 1897 they were ordained to provide an accommodation bridge. The bridge was not provided till March 1898, by which time the doubled and extended line had been opened for traffic, and the level crossing in consequence useless, for ten months. The tenant then brought an action against the railway company for damages on account of the loss sustained by him through the want of means of communication between the two portions of his farm during these ten months.

The Lord Ordinary (Kyllachy) assoilzied the defenders, on the ground that the pursuer was not entitled to damages under section 48 of the Railways Clauses Consolidation (Scotland) Act, 1845, in respect that that section and section 46 of the Act applied only to physical interference with a road, and not to damage resulting from increase of traffic, and that in the present case the laying down of the second line of rails—the only physical interference with the road—did not *per se* render the level crossing impassable or dangerous.

Held (in *rev.* the judgment of the Lord Ordinary) that the pursuer was entitled to damages at common law, in respect that the defenders had not fulfilled their statutory duty under section 60 of the Act, of providing the accommodation bridge "forthwith" on the formation of their line.

Held further, and alternatively (*per* Lord Moncreiff) that the pursuer was entitled to damages under section 48 of the Act. *Opinions* (*per* the Lord Justice-Clerk and Lord Trayner) *contra*.

2d Division.
Ld. Kyllachy.

By the Glasgow, Yoker, and Clydebank Railway Act, 1878 (41 and 42 Vict. cap. cl.), the Glasgow, Yoker, and Clydebank Railway Company was incorporated, and was authorised to construct a railway from the Stobcross branch of the North British Railway Company to Yoker and Clydebank. The time provided by the Act for the completion of the railway was five years from 4th July 1878. The Act incorporated the Lands Clauses Consolidation (Scotland) Act, 1845, and the Railways Clauses Consolidation (Scotland) Act, 1845.

In March 1881 Mr Speirs of Elderslie, proprietor of the farm of Yoker Mains, was served by the railway company with a notice to take certain portions of that farm for the purposes of the Act of 1878, Thereafter the Commissioners of Mr Speirs granted a disposition,

dated and recorded in the Register of Sasines in May 1885, in consideration of the payment by the railway company of the sum therein specified, being the amount fixed and determined by arbitration, in terms of the Lands Clauses Consolidation (Scotland) Act, 1845, "as the compensation to be paid for the lands and others hereinafter disponed, taken by the said railway company in virtue of the powers contained in the" Company's Act of 1878, "and for severance or other injuries affecting the remaining lands belonging to the said Alexander Archibald Speirs, all conform to decree-arbitral, dated," &c., whereby it was declared that the said sum "is in full satisfaction of all claims competent to the said Alexander Archibald Speirs or his commissioners, and the heirs who shall succeed to him in the said entailed lands and estate from the said Glasgow, Yoker, and Clydebank Railway Company, under the said reference," and the commissioners "do hereby, as commissioners foresaid, sell, alienate, dispone, convey, assign, and make over from the said Alexander Archibald Speirs and his heirs and successors to the said The Glasgow, Yoker, and Clydebank Railway Company, their successors and assigns for ever, according to the true intent and meaning of the foresaid Acts," *inter alia*, the portions of the farm of Yoker Mains specified in the notice to take. The claims of William Renwick, who was then the tenant of the farm of Yoker Mains, were also settled by the company, conform to discharge granted by Renwick in August 1882.

The railway intersected the farm of Yoker Mains, dividing it into two nearly equal portions. The farm steading was on the southern portion, and prior to the making of the railway was connected with the northern portion by a farm road, which consequently was intersected by the railway, and part of the ground disponed to the railway company by the above-mentioned disposition was the portion of the road within the line of the railway. The railway company formed a level crossing at this point, thus making it possible to continue to use the road as a means of communication between the farm steading and the northern portion of the farm. In the action of damages after mentioned it was admitted by the railway company that the above-mentioned claims of the landlord and the tenant were settled on the footing that the two portions of the farm were to be connected by this level crossing.

The railway was opened for public traffic in December 1882. Land had been taken sufficient for a double line, but as opened the line was (in so far as it passed through the farm of Yoker Mains) a single line, with a purely local traffic. In 1893, however, by the Glasgow, Yoker, and Clydebank Railway Act, 1893 (56 and 57 Vict. cap. clxxiv.), the company were authorised to complete the doubling of their line and to extend it as a double line to Dalmuir.

In consequence of this Act a petition was in June 1896 presented in the Sheriff Court at Glasgow against the railway company by Mr Speirs of Elderslie, and by Walter Pollock, who had come to be tenant of Yoker Mains, praying for decree ordaining the company to provide "an accommodation bridge" in lieu of the level crossing, "in terms of and to the effect provided by the Railways Clauses Consolidation (Scotland) Act, 1845, and particularly section 60 thereof, and Acts amending the same, and to ordain the defenders to pay expenses to the pursuers."*

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* The following sections of the Railways Clauses Consolidation (Scot-

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The pursuers averred that the farm road with the level crossing was the only means of communication between the farm steading and the northern portion of the farm; that the farm was a dairy farm, with a large cattle and other traffic passing frequently each day along the road and level crossing; that by their Act of 1893 the defenders had been authorised to make the railways therein described, and, *inter alia*, railway No. 2, being a doubling of the railway which passed through the farm of Yoker Mains; that these railways when completed and opened for public traffic would form the direct route of the North British Railway Company into Dumbartonshire. (Cond. 6) "So long as the said railway formed a single line the level crossing was a convenient mode of passing it with the cattle, carts, and traffic going to and from the fields to the north of the railway and the steading. When the double line of railway is formed and opened for public traffic it will be used for the running of express trains, and because of this, and the large general traffic which will pass over the railway, it will be impossible to continue to use the level crossing." The pursuers therefore pleaded that the accommodation bridge sued

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land) Act, 1845 (8 and 9 Vict. cap. 33), were referred to in the Court of Session action after mentioned, and now reported:—

Sec. 46—"If in the exercise of the powers by this or the special Act granted, it be found necessary to cross, cut through, raise, sink, or use any part of any road, whether carriage-road, horse-road, tramroad, or railway, either public or private, so as to render it impassable for or dangerous to passengers or carriages, or to the persons entitled to the use thereof, the company shall, before the commencement of any such operations, cause a sufficient road to be made instead of the road to be interfered with, and shall at their own expense maintain such substituted road in a state as convenient for passengers and carriages as the road so interfered with, or as nearly so as may be."

Sec. 47—"If the company do not cause another sufficient road to be so made before they interfere with any such existing road as aforesaid, they shall forfeit twenty pounds for every day during which such substituted road shall not be made after the existing road shall have been interrupted; and such penalty shall be paid to the trustees, commissioners, surveyor, or other person having the management of such road, if a public road, and shall be applied for the purposes thereof, or in case of a private road the same shall be paid to the owner thereof; and every such penalty shall be recoverable with costs by action in any competent Court."

Sec. 48—"If any party entitled to a right of way over any road so interfered with by the company shall suffer any special damage by reason that the company shall fail to cause another sufficient road to be made before they interfere with the existing road, it shall be lawful for such party to recover the amount of such special damage from the company, with expenses, by action in the Court of Session, if the damage claimed exceeds twenty-five pounds, or in the Sheriff Court if the damage claimed does not exceed twenty-five pounds, and that whether any party shall have sued for such penalty as aforesaid or not, and without prejudice to the right of any party to sue for the same."

Sec. 49—"If the road so interfered with can be restored compatibly with the formation and use of the railway, the same shall be restored to as good a condition as the same was in at the time when the same was first interfered with by the company, or as near thereto as may be; and if such road cannot be restored compatibly with the formation and use of the railway, the company shall cause the new or substituted road, or some other sufficient substituted road, to be put into a permanently substantial condition, equally

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for being necessary for the working of the farm, on the execution of the works authorised by the Act of 1893, decree should be granted as craved.

The defenders denied liability to make the bridge as an accommodation work under their Act of 1893, on the ground that a double line was authorised by their Act of 1878, and that the doubling of the line was included in the Act of 1893, not to give them power to double the line, but merely to define the purposes to which the capital authorised by the Act of 1893 might be applied. The defenders further maintained that the bridge could not be regarded as an accommodation work under the Act of 1878, in respect that the period within which additional accommodation works under that Act might be demanded had (under section 65 of the Railways Clauses Consolidation (Scotland) Act, 1845), expired in December 1887, being five years from the opening of the line for public traffic. In any view, the defenders maintained that a bridge was not necessary for the working of the farm.

On 14th August 1896 the Sheriff-substitute (Balfour) allowed a proof as to the necessity for making a bridge; *quoad ultra* he repelled the defences.

On 14th February 1897 the Sheriff (Berry) on appeal adhered, and remitted to the Sheriff-substitute.

A proof having been led, the Sheriff-substitute pronounced this interlocutor, on 14th July 1897 (after findings in fact in conformity with the foregoing narrative):—"Finds that in the working of the

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convenient as the former road, or as near thereto as circumstances will allow; and the former road shall be restored, or the substituted road put into such condition as aforesaid, as the case may be, within the following periods after the first operation on the former road shall have been commenced, unless the trustees or parties having the management of the road to be restored by writing under their hands consent to an extension of the period, and in such case within such extended period; (that is to say) if the road be a turnpike-road, within six months, and if the road be not a turnpike-road, within twelve months."

Sec. 60—"The company shall make and at all times thereafter maintain the following works for the accommodation of the owners and occupiers of lands adjoining the railway (that is to say)," *inter alia*,—

"Such and so many convenient gates, bridges, arches, culverts, and passages over, under, or by the sides of or leading to or from the railway, as shall be necessary for the purpose of making good any interruptions caused by the railway to the use of the lands through which the railway shall be made; and such works shall be made forthwith after the part of the railway passing over such lands shall have been laid out or formed, or during the formation thereof:

Provided always, that the company shall not be required to make such accommodation works in such a manner as would prevent or obstruct the working or using of the railway, and that the company may, in lieu of such accommodation works, make compensation to the owners and occupiers of the lands for the want thereof, in such manner as may be agreed upon between the company and such owners and occupiers, nor to make any accommodation works with respect to which the owners, lessees, and occupiers of the lands shall have agreed to receive and shall have been paid compensation instead of the making of them."

Sections 61 to 65 made various provisions for the failure duly to provide accommodation works under section 60. An action of damages was not therein mentioned.

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farm the level crossing has had to be made constant use of, there being fifty-two cows on the farm, and there being large carting operations from the field under crop: . . . Finds that while the railway was worked as a single line it was worked on the baton system, and the trains ran within about twenty minutes of one another, and the tenant of the farm had an interval of twenty minutes to pass his cows and carts over the level crossing, and he was thus enabled to work his farm with convenience and safety: Finds that in July 1893 the defenders obtained another Act to extend the railway to Dalmuir and to double their existing main line: Finds that this new line joins the main line to Helensburgh at Dalmuir, and it is now a trunk line of the North British system, and the defenders are now working it as a double line, and are conducting a greatly increased traffic over it, including the running of a large number of express trains at very high rates of speed through the pursuers' farm: Finds that the effect of this has been to render the level crossing useless, and to make it impossible for the tenant of the farm to pass his cows and carts over the crossing: Finds that the pursuers have therefore demanded new accommodation works, and they claim that a suitable accommodation bridge with suitable approaches should be provided for them in lieu of the level crossing: Finds that under the circumstances a bridge with approaches is the proper mode of providing suitable accommodation works for the pursuers in lieu of the level crossing: Therefore ordains the defenders to provide an accommodation bridge . . . Finds the defenders liable to the pursuer in expenses: Allows," &c.

The doubled and extended line had been opened for public traffic on 17th May 1897. On 1st August 1897 the Glasgow, Yoker, and Clydebank Railway Company was by statute amalgamated with, and its assets and liabilities taken over by, the North British Railway Company.

The accommodation bridge, which the Sheriff-substitute had by his interlocutor of 14th July ordered to be provided, was completed and ready for use in March 1898.

Thereafter, in October 1898, Pollock, the tenant of Yoker Mains, brought the present action against the North British Railway Company, concluding for payment of £200 as damages for loss sustained by him from 17th May 1897, when the doubled line was opened, to March 1898, when the accommodation bridge was completed.

The pursuer set forth a narrative of the circumstances already explained, in particular averring (what the defenders, as already stated, admitted), that the claims for compensation were settled on the footing that the two portions of the farm were to be connected by the level crossing in question. The pursuer then averred;—(Cond. 9) "The pursuer has suffered much loss and damage through being deprived of the road to said fields from the date when he was deprived of the said level crossing, namely, 17th May 1897, till the opening of the said accommodation bridge in March 1898. His subjects on the north side of the railway were rendered of much less value to the pursuer." The pursuer then set forth specific averments of loss, which consisted largely in having to drive his cows for the northern pasture grounds of the farm by a very circuitous route, to the serious diminution of their milking capacity. "The railway company ought to have caused a sufficient road to be made before interfering with the existing road used by the pursuer for access to that part of his farm to the north of the railway line, but this they

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culpably failed to do, and it was only after ten months' delay that they provided a sufficient road. The said delay, which was most unjustifiable, was productive of the said special loss and damage to the pursuer, caused thus through the fault of the defenders, as above condescended on, for which he is entitled to reparation both at common law and under statute, and in particular section 48 of the Railway Clauses Act, 1845. The forming of the said bridge and approaches could have been done in a very short time, and ought to have been done prior to the interference with the existing road." The pursuer did not aver that, prior to the opening of the doubled line the railway company had interfered with the level crossing so as to cause loss to him.

The pursuer pleaded, *inter alia;*—(1) The defenders' predecessors, whose obligations they have assumed, having failed to provide the necessary accommodation bridge for the said farm, for the period condescended on, in terms of the statutes, they are liable to the pursuer for the loss and damage thereby sustained by him. (2) The pursuer having suffered special loss and damage through the defenders' said predecessors having failed to cause a sufficient road to be made for access to that part of his farm north of the railway line before interfering with the existing road, the defenders are liable in compensation as claimed, with expenses. (3) The defenders' predecessors having interfered with the pursuer's access to part of his lands, and having culpably and unjustifiably delayed to provide a proper access thereto, the pursuer is entitled to compensation as claimed.

The defenders pleaded, *inter alia;*—(2) The defenders having doubled their railway and used the same as doubled under statutory powers, should be assoilzied, with expenses. (4) The defenders should be assoilzied, in respect that the pursuer has suffered no special loss and damage through any failure on the part of the defenders' predecessors to provide a sufficient road between the intersected parts of the pursuer's farm. (5) The defenders, as soon as they were ordained to provide additional accommodation works for the farm, having carried out the order of the Court forthwith, are not liable to the pursuer in damages, and decree of absolvitor should be pronounced, with expenses. (6) The defenders should be assoilzied, in respect that the provisions of the Railways Clauses Consolidation (Scotland) Act, 1845, founded on by the pursuer, are not applicable in the present case, where the *solum* of the road, so far as within the fences of the railway, is the property of the defenders.

A proof was led. The evidence was to the same general effect as that in the proof in the former action, the import of which sufficiently appears from the interlocutor of the Sheriff-substitute of 14th July 1897.

On 29th December 1899 the Lord Ordinary (Kyllachy) assoilzied the defenders.*

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* "OPINION.— . . . The defenders' first point, and that on which they mainly relied, was this:—They contended that the road in question is not a road in the sense of the 46th section. There was accordingly evidence led as to its construction and character. . . . Without going into detail, but having in view that the road was a made road in a definite line leading from the steading to a central point on the farm from which point access is obtained by gates to the various fields, I see no sufficient reason for excluding the road from the scope of the statute. I may note that this question

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The pursuer reclaimed, and argued;—(1) Even if the Lord Ordinary was right in holding that the pursuer was not entitled to damages under section 48 of the Railways Clauses Consolidation (Scotland) Act, 1845, the pursuer was nevertheless entitled to damages,—that was to say, to damages at common law. It was decided in the former proceedings in the Sheriff Court—and it must be taken as a fact in the present proceedings—that the defenders, or strictly their predecessors, whose obligations they had undertaken, were bound under section 60 of the Act to provide an accommodation bridge in lieu of the level crossing. Under section 60 the defenders' obligation was to provide such a bridge "forthwith" after the formation of the line, if not before. Instead of doing so, the defenders had litigated the question of their liability, and had delayed the construction of the bridge, with the result that the bridge was not ready for the pursuer's use until ten months after the opening of the doubled line, and during these ten months the pursuer had incurred the loss on account of which he now sued. For this loss the defenders were liable in damages at common law, if not under the Act. The defenders were no doubt entitled to

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was considered, and opinions expressed upon it in the case of *Carruthers*, 15 D. 591, referred to at the discussion.

"The defenders' next point was that the interference complained of is with a part of the road which is their own property, and which they took and paid for under their original Act of 1878, or rather under the Lands Clauses Act therewith incorporated. They contend in these circumstances that their recent operations—I mean those connected with the doubling of their line at the level crossing—were in exercise of their proprietary rights, and not as assumed by the pursuer in exercise of powers conferred by the Railways Clauses Act, or by their special Act of 1893. They seem in short to consider that the case is the same as if, when the railway was first made and the road first interfered with, the pursuer had demanded a substitute road under the 46th section of the Railways Clauses Act, and they were defending themselves against that demand.

"Now I am quite prepared to hold that if the railway company had—say in 1878 when their original line was made—shut up and appropriated this part of the road which they had taken and purchased, the pursuer's predecessors would have had no claim whatever under the 46th and following sections of the Railways Clauses Act. Their remedy in that case would, I think, have been compensation and nothing else. That, I think, is decided by the case of *Campbell*, 17 D. 613. At all events I concur with the opinion to that effect expressed in that case by the first Lord Curriehill.

"In my view, however, that is not really the position with which we have here to deal. The railway company did appropriate part of the road. There is no doubt about that. It is admitted that they purchased and paid for it. But they at the same time, or subsequently, made in effect a *new road*, granting to the pursuer's predecessors a right of way over the railway, which made the farm road continuous as before. As it happened, the crossing over the railway was on the level; but the position would, I apprehend, have been just the same if it had been by a bridge with approaches, either over or under the line. And what I have now to consider is not as to the original interference with the original road, but as to an alleged interference with what I have called the new road—the road as it has existed since about 1882. It is, in my view, a mere accident that that road had a particular origin, and consists partly of a right of way over the railway, and crosses the railway on the level instead of by a bridge with approaches. Accordingly, if the pursuer's complaint had here been that the railway company had, under the powers of their 1893 Act, rendered his road at the

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litigate the question, but if the result of the litigation was to establish that they had not fulfilled their statutory obligation, the fact that they had litigated would not absolve them from liability in damages.[1] If section 48 of the Act did not apply to the present case (as *ex hypothesi* of the present branch of the argument it did not), there was nothing in the Act to exclude a claim of damages at common law. But (2) section 48 did apply in the present case. The question was, Had the defenders in the exercise of their powers interfered with the "use" of a road, within the meaning of section 46 of the Act, so as to render it impassable for or dangerous to passengers or carriages? That the defenders had so interfered with this road in fact, and in a popular sense, there could be no doubt; the pursuer contended that they had done so also in the sense of section 46, and if they had, there was no doubt that section 48 applied. It might be that the primary and typical case contemplated by section 46 was that to which the Lord Ordinary held the section to apply exclusively, viz., interference during the construction of the line; but there was nothing in the language of the section to confine it to such cases. No doubt the

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level crossing physically impassable (as, for example, by raising or lowering the level of the railway at that point), or had done anything of that description, I do not, I confess, see how the fact of the operation being within their own property could afford the company a defence as against an action such as the present.

"This, however, brings up what I conceive to be the true question. Have the railway company, in fact, interfered with the pursuer's road in the sense of the 46th section of the Railways Clauses Act? In other words, did they by their recent operations 'cross, cut through, raise, sink, or use any part of this (any) road, so as to render it impassable for or dangerous to passengers or carriages, or to persons entitled to the use thereof'?

"I assume in the pursuer's favour that the doubling of the line was not authorised by the original Act, or, if so, that the power of doubling had expired, and that when exercised it was so by virtue only of the powers contained in the Act of 1893. But making that assumption, it appears to me that the pursuer has still to shew that the road has been interfered with in the sense and to the effect of the 46th section of the statute.

"Now, I have, I confess, had some difficulty on this question—the question which, I think, is the real question in the case. But, in the end, I have come to be of opinion that the pursuer has failed to make good his point.

"It is clear that the only physical interference with the road is the laying down of a second line of rails. It is also I think clear that *per se* that operation did not render the road—*i.e.*, the level crossing, impassable or dangerous. The pursuer's complaint really is, that as the result of the doubling of the line, or of the doubling plus the extension to Dalmuir, a greatly increased *use* of the railway, that is to say, a greatly increased traffic, has been made possible, and has in fact resulted. That is what the pursuer's case really comes to, and I do not see my way to hold that that is the kind of interference which the 46th section contemplates. I think that what it contemplates is interference by the *construction* of the railway and danger resulting therefrom. It does not I think contemplate interference which merely facilitates increased traffic, and danger resulting from that increase. Such increase of traffic may give rise to a claim for additional or different accommodation works under the 62d section of the statute; and

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[1] Houldsworth v. Brand's Trustees, Jan. 8, 1876, 3 R. 304, *per* Lord Ormidale, at p. 315.

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defenders had acquired the *solum* of the level crossing in property, but they had acquired it (as they admitted) subject to the burden of the level crossing. This consideration distinguished the present case from that of *Campbell*,[1] to which the Lord Ordinary referred. There the road was taken by the railway company absolutely and free of any burden. Here, on the other hand, the case was one of servitude of way, the dominant tenement being the farm of Yoker Mains and the servient tenement being the railway. The ordinary rule therefore applied that the owner of the servient tenement was not entitled to exercise his powers so as to make the servitude useless to the dominant tenement. In this view it was nothing to the purpose to say, as the defenders said, that the landlord and the tenant, having in the original compensation proceedings accepted the level crossing as a sufficient equivalent for the interruption of the road, must submit to any increase in the volume and speed of the traffic which the defenders, in the exercise of their statutory powers, might see fit to make. The defenders had no right, simply because their powers were statutory, to render a servitude of way over their property useless, and if they rendered such a servitude useless, they interfered with the use of a road within the meaning of section 46. Besides, the original compensation was fixed on the footing that the line was to be a single line with a local traffic only. It might be that defenders did not require further powers to double their line, but they certainly required further powers to convert it into a through line with an express traffic, and it was this which had made the level crossing useless.

Argued for the defenders;—(1) The pursuer had no claim under section 48 of the Act of 1845. The group of sections to which section 48 belonged applied only to interference during the construction of the line; that was plain from section 49. Further, the kind of interference contemplated was physical interference. But the pursuer did not claim damages on account of the mere work of doubling the line, nor did he claim damages on account of any physical interference with the level crossing. His claim was for damages caused by the increased traffic which followed on the doubling of the line. Such a claim was inadmissible under section 48. The landlord and the tenant had in the original compensation proceedings accepted the level crossing as sufficient for the purposes of their farm,—that was to say, they took the risk of whatever traffic the defenders or their predecessors might choose to send along their own rails. The defenders might, under the original Act of 1878, have sent as many and as fast trains as they pleased, and they might also have doubled their line.[2] They did not need the Act of 1893 for either purpose. If the defenders

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that redress the pursuer has in fact obtained. But to bring in the provisions of section 46 and the following sections, something more seems to me to be necessary. In saying so, I do not overlook the reference to 'use' in the 46th section. But considering the context, and reading the section as a whole, it seems to me that the 'use' contemplated is use incident to the construction of the railway and nothing else. And, accordingly, on the whole matter I am of opinion that the defenders were not bound to give the pursuer a substitute road as a preliminary to their recent operations, and that, therefore, they are entitled to be assoilzied . . ."

[1] Campbell v. Edinburgh and Glasgow Railway Co., March 7, 1855, 17 D. 613, 27 Scot. Jur. 259.

[2] Western District Committee of the County Council of Stirling v. North British Railway Co., July 2, 1896, 23 R. 929.

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in doubling the line had physically obstructed the level crossing the pursuer's position would have been stronger, but as matter of fact the level crossing was there as it had been from the first, and the pursuer could use it, as he had all along done, subject to such risks, greater or less, as the defenders' traffic might cause. The defenders, in providing the level crossing, had done all that the statute required. That was their position in the Sheriff Court, but the Sheriff had thought otherwise, and had ordered the defenders to provide an accommodation bridge under section 60 of the Act, and the pursuer had got his bridge. He now sought to take advantage of section 48 in order to obtain damages for what he said was undue delay on the defenders' part in fulfilling what were ultimately found to be their obligations under section 60. Section 48 did not apply to such a case. Further, section 48 did not apply to roads the *solum* of which were the property of the railway company,[1] as was the case here. Nor was there here either a road or a right of way within the meaning of the section. It was a mere farm track through fields. (2) The pursuer was not entitled to damages at common law. The remedies for failure duly to provide accommodation works under section 60 of the Act were set forth in sections 61 to 65, and an action of damages was not among these remedies. The inference was, that if it was intended that a railway should be liable in damages for failure duly to comply with section 60, the Act would have provided such a remedy, just as section 48 provided for failure to comply with section 46. Even if a common law action of damages was competent where a railway company had wrongously failed to comply with section 60, the pursuer had no right of action here. For, in the first place, the defenders in *bona fide* litigating a claim to make them provide an accommodation bridge had not acted wrongously—the case of *Houldsworth*,[2] on which the pursuer founded, was for breach of contract and for violent profits; and, in the second place, there had not been in fact undue delay in providing the bridge.

At advising,—

LORD JUSTICE-CLERK.—I am with the Lord Ordinary in thinking that the 46th and following clauses of the Railways Clauses Act do not apply to the present case. As I read these clauses they are intended to meet the case of the construction of the works interfering with a road, and are intended to make it compulsory on the railway company, before they proceed to do any work which will interfere with the use of the road, to provide an efficient substitute way, which shall be kept open till the works are finished, and when that time arrives shall be taken away, unless it shall turn out that the construction of the works has made restoration of the original way impossible. In this case the construction of the line had been completed for many years, and therefore if I am right in the view I take of these clauses, it is not under them that the pursuer can succeed in a demand for damages because of interference with a road to the use of which he has right. But when the Lord Ordinary, as a consequence of that reading of those clauses, holds that the pursuer is debarred from claiming damages for the injury he complains of in this case, and assoilzies the defenders from

[1] Campbell v. Edinburgh and Glasgow Railway, 17 D. 613.
[2] 3 R. 304.

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the conclusions of the action, I am unable to agree with him, as I think the pursuer may be entitled to compensation on a different ground.

The facts are these: When the line was originally constructed the defenders were required to leave, and did leave, a way across their line for the accommodation of the farm, of which the pursuer is now tenant, to enable access to be obtained from one part of the farm to another where it had been severed by the construction of the works. It must be assumed that Parliament held such a passage to be necessary for the working of the farm, and sufficient for its reasonable working, according to what was then in contemplation.

Recently, however, the defenders have doubled this line, and brought it into direct communication with the main line. The result has been that the passage which formerly was a sufficient accommodation at that place for the working of the farm has ceased to be so. This is admitted by the defenders. The traffic on the line is now so frequent and so fast that a level crossing cannot provide the tenant with a reasonably safe and convenient passage for the traffic which he requires to have passed from one side of the railway to the other.

It was accordingly a case in which under a different section of the statute (section 60) the tenant had a right to ask for accommodation works by which the safe and reasonable working of his farm might be ensured. The pursuer complains that the defenders disputed his claim for such works, contested the matter with him before the tribunal appointed by the statute to decide such disputes, and when ordered delayed to proceed to execute the works. Now it appears to me that if the railway company should have given accommodation works when by their actings they rendered an existing work unfit to give the accommodation for which it had been originally provided under compulsion of the Legislature, and if and in so far as they failed to do so, the pursuer is entitled to complain of their failure as a wrong, and to receive compensation for such injury as he can substantiate by evidence.

I am of opinion that he has reasonably and fairly established loss and damage by being deprived of the use of his passage across the line, the company having practically made it impassable, and that he is entitled to reasonable compensation. In this case the loss consisted in the diminished yield of milk from his farm, which is a dairy farm, caused by the necessity of driving his herd of cows a long distance round daily so as to obtain a safe crossing from the one part of the farm to the other on the opposite side of the line. I think he has sufficiently established the fact that such diminution of yield would take place from such a cause.

As regards the amount of the loss, I think the claim which the pursuer makes is reasonable and moderate. Indeed, I think it possible that if his claim had been somewhat greater he might have been able to shew ground for allowing it.

I would therefore move your Lordships to recall the interlocutor of the Lord Ordinary, to find the defenders liable in £200 to the pursuer in name of damages, and to find him entitled to expenses.

LORD YOUNG concurred.

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LORD TRAYNER.—The Lord Ordinary has dealt with this case on the footing that the pursuer's claim is one based on the 46th and 48th sections of the Railway Clauses Act. If that were so, and if the damage or inconvenience for which the pursuer seeks redress was merely occasioned by the use—the extended and increased use—to which the defenders were putting their line after its completion (as the Lord Ordinary thinks it is) I should be disposed to concur in the decision reclaimed against. It appears to me that no claim of damage would arise against the defender from a use of their railway which the Legislature had authorised. But the case seems to me to be different from that which the Lord Ordinary has described. The pursuer concludes for a sum of money, which in his condescendence (art. 9) he explains he claims not merely on the provisions of the statute but also at common law. And without deciding positively whether the claim is well founded on the statute, I am of opinion that at common law the pursuer is entitled to succeed.

The view I take of the case is this: The pursuer in June 1896 presented a petition to the Sheriff craving that the defenders should be ordained to execute and afford certain accommodation works as provided by the 60th section of the Railway Clauses Act. This application the defenders opposed, and after a litigation for which the pursuer was not responsible, the Sheriff-substitute in July 1897 granted the prayer of the pursuer's application. The accommodation works which the defenders were thus ordered by a final judgment to afford were not completed until March 1898. The result is that the defenders failed to afford the pursuer the accommodation to which (*ex hypothesi* of the judgment by the Sheriff-substitute) he was entitled when he presented his application, for a period of about one year and one month. It is for the damage ensuing in the year 1897 out of the defenders' failure to give the accommodation works that the pursuer now seeks decree. In this view of the case the issue is a very simple one. Were the defenders in default during 1897, and did the pursuer suffer damage thereby? I think their default is clear. It has been decided, as I have said, that the pursuer's demand made in June 1896 was one with which the defenders were bound to comply. They did not fulfil their duty so judicially ascertained until March 1898. The defenders were entitled, it may be admitted, to a reasonable time to execute their works, and they did execute them in about eight months after the date of the final judgment. But if they had executed the works within eight months (assuming that that period was necessary) after the date of the pursuer's application to the Sheriff, the works would have been completed by February 1897, and the damage complained of would not have been incurred. I think the defenders are liable for any damage occasioned by their delay, that is, their default in providing the accommodation works timeously. On the amount of damage there is not much evidence, but there is I think sufficient evidence to support the claim which the pursuer has made.

LORD MONCREIFF.—I am of opinion that the pursuer is entitled to damages. The facts, which are stated with great clearness by the Sheriff-substitute in his interlocutor of 14th July 1897 (in the former proceedings), lead irresistibly to this result, unless there is anything in the Railway Statutes which excludes what appears to be a just claim.

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It is a matter of express admission on record that when Yoker Farm was bisected by the company, whom the defenders represent, under the powers conferred in their Act of 1878, the claims of the landlord and tenant were settled on the footing that the severed portions of the farm were to be connected by a level crossing at the place in question for the accommodation of the pursuers' farm. The line proposed to be formed was a single line terminating at Clydebank, and the level crossing was sufficient to enable the tenant to cross and recross in safety.

The effect of this settlement was the same as if the proprietor of Yoker Farm had conveyed the land to the railway company under burden of a reserved servitude or right of way by the level crossing, or as if the railway company, having bought the land out and out, had thereafter granted such a right to the proprietor of the farm.

The proprietor had thus a separate, and what was intended to be a permanent, right over the road, although the *solum* belonged to the company, and they also had a concurrent right to use the surface for the purposes of their traffic.

The next point to be noted is that in 1893 the railway company obtained an Act of Parliament which empowered them to construct a double line of railway on the Yoker line; and by extending their railway to Dalmuir, to run a large through traffic, including express trains, by the Yoker line to Helensburgh. The result of this was that the level crossing became useless for the purposes of the farm, because the interval between the trains came to be so short that traffic could not be driven across it with safety.

The proprietor and tenant of Yoker Farm therefore called upon the railway company to supply them with a substitute road. This demand was strenuously resisted by the railway company, and in the end the proprietor and tenant were obliged to apply to the Sheriff for an order upon the railway company to provide a suitable accommodation bridge and approaches in lieu of the level crossing. This application was opposed by the railway company, and it was only after a year's litigation that the Sheriff ordained the defenders to provide an accommodation bridge as prayed for. That bridge has now been formed, but before the present pursuer got the benefit of it he had been deprived of the use of the level crossing for at least ten months, in consequence of which he was admittedly put to inconvenience and suffered loss.

It seems to me that the broad question is this—Was the railway company under a statutory obligation to supply a substitute road before using their line in such a way as to make the level crossing impassable and dangerous? If it was not, the pursuer cannot recover damages, because the use made of the line is authorised by the company's statutes. But if the company were in breach of a statutory obligation in failing to supply a substitute road, the pursuer is entitled to damages; and it is comparatively unimportant which group of sections in the Railway Clauses Act, 1845, is held to apply to the case.

I think it is clear that the company were under a statutory obligation to provide additional accommodation at the place in question. Indeed, it may be said that this is *res judicata*, the Sheriff's judgment being final. That being so, the company were guilty of a wrong in not timeously performing their statutory duty, and for that wrong they are liable in damages at com-

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mon law if the statute does not expressly provide for such a claim. That is very clearly stated in the Lord Chancellor's opinion in the case of the *Caledonian Railway Company* v. *Colt*.[1] His Lordship there says,—"Upon the first question I have not been able to entertain any doubt. The company were under statutable obligation to restore the branch railway within a given period. They neglected to do so, whereby the pursuer was clearly damnified. *Prima facie*, therefore, he has a right of action against them. One answer attempted in the Court below, and countenanced to a certain degree by the Lord Ordinary, is that the pursuer was confined for a remedy to the statutory tribunal which the Legislature has provided where losses are sustained in the formation of railways. But it is well settled that this statutory tribunal is only established to give compensation for losses sustained in consequence of what the railway company may do lawfully under the powers which the Legislature has conferred upon them, and that for anything done in excess of these powers, or contrary to what the Legislature, in conferring these powers, has commanded, the proper remedy is a common law action in the common law Courts. The company were guilty of a wrong in disobeying the Act of Parliament which requires the restoration of the pursuers' branch railway, and for this wrong they are liable to an action *ex delicto*. At your Lordships' bar the answer to the action chiefly relied upon was that the pursuer is confined to the penalties given by the 50th section of the statute. But this seems to me to be only a cumulative remedy given with a view to hasten the performance of the duty which the Legislature has imposed."

If this view is sound, it is perhaps not necessary to examine in detail the subtle argument which was presented to us by Mr Ure on behalf of the company.

He maintained to us that the 46th and following sections of the Railway Clauses Act, 1845, only apply to temporary interference with the roads in the course of the construction of the line. I think it can be shewn that these sections apply to permanent as well as temporary damage, and it has been so held[2] under the corresponding sections of the English Railway Clauses Act of 1845 (section 53, *et seq.*). I do not understand that the Lord Ordinary takes a different view on this point, but he has decided against the pursuer, on the ground that the damage complained of was not the result of any physical interference with the level crossing, but was caused by the use made by the company of the double line after it was formed. In point of fact there was physical interference with the level crossing, because the second line of rails, without which the obstruction could not have occurred, was laid across it. But passing from this, I think the Lord Ordinary has taken a somewhat too narrow view of the statute. It may be that the kind of interference chiefly struck at in these sections is physical interference, but a road may be interfered with as effectually by the use that is made of it as by actual interference with its surface. If, for instance, the company had used the line at the level crossing as a siding, or

[1] Aug. 3, 1860, 3 Macq. 808, at pp. 838-839.

[2] [See Attorney-General v. Barry Docks and Railway Co., 1887, L. R., 35 Chanc. Div. 573.]

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placed locked gates on it, I am disposed to think that this would have been a use of the road which in the sense of section 46 would render it "impassable for or dangerous to persons entitled to the use thereof."

No doubt the use made of the line by the company is authorised by their statute, but the provisions of section 46 expressly apply to interference with a road "in the exercise of the powers by this or the special Act granted."

It is said that section 48 of the Railway Clauses Act, 1845, which provides for the recovery of special damages by any party entitled to a "right of way" over a road interfered with by the company applies only to public rights of way. I am not satisfied of this, and the opposite has been decided under the corresponding section (section 55) of the English statute.[1] But even supposing that this section only makes special provision for members of the public recovering compensation on proof of special damage, the owner of a private road has higher or at least as high rights, and his common law right to damages is not taken away by the statute.

I have dwelt so far upon those sections, because it strikes me that they apply more appropriately to the case, the damage having been caused through interference with an existing private road. But if I am wrong in this—if they do not apply—the company were still bound to provide accommodation works under the 60th section. They were bound to do so "forthwith"; that was their statutory duty; they failed to do so, and wasted ten months in litigation, and in my opinion they are liable in damages at common law to the amount claimed.

THE COURT pronounced this interlocutor:—"Having heard counsel for the parties on the reclaiming note for the pursuer against the interlocutor of Lord Kyllachy dated 29th December 1899, recall the said interlocutor reclaimed against: Ordain the defenders to make payment to the pursuer of the sum of £200 sterling, with interest thereon at the rate of £5 per centum per annum from the date of citation till payment, and decern: Find the pursuer entitled to expenses," &c.

MARCUS J. BROWN, S.S.C.—JAMES WATSON, S.S.C.—Agents.

No. 114. Mar. 20, 1901. Lower Ward of Lanarkshire District Committee v. Magistrates of Rutherglen.

LOWER WARD OF LANARKSHIRE DISTRICT COMMITTEE, Pursuers and Respondents.—*Dundas, K.C.—W. Thomson.*

MAGISTRATES OF RUTHERGLEN, Defenders.—*Sol.-Gen. Dickson—Clyde.*

Public Health—Areas of Administration of County and Burgh—Public Health (Scotland) Act, 1897 (60 *and* 61 *Vict. cap.* 38), *secs.* 3, 12, *and* 181—*Local Government (Scotland) Act*, 1889 (52 *and* 53 *Vict. cap.* 50), *secs.* 11, 17, 44, 105.—The Local Government Act, 1889, by section 11, transferred to District Committees the administration within the county of, *inter alia*, the Acts relating to public health then in force.

It defined "county" as exclusive of any burgh wholly or partially situated therein, and "burgh" as meaning any royal or parliamentary burgh.

It also provided, sec. 44 (*b*), that the boundaries of any burgh for the purposes of the Act should be its boundaries for police purposes, or, if no police assessment should be levied, its boundaries for municipal purposes.

The Public Health Act, 1897, "an Act to consolidate and amend the

[1] [See Watkins v. Great Northern Railway Company, 1851, L. J. (N.S.), 20 Q. B. 391.]

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laws relating to public health in Scotland," repealed the Public Health Acts referred to in sec. 11 of the Local Government Act of 1889. It appointed the District Committee as the county local authority for the administration of the Act, and declared "county" to be exclusive of any burgh, and "burgh" to include, *inter alia*, any royal burgh.

It did not contain any provision dealing with the boundaries of burghs.

Held (*rev.* judgment of Lord Kyllachy) that the limitation of the boundaries of burghs in sec. 44 (*b*) of the Act of 1889 did not apply to public health administration under the Act of 1897, and accordingly that a District Committee had no jurisdiction for the purposes of the Act over the area included within the royalty but outside the police boundaries of a royal burgh.

1ST DIVISION. Ld. Kyllachy.

THIS was an action raised by the District Committee of the Lower Ward of Lanarkshire against the Magistrates of the Royal Burgh of Rutherglen, concluding, *inter alia*, for declarator, that for the purpose of the administration of the Public Health Act, 1897, the pursuers were the Local Authority for the district of the said Lower Ward, and that the defenders had no jurisdiction over that part of the Royal Burgh of Rutherglen which lay within the royalty but outside the police boundaries. The pursuers founded on the 44th section of the Local Government (Scotland) Act, 1889, as limiting the jurisdiction of the defenders to the police boundaries.*

The defenders, the Magistrates of Rutherglen, maintained that under the Public Health Act, 1897, they, as the burgh Local Authority

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* The following statutory provisions were referred to:—

The Public Health Act, 1897 (60 and 61 Vict. c. 38), "An Act to consolidate and amend the laws relating to public health in Scotland," enacts, —Section 3—"In this Act the following words and expressions have the meanings hereinafter assigned to them, unless such meaning is inconsistent with the context:

"The word 'burgh' includes not only royal burgh, parliamentary burgh, burgh incorporated by Act of Parliament, but also any police burgh within the meaning of the Burgh Police (Scotland) Act, 1892:

"The word 'county' means a county exclusive of any burgh, and does not include a county of a city:

"The word 'district' means the district of any local authority under this Act:

"The expression 'district committee' means a district committee under the Local Government (Scotland) Act, 1889, and, subject to the provisions of section 78, subsection 3, of that Act, as amended by section 19, subsection 7 of the Local Government (Scotland) Act, 1894, in the case of a county not divided into districts, includes a county council."

Section 12—"The following shall respectively be the local authority to execute this Act within the districts hereunder stated:—

"(1) In burghs subject to the provisions of the Burgh (Scotland) Act, 1892, [*infra*], the town-council or burgh commissioners:

"(2) In other burghs, the town-council or board of police, as the case may be:

"(3) In districts where the county is divided into districts under the Local Government (Scotland) Act, 1889, and subject to the provisions of section 17 of that Act, as amended by this Act, the district committee. . . ."

Section 181—"(1) The local authority of any district other than a burgh may, subject to the approval of the county council, make bye-laws for the whole or any part of their district for regulating the building or rebuilding of houses or buildings, or the use for human habitation of any

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on matters of public health, were entitled to exclusive jurisdiction over the whole area of the royalty.

The Lord Ordinary (Kyllachy), on 9th June 1900, pronounced an interlocutor which contained, *inter alia*, the following findings:—"That the said pursuers, the District Committee, are the only local authority which has the right or power to exercise the jurisdiction and powers conferred by sections 181 to 188, both inclusive, of the said Public Health (Scotland) Act, 1897, in that part of the parish of

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building not previously so used, or any alteration in the mode of occupancy of any existing house in such a manner as will increase the number of separate houses in respect to the following matters:— . . ."

Section 190—"Except in so far as expressly provided, nothing in this Act shall prejudice or affect the provisions of the Local Government (Scotland) Acts. . . ."

Section 191—"Except in so far as expressly provided, nothing in this Act shall prejudice or affect the powers, rights, and liabilities of County Councils and Standing Joint Committees with respect to capital works, rating, borrowing, or acquiring and holding land."

The Burgh Police (Scotland) Act, 1892 (55 and 56 Vict. c. 55), enacts—Section 4—"The following words and expressions in this Act shall have the meanings hereby assigned to them, unless there be something in the subject or context repugnant to such construction; that is to say,—

"(4) 'Burgh' when used alone, unless otherwise expressed or inconsistent with the context, shall include royal burgh, parliamentary burgh, burgh incorporated by Act of Parliament, burgh of regality, burgh of barony, and any populous place or police burgh administered in whole or in part under any general or local Police Acts, or any burgh created under this Act."

Section 5—"(1) This Act shall apply—

"(*a*) From its commencement to every existing burgh, with the exception of the burghs named in Schedule II. of this Act." [The burghs named in the Schedule did not include Rutherglen.]

Section 7—"The boundaries of any burgh, which at the commencement of this Act is administered wholly or partly under any general or local Police Act, shall, for the purposes of this Act, be the boundaries to which such Police Act extends."

The Local Government (Scotland) Act, 1889 (52 and 53 Vict. cap. 50), enacts,—Section 11—"Subject to the provisions in this Act, there shall be transferred to and vested in the Council of each county on and after the appointed day, or at such times as are in this Act in that behalf respectively specified:— . . .

"(4) The whole powers and duties of the Local Authorities under the Public Health Acts of parishes so far as within the county (excluding burghs and police burghs). . . ."

Section 17—"With respect to the transference to the County Council of the powers and duties of certain Local Authorities under the Public Health Acts, the following provisions shall have effect:—

"(1) For the purposes of the administration of the laws relating to public health the county shall, except as hereinafter provided, be divided into districts in the manner provided in this Act, and there shall be a District Committee for each such district constituted as provided in this Act;

"(2) A District Committee shall, subject to the provisions of this Act, be the Local Authority under the Public Health Acts, and as such shall have and may exercise within its district all the powers and duties, and be subject to all the liabilities by this Act transferred to, or conferred on, the County Council, with respect to the administra-

Rutherglen situate outwith the boundaries of the Police and Municipal Burgh of Rutherglen, and within the district of the Lower Ward of the County of Lanark, and which is delineated and tinted yellow on the plan; and that the defenders, the Provost, Magistrates, and Town-Council of the Royal Burgh of Rutherglen, as local authority thereof, have no right or power to exercise the jurisdiction or powers of a local authority over the said area so delineated on said plan."*

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tion of the laws relating to public health, except those relating to medical officers, or sanitary inspectors for the county, and subject to the provisions following:— . . .

"(4) The sums necessary to meet any deficiency in respect of the expenditure under the Public Health Acts within any district shall be levied by the County Council by a rate imposed on all lands and heritages within such district, or within any special drainage or water supply district within the meaning and subject to the provisions of the Public Health Acts."

Section 27—"(1) The County Council shall annually fix the rate in the pound of the rateable property which will be necessary to meet the deficiency in the county fund."

Section 43—"Wherever a royal burgh or police burgh, or part thereof, is included within the parliamentary area of a burgh, it shall nevertheless be deemed to be a separate burgh or police burgh for the purposes of this Act, having for these purposes the boundaries fixed or ascertained for police purposes under any general or local Act of Parliament."

Section 44—"For the purposes, and subject to the provisions, of this Act, and except so far as varied by an order made under this Act, as hereinafter mentioned, the following provisions shall have effect:—

"(*a*) From and after the passing of this Act counties shall have the contents and boundaries which they respectively have, or in the case of counties still subject to local Acts of Parliament regulating highways will have, after the appointed day for the purposes of the Roads and Bridges (Scotland) Act, 1878; and

"(*b*) The boundaries of burghs for the purposes of this Act shall be held to be the boundaries thereof, as the same are or may be ascertained, fixed, or determined for police purposes under the provisions contained in any general or local Act of Parliament, or when no police assessment is levied, as the same are or may be ascertained, fixed, or determined for municipal purposes: Provided that police burghs shall not in any case be deemed to be burghs for the purposes of this Act, except for the purposes of and subject to the provisions of the Roads and Bridges (Scotland) Act, 1878. . . ."

Section 105—"In this Act, if not inconsistent with the context, the following terms have the meanings hereinafter respectively assigned to them; that is to say,—

"The expression 'county' means a county exclusive of any burgh wholly or partly situate therein, and does not include a county of a city.

"The expression 'burgh' means any royal or parliamentary burgh."

* "OPINION.—The question in this case is whether the District Committee of the County Council for the Lower Ward of Lanarkshire have, for the purposes of public health, jurisdiction over that part of the royal burgh of Rutherglen which is outside the police boundary. The County Authority maintains the affirmative, and brings this action to have its rights declared. The Town-Council, on the other hand, contend that their jurisdiction extends over the whole area of the ancient royalty—an area which in Rutherglen is, as it happens, exceptionally large, and includes indeed a large extent of agricultural land.

"The question depends primarily upon the Local Government Act of

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The defenders reclaimed, and argued;—The question depended on the Public Health Act of 1897. That Act formed a complete code regulating the laws of public health and their administration, and it was not competent to control or modify that code by importing into it 1889, by which, for the purposes, *inter alia*, of public health, the county and burgh authorities have their jurisdiction defined; and, on the terms of that Act, there appear to be two things of which there is no doubt. The first is that the county includes every area which is not in the sense of the Act a royal or parliamentary burgh. The second is that, for the purposes of the Act, the boundaries of all burghs are, by the 44th section, declared to be the boundaries thereof for police purposes, as ascertained, fixed, and determined by the provisions of any general or local Act of Parliament.

"The question therefore, is—What are to be held as the police boundaries of the burgh of Rutherglen? And that matter is so far settled by the 4th section of the General Police Act of 1862,* which is admitted to be the Police Act for the burgh of Rutherglen, and which, by its 4th section, provides that the boundaries of such royal burghs as (like Rutherglen) send or contribute to send a member to Parliament, shall, for the purposes of the Act, include the whole limits of such burgh as the same are defined by or referred to in the Municipal Reform Act of 1833—that is, the Act 3 and 4 Will. IV. cap. 76.† The words are added, 'or otherwise, as fixed by law.' But these words make no difference for the present purpose, referring, as I think they plainly do, to burghs which have local Police Acts,

* The General Police and Improvement (Scotland) Act, 1862 (25 and 26 Vict. cap. 101), enacts,—Section 3—"The following words and expressions in this Act shall have the meanings hereby assigned to them, unless there be something in the subject or context repugnant to such construction; that is to say, the expression 'royal burgh' shall mean a burgh having magistrates and councillors elected under the powers of the Public General Act, Third and Fourth William the Fourth, chapter seventy-six, and also those burghs enumerated in Schedule (F) of the said Act:—"

. . . . . .

Section 4—"The boundaries of such royal burghs as send, or contribute to send, a member or members to Parliament shall, for the purposes of this Act, include the whole limits of such burgh, as the same are defined by or referred to in the said Act, Third and Fourth William the Fourth, chapter seventy-six, or otherwise fixed by law, unless it shall be resolved in adopting this Act that its operation shall be limited to such portion of the burgh as is comprehended within the parliamentary boundaries."

† The Municipal Reform Act, 1833 (3 and 4 Will. IV. cap. 76), section 1, enacts that "from and after the period when this Act shall come into operation, the right of electing the town-councils in all such burghs [*i.e.*, royal burghs] respectively (except in those contained in Schedule (F) to this Act annexed) shall be in and belong to all such persons, and to such only (except as hereinafter excepted), as are or shall be qualified, as owners or occupants of premises within the royalty, whether original or extended, of any such burgh, to vote in the election of a Member of Parliament for such burgh by virtue of an Act passed in the second and third year of the reign of His Majesty King William the Fourth, intituled 'An Act to amend the Representation of the People in Scotland,' and as are duly registered as such voters in the registers by the said recited Act appointed to be kept, and also in all such persons who are possessed of the qualification described in the said recited Act in respect of the property or occupancy of any house or other subject therein described, of the value thereby required, within the royalty of any royal burgh not now entitled to send members to Parliament . . ." Schedule (F) did not include Rutherglen.

rovisions of earlier statutes. The provisions, taken by themselves, were perfectly clear. It laid down that "county" was to mean a county exclusive of any burgh," and therefore exclusive of any oyal burgh. But unless specially limited, a royal burgh must

nd have their boundaries thus or otherwise fixed by statute. The words re also added, 'unless it shall be resolved, in adopting this Act, that its peration shall be limited to such portion of the burgh as is comprehended within the parliamentary boundaries.' But these words also have no application to the present case.

"Accordingly, the bounds of the burgh of Rutherglen for the purposes of the Act of 1889, and, *inter alia*, for the purposes of jurisdiction under the Public Health Acts, are left to be ascertained by reference to the Municipal Reform Act of 1833; and the only section of that Act which makes reference to the boundaries of burghs is the first section, which defines the area within which persons possessing the prescribed qualification shall have right to exercise the municipal franchise, and which defines that area, as I read the section, by reference to two conditions, viz.:—(1) It must be within the royalty of the burgh; and (2) it must also be within the parliamentary area, viz., the area to which the parliamentary franchise is confined by the Reform Act of 1832—the Act 2 and 3 Will. IV. cap. 65.* The words are 'That, from and after the period when this Act shall come into operation, the right of electing the town-councils in all such burghs respectively shall be in and belong to all such persons, and to such only (except as hereinafter excepted), as are or shall be qualified as owners or occupants of premises within the royalty, whether original or extended, of any such burgh to vote in the election of a Member of Parliament for such burgh by virtue of an Act passed in the second and third year of the reign of His Majesty King William the Fourth, intituled "An Act to amend the representation of the people in Scotland," and as are duly registered as such voters in the registers by the said recited Act appointed to be kept.'

"Now, it appears to me that, on a combined reading of these various statutory enactments, it is sufficiently clear that they define the boundaries of the burgh of Rutherglen for the purposes of the Act of 1889, including the purposes of public health, as being the boundaries contended for by the County Council. I observe there is a suggestion that in adopting the General Police Act of 1862, more extensive boundaries were, by error or otherwise, described; but that obviously can have no effect as against the terms of the Acts of Parliament. I observe also that both parties allege a certain amount of usage in favour of their respective contentions. But, in the first place, it is clear that the boundaries maintained by the pursuers have been assumed at least as frequently as those maintained by the defenders; and in the next place, it is, I think, manifest that no actings or assumptions, whether by the parties to this action or by third parties, can override the true construction of the statutes when once ascertained. The result seems to be that the pursuers should obtain declarator in terms of their summons."

* The Representation of the People (Scotland) Act, 1832 (2 and 3 Will. IV. cap. 65), enacts,—Section 5—"And be it enacted that the limits and boundaries of all the cities, burghs, and towns enumerated in any of the above-mentioned schedules shall, for the purposes of this Act, be taken and held to be according to the description and specification of such limits and boundaries set forth and contained in Schedule (M) to this Act annexed. . . ."

Schedule (M).—Rutherglen.—[The description given in the schedule defined the parliamentary area.]

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include its whole area, and therefore its whole area was excluded from the county.

Argued for the pursuers;—The question at issue depended on the Local Government Act of 1889. That Act created the District Committee, and vested in it the administration of the Public Health Acts then in force, defining once for all the respective areas of jurisdiction for public health purposes of the county and burgh. By section 44 (*b*) the burgh, for the purposes of the Act, was limited to that part of it within the police boundaries. The Act of 1897 repealed the Public Health Acts in force at the passing of the Act of 1889, and consolidated and amended the former provisions as to public health, retaining the District Committee as the Local Authority for their administration in the counties. It did not again define the respective limits of the county and burgh for public health administration, that having already been done by the Act of 1889. The provisions of that Act were saved (secs. 190, 191) by the Act of 1897.

The sections of the Acts quoted below were referred to in the Inner-House.*

At advising,—

LORD PRESIDENT.—The question in this case is, whether the District Committee of the Lower Ward of the County of Lanark, or the Provost, Magistrates, and Town-Council of the Royal Burgh of Rutherglen are the local authority for executing the Public Health (Scotland) Act, 1897, in the territory outside the police and municipal boundaries but within the royalty of the burgh.

The Lord Ordinary says that the question depends primarily on the Local Government Act of 1889, and that upon the terms of that Act there appear to be two things of which there is no doubt—(1) that the county includes every area which is not in the sense of the Act a royal or parliamentary burgh, and (2) that for the purposes of the Act the boundaries of all burghs are by section 44 declared to be the boundaries thereof for police purposes as ascertained, fixed, and determined by the provisions of any

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* The Public Health (Scotland) Act, 1867 (30 and 31 Vict. cap. 101), enacts,—Section 3—"In this Act the following words and expressions shall have the meanings hereinafter assigned to them, unless such meaning is inconsistent with the context:—

"The word 'burgh' shall include not only royal burgh, parliamentary burgh, burgh incorporated by Act of Parliament, burgh of barony, and burgh of regality, but also any populous place having a town-council, police commissioners, or trustees exercising the functions of police commissioners under any general or local Act."

The Municipal Elections Amendment (Scotland) Act, 1868 (31 and 32 Vict. cap. 108), enacts,—Section 3—"In every royal burgh in Scotland now returning, or contributing to return, a member or members to Parliament . . . the right of electing the town-council shall be in and belong to all such persons . . . and also in all persons who are possessed of the qualifications described in the said Acts, Second and Third William the Fourth, chapter sixty-five, or Thirty-first and Thirty-second Victoria, chapter forty-eight, in respect of the premises therein described, within the royalty of any such royal burgh where the limits thereof, at any point or points, extend beyond the parliamentary boundaries of such burgh. . . ."

general or local Act of Parliament; and his Lordship then proceeds to consider what are the police boundaries of the burgh of Rutherglen under that Act, referring to the General Police Act of 1862 as determining this. I am unable to concur with the Lord Ordinary either in this mode of stating the question, or as to the Acts upon the provisions of which it is mainly to be determined.

The question, in my view, depends upon the construction and effect of the Public Health (Scotland) Act, 1897, and the Acts referred to in that Act, and therefore it may be proper, in the first place, to advert to the Act of 1897, and then to trace backwards the references to other statutes which it contains, with the view especially of ascertaining what territory is included in the terms "burgh" or "royal burgh" for the purposes of the present question.

By section 3 of the Act of 1897 it is declared that the word "burgh" includes not only royal burgh, parliamentary burgh, burgh incorporated by Act of Parliament, but also any police burgh within the meaning of the Burgh Police (Scotland) Act, 1892, and that the word "county" means a county exclusive of any burgh, and does not include a county of a city. It thus appears that whatever is included in any burgh (and particularly in any royal burgh) is excluded from the county for the purposes of the Act.

By section 12 it is declared that the local authority to execute the Act in burghs subject to the provisions of the Burgh Police (Scotland) Act, 1892, shall be the town-council or burgh commissioners, and in other burghs the town-council or board of police, as the case may be, and in districts where the county is divided into districts under the Local Government (Scotland) Act, 1889, and subject to the provisions of section 17 of that Act, as amended by this Act, the District Committee.

As the Act of 1897 refers to the Burgh Police Act of 1892* in its definition of "burgh," I may point out that it is declared in the latter Act that "'burgh' when used alone, unless otherwise expressed or inconsistent with the context, shall include royal burgh, parliamentary burgh, burgh incorporated by Act of Parliament, burgh of regality, burgh of barony, and any populous place or police burgh administered in whole or in part under any general or local Police Acts or any burgh created under this Act," and by section 5 of the Act it is declared that it shall apply to every existing burgh, with the exceptions of the burghs named in Schedule II., viz., Edinburgh, Glasgow, Aberdeen, Dundee, and Greenock. It is thus clear that the royal burgh of Rutherglen is a burgh within the meaning both of the Public Health Act, 1897, and of the Burgh Police Act, 1892 (not as defined by the Act of 1862), and it appears to me that *prima facie* the term "burgh," as used in both these Acts with reference to a royal burgh would include the whole burgh erection or royalty of the burgh unless there is something in the Acts to restrict it to narrower limits.

Section 11 of the Act of 1889, in making the transfer of the powers and duties of local authorities to the county councils expressly excludes "burghs and police burghs," leaving to them the powers of public health administration conferred on them by the Act of 1867.

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* Quoted *supra*, p. 744.

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The definition of "burgh" in the Act of 1889 is less extensive, but that appears to me to be of little moment in this question, as the Act of 1889 relates to county (not to burgh) administration and not to a subject-matter affecting both like public health, with which the Acts of 1867 and 1897 deal. Further, neither the Act of 1897 nor the Act of 1892 refers to the Act of 1889 for the definition of burgh. Section 43 of the Act of 1889 appears to me to apply to very special and somewhat exceptional circumstances which do not exist in the present case.

By section 44 (*b*) of the Act of 1889 (with which the Lord Ordinary has begun), it is declared that the boundaries of burghs, for the purposes of that Act (it is not said for the purposes of the Public Health Act, 1867) shall be held to be the boundaries thereof, as the same shall be or may be ascertained, fixed, or determined for police purposes under the provision contained in any general or local Act of Parliament, or when no police assessment is levied as the same are or may be ascertained, fixed, or determined for municipal purposes. This provision would apparently confine the definition of "burgh" to the area fixed for police purposes, even although that might be a much smaller area than the royalty, but again it is to be observed that this is only for the purposes of the Act of 1889, which is prior to the Acts of 1892 and 1897, and must therefore give way to these later Acts if their provisions differ. The restrictive character of the definition of "burgh" in the Act of 1889 is well illustrated by the next provision in this section (44) that police burghs shall not in any case be deemed to be burghs for the purposes of the Act except for those of the Roads and Bridges Act, 1878.

By section 105 of the Act of 1889 it is declared that the expression "county" means a county exclusive of any burgh wholly or partially situate therein, and does not include the county of a city, and that the expression "burgh" means any royal or parliamentary burgh. The use of the term "royal burgh" would have left the question of area open even for the purposes of the Act of 1889 had it not been that apparently the effect of section 44 is to provide that the boundaries of a royal burgh, for the purposes of the Act, should be the boundaries fixed for police purposes, or where no police assessment is levied, as the boundaries may be ascertained for municipal purposes, and these boundaries might, as in the present case, be much within the royalty.

The pursuers referred to section 3 of the Roads and Bridges Act, 1878, which declares that the boundaries of burghs, for the purposes of that Act, shall be held to be the boundaries thereof as ascertained, fixed, or determined for police purposes under any general or local Act of Parliament, or when no police assessment is levied, as the same may be ascertained, fixed, or determined for municipal purposes. This restrictive definition is quite intelligible in a Road Act, which simply looked to who were the road authorities for the respective areas, but it seems to me that it can have no effect in interpreting, still less in limiting, the larger definitions of the Acts of 1892 and 1897.

By section 3 of the Public Health (Scotland) Act, 1867, the word "burgh" is declared to include not only royal burgh, parliamentary burgh, burgh incorporated by Act of Parliament, burgh of barony, burgh of regality, but

also any populous place having a town-council, police commissioners, or trustees exercising the functions of police commissioners under any general or local Act. Here again no limitation is placed upon the term "royal burgh," so that it would, I apprehend, include the whole area within the royalty.

By section 3 of the General Police and Improvement Act, 1862, it was declared that the expression "royal burgh" shall mean a burgh having magistrates and councillors elected under the powers of the Public General Act, 3 and 4 Will. IV. c. 76, and also the burghs enumerated in Schedule (F); and by section 4 of that Act it is provided that the boundaries of such royal burghs as send, or contribute to send, a member or members to Parliament shall, for the purposes of that Act, include the whole limits of such burgh as the same are defined by or referred to in the Act of 3 and 4 Will. IV. c. 76, or otherwise fixed by law, unless it shall be resolved in adopting that Act that its operation shall be limited to such portion of such burgh as is comprehended within the parliamentary boundary. This provision seems to imply that unless the operation of the Act (1862) is expressly limited to such portion of the burgh as is comprehended within the parliamentary boundaries (which it appears to be here assumed are smaller than the burgh proper), the term "burgh" shall include the whole limits as defined by the Act 3 and 4 Will. IV. cap. 76, or otherwise fixed by law. It is to be observed that the section does not declare that the boundaries of the "burgh" may not be larger than the limits defined for the purposes of the Act, the words being that it shall "include the whole limits," though it may also include something more. In other words, there is nothing in the section which should prevent the definition from including the entire royalty where it is larger than the portion of the burgh comprehended in the parliamentary boundary.

The pursuers maintained that the words "or otherwise fixed by law" mean fixed by statute, but I am unable to see any sufficient ground for this limitation. It appears to me that the words are equivalent to "lawfully fixed," and that if the limits were lawfully fixed otherwise than by statute, this would satisfy the language of the section. For the reasons already given, however, it appears to me that the important definitions are not those of the Act of 1862, especially as things which were doubtful under the former Act are clear under the latter Act.

By the Act 3 and 4 Will. IV. c. 76, it is declared that from and after the period when the Act comes into operation, the right of electing town-councils in all such burghs respectively (except those contained in Schedule (F) to the Act annexed) shall be in and belong to such persons, and to such only (except as therein excepted), as are or shall be qualified, as owners or occupants of premises within the royalty, whether original or extended, of any such burgh, to vote in the election of a Member of Parliament for such burgh by virtue of the Act 2 and 3 Will. IV. c. 65, and as are duly registered as such voters in the register by that Act appointed to be kept. If the effect of this provision was, as the pursuers contend, to restrict the right of voting in town-council elections to persons who had a qualification in a locality within both the parliamentary area and the royalty, this restriction was removed by section 3 of the Municipal Elections Amendment Act, 1868, which provided, *inter alia*, that all persons should be entitled to vote "who

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are possessed of the qualifications described in the said Acts 2 and 3 Will. IV. c. 65, or 31 and 32 Vict. c. 48, in respect of the premises therein described, within the royalty of any such royal burgh, where the limits thereof at any point or points extend beyond the parliamentary boundaries of such burgh." It was argued for the pursuers that the term royal burgh is something less than the royalty, but this contention does not appear to me to be well founded, and, in any view, the right of voting at municipal elections is conferred upon all who possess the requisite qualification within the royalty. It is difficult to suggest any reason for giving the municipal franchise to qualified persons throughout the royalty, unless the councillors whom they took part in electing were to have some jurisdiction and powers throughout the royalty. By section 31 of the Act it is declared that the magistrates and council elected under the Act shall have the same jurisdiction and the same rights of administration of the property and affairs of the burgh as their predecessors.

The pursuers maintain that the boundaries of Rutherglen for parliamentary purposes contained in Schedule (M) to the Act of 2 and 3 Will. IV. c. 65, must be held to limit the burgh for the purposes of the present question to the parliamentary and municipal area, but I am unable to find any warrant for this contention. The definition in the Act of 1832 is for the purposes of that Act, and for no other purpose.

Upon a consideration of the whole of these enactments, it appears to me that the area of a royal burgh for the purposes of the Public Health Act, 1897, includes the whole royalty of the burgh, and that it is not limited either to the police or municipal area, or to the parliamentary area, as the pursuers contend that it is.

Holding these views, I do not find it necessary to consider the effect of what was actually done by the burgh in adopting the Act of 1862 in the year after it passed. A meeting was called by the provost to be held on 10th March 1863 for the purpose of considering the propriety of adopting in whole or in part the Act of 1862, "as applicable to the whole limits of" the burgh, as the same are defined by or referred to in the Act of 3 and 4 Will. IV. cap. 76. The meeting unanimously resolved to adopt, and did adopt, the Act of 1862, "and the whole powers and provisions thereof as applicable to the whole limits of the royal burgh of Rutherglen without any limitation" in terms of the Act. The resolution was duly reported to the Sheriff of the county in order that he might pronounce a deliverance thereon, and on 11th March 1863 he did pronounce a deliverance declaring that the Act of 1862, "and the whole powers and provisions thereof, have been adopted by the Magistrates and Council of the said royal burgh of Rutherglen, as applicable to the whole limits of the said royal burgh, without limitation, and finds and declares that the said Act shall apply to the whole limits of the said royal burgh of Rutherglen without any limitation accordingly." It would be difficult to devise larger language than this, and the defenders contend that it applies to the whole royalty of the burgh, and that even if it should be held to have been *ultra vires* to adopt the Act over the whole of that area, the adoption is protected from challenge by the deliverance of the Sheriff being declared to be final by section 20 of the Act of 1862, and by section 18 of the Act of 1892, which declares that

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such proceedings shall not be liable to challenge after three years from the date of the alleged non-compliance with the statutory requirements and provisions.

The defenders also rely on section 7 of the Act of 1892, which declares that the boundaries of any burgh which at the commencement of that Act is administered wholly or partly under any general or local Police Act shall, for the purposes of the Act, be the boundaries to which such Police Act extends, and upon the fact that when Rutherglen was divided into wards in 1885, the whole area within the royalty was comprehended in the division, and the division was approved of by the Home Secretary on 7th August 1885.

It appears to me, however, to be unnecessary to express any opinion upon these and other arguments maintained by the defenders, as I consider, for the reasons already given, that the Lord Ordinary's interlocutor should be recalled, and that they should be assoilzied from the conclusions of the summons.

LORD ADAM and LORD M'LAREN concurred.

LORD KINNEAR having been absent at the hearing gave no opinion.

THE COURT recalled the interlocutor of the Lord Ordinary, and assoilzied the defenders from the conclusions of the summons.

MACKENZIE & BLACK, W.S.—J. & A. HASTIE, Solicitors—Agents.

No. 115.

Mar. 20, 1901.
City Parish of Edinburgh Parish Council v. Gladsmuir Parish Council.

PARISH COUNCIL OF THE CITY PARISH OF EDINBURGH, Pursuers (Reclaimers).—*Lees—Guy—Addison Smith.*
PARISH COUNCIL OF THE PARISH OF GLADSMUIR, Defenders (Respondents).—*Campbell, K.C.—Clyde.*

Poor—Residential Settlement—Effect of order altering parish boundaries—Extinction of Parish—Local Government (Scotland) Act, 1889 (52 *and* 53 *Vict. cap.* 50), *sec.* 51—*Local Government (Scotland) Act*, 1894 (57 *and* 58 *Vict. cap.* 58), *sec.* 46.—Where by Orders of the Secretary of Scotland under the Local Government Acts taking effect simultaneously, a parish was extinguished by a part of its territory being transferred to one parish and the remainder to another, *held* (*aff.* judgment of Lord Kincairney, *dis.* Lord Kinnear) that the liabilities of the extinguished parish might be regarded as apportioned between the divided parts, and each part regarded as if it had previously been a complete parish, and therefore that in accordance with the case of *M'Graw*, 25 R. 385, the acquisition of a settlement in one of the parts was not interrupted by its being merged in another parish.

Rule of (*M'Graw's* case) *City Parish of Edinburgh* v. *City Parish of Glasgow*, Jan. 7, 1898, 25 R. 385, *applied.*

1ST DIVISION. Lord Kincairney.

DAVID GRANT, a labourer, was born in 1857 in the parish of Gladsmuir. From 28th August 1891 till 2d August 1898 he resided in Begg's Buildings, which at the former date were situate within the parish of South Leith. By order (No. XXI.) of the Secretary for Scotland (under section 51 of the Local Government Act, 1889, and section 46 of the Local Government Act, 1894), dated 14th March 1895, that part of the parish of South Leith lying within the municipal boundaries of Edinburgh, and including Begg's Buildings, was, with certain portions of other parishes, united with the old City Parish of Edinburgh to form a new parish, to be called the City Parish of Edinburgh.

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By this order the new City Parish of Edinburgh became bound to relieve the Parish Council of Leith of advances on account of any pauper whose claim was derived from birth in that part of South Leith now united to the City Parish of Edinburgh, or from residence therein for the statutory period prior to 15th May 1895.

By a similar order (No. XXII.) of the same date, the remainder of the parish of South Leith was with certain other portions of parishes united into a new parish to be called the Parish of Leith.

Both orders became operative on 15th May 1895.

On 2d August 1898 the wife of David Grant became chargeable as a pauper lunatic upon the City Parish of Edinburgh, and thereafter the Parish Council of that parish raised the present action to recover from the Parish Council of the parish of Gladsmuir (the husband's birth settlement) the sum of £41, 14s. 9d. expended upon the maintenance of this pauper lunatic from 2d August 1898 till 28th October 1899.

The pursuers pleaded;—The said David Grant having been born in the parish of Gladsmuir, and not having a settlement in any other parish, the defenders are bound to relieve the pursuers of the maintenance of his wife, and decree of declarator should be pronounced accordingly.

The defenders pleaded;—(2) The pursuers are liable for and have no right of relief against the defenders for the sum sued for, in respect that David Grant and his said wife acquired a residential settlement within the pursuers' parish, and the defenders should therefore be assoilzied.

On 12th July 1900 the Lord Ordinary (Kincairney) pronounced this interlocutor:—"Finds (1) that the pauper, David Grant, resided for three and a half years or thereby prior to 15th March 1895 in Begg's Buildings, in the parish of South Leith; (2) that, at that date, the portion of South Leith which includes Begg's Buildings was united to the City Parish of Edinburgh; (3) that said David Grant and his wife continued to reside in Begg's Buildings until they became chargeable in 1898; (4) that, by said residence, the said paupers acquired a settlement in the said City Parish: Therefore sustains the second plea in law for the defenders, and assoilzies them from the conclusions of the summons; and decerns."*

The Parish Council of the City Parish of Edinburgh reclaimed.

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* "OPINION.—I refer to my opinion in the case of the *City Parish of Edinburgh* v. *Lauder*, decided to-day [*infra*, p. 755]. This case is also an action by the City Parish as relieving parish of a lunatic pauper, Mrs Grant, who received relief on 2d August 1898.

"In this case the facts are these:—That David Grant, husband of the pauper, resided at Block A, Begg's Buildings, from 28th August 1891 to 2d August 1898, *i.e.*, he lived in the same house, or at least the same buildings, for seven years. This residence was, however, divided into two parts by the unification order mentioned in my opinion in *Lauder's* case. Before the date of that order Block A, Begg's Buildings, was in the parish of South Leith. But it was included in the portion of South Leith disjoined by the order and united with the City Parish and the portions of the other parishes mentioned in the order to form the new City Parish.

"At the date of the order Grant had not acquired a settlement by residence, and his birth settlement was liable for his maintenance. He had then resided in South Leith for less than four years. He resided in the

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Argued for the reclaimers;—The Lord Ordinary proceeded upon the authority of *M'Graw's*[1] case, but that case was decided on the footing that the whole of St Cuthbert's and Canongate Combination was united to Edinburgh. The question was raised in a special case, and the judgment was necessarily given on the facts therein stated, so that it could only be regarded as an authority where one parish was wholly absorbed in another, and was therefore no authority upon the question raised in this case, which had reference to the absorption of a part of a parish only. The principle here applicable was that given effect to in the *Galashiels*[2] case.

Argued for the defenders;—The principle of *M'Graw's*[1] case ruled the present. In that case St Cuthbert's Combination was in exactly the same position as South Leith. They were both dealt with by the same orders (Orders XXI. and XXII.) in the same way. Both were divided into two portions, and these were absorbed simultaneously, one portion in each case by the new City Parish of Edinburgh, and the other by the new Parish of Leith. When an order altered the

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new parish for about three years, so that he has no residential settlement unless these periods can be added.

"The periods of residence are continuous. The duration would have been more than sufficient but for the order. Had the whole of South Leith been joined to the united parishes, I should not have doubted, and, as matters stand, I am of opinion that this case must be held to be ruled in favour of the defenders by the case of *M'Graw*, being the first branch of the case of *The City Parish of Edinburgh* v. *The City Parish of Glasgow*. That case regarded the settlement of a pauper who had resided in the combination of St Cuthbert's and Canongate, and whose residence had been placed within the area of the new parish by the order. It does not appear very clearly from the report in the case of *M'Graw* that only a part of the combination of St Cuthbert's and Canongate was conjoined with the new parish. But it was so; and, having that in view, the two cases seem the same."

OPINION of LORD KINCAIRNEY above referred to in *Parish Council of the City Parish of Edinburgh* v. *Parish Council of the Parish of Lauder*.

"This action relates to the settlement of two paupers, Alexander Blaikie and his wife, who in April 1898 became chargeable to the City Parish of Edinburgh, and it sues the Parish of Lauder, in which Alexander Blaikie was born, for relief. Alexander Blaikie died on 15th August 1898; his wife survives. The defence is that the City Parish is itself liable because Alexander Blaikie had acquired a residential settlement in the City Parish. The question has arisen as the result of alterations in the boundaries of parishes in the vicinity of Edinburgh by an order by the Secretary for Scotland made under the powers conferred by section 51 of the Local Government Act, 1889, and section 46 of the Local Government Act, 1894. The difficulty is caused, to adopt the remark of the Lord President in *Borthwick* v. *Temple*, 17th July 1891, 18 R. 1190, by the act of the Legislature 'in altering the law, in so far as the division of the parishes is concerned, without making any provision as to the effect of that alteration on the law of residential settlement.' Since that judgment the Local Government Act of 1894 has been passed, but that oversight, if it was an oversight, has not been remedied. Questions as to settlements,

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[1] Parish Council of City Parish of Edinburgh v. Parish Council of City Parish of Glasgow, Jan. 7, 1898, 25 R. 385.

[2] Inspector of Poor of Galashiels v. Inspector of Poor of Melrose (1st Case), May 12, 1892, 19 R. 758; (2d Case), Jan. 19, 1894, 21 R. 391.

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boundaries of a parish two different cases might arise. The first, where the order left the parish from which the area was transferred as an existing administrative body; and the second, where the order extinguished the parish by its absorption in one or more parishes, thereby bringing to an end all its responsibilities and rights. The principle applicable to the first set of circumstances was that given effect to in the *Galashiels*[1] case. In that case the parish, although shorn of a part of its area, still remained liable for its burdens, including its obligation to maintain persons who had acquired a residential settlement in the transferred area, until that settlement was lost by the lapse of four years after the transfer. Where, on the other hand, the parish was extinguished, its liabilities were transferred along with its territory to the absorbing parishes, each taking up the liabilities attaching to the territory which it had acquired. This was the principle of *M'Graw's*[2] case.

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therefore, occasioned by such alterations of parishes must apparently be solved by application of the provisions of the Poor-Law Act to circumstances which were not in contemplation at its date.

"Some expressions in the case of *Borthwick* v. *Temple* may suggest a doubt whether the adjustment of such questions was not committed to the Boundary Commissioners. But since then the Court have entertained and decided two cases of the class—*Galashiels* v. *Melrose*, 12th May 1892, 19 R. 758; and *City Parish of Edinburgh* v. *City Parish of Glasgow*, 7th January 1898, 25 R. 385. The former of these cases has been considered and explained, and perhaps its apparent importance has been thereby somewhat diminished, in *Galashiels* v. *Melrose*, 19th January 1894, 21 R. 391.

"The order of the Secretary for Scotland which occasioned this question took effect on 15th May 1895. It ordered that portions of the St Cuthbert's and Canongate Combination should cease to be parts of that combination, and that portions of the parishes of North Leith, South Leith, Duddingston, and Liberton should cease to be parts of these parishes, and that these disjoined parishes should, along with the City Parish, be united into one parish, to be called the City Parish.

"The facts as to the pauper's residences, so far as of importance in this question of residential settlement, are, I believe, admitted, and are these:—The pauper resided for about three and a half years in St Cuthbert's Parish, beginning in August 1887, about three years in the Old City Parish, about one year from May 1894 to May 1895, and again for another year until May 1896, in St Cuthbert's Parish, but in a part of it not separated from the parish by the order, and for the two years immediately prior to becoming chargeable in the new City Parish.

"The question is whether these residences, or any of them, can be so joined as to confer a residential settlement in the new City Parish. I am of opinion that that cannot be done. The case of *Galashiels* related to a settlement acquired before alteration in the parishes of Galashiels and Melrose was made, and I think does not apply. Here there was no settlement acquired before the change in the parishes, or before the paupers came to live in the united parish. The defenders, the parish of birth, relied chiefly on the case of *The City Parish of Edinburgh* v. *The City Parish of Glasgow*, and on the principle which they deduced from that case, namely, that when two parishes were united the new parish was held to continue the life of the old, and that residence in the old parish might be added to residence in the new, so as to make up a residence for the statutory period of five years. Conceding that principle, I do not see how it can be applied. The res-

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[1] 19 R. 758. [2] 25 R. 385.

At advising,— **No. 115.**

Mar. 20, 1901. City Parish of Edinburgh Parish Council v. Gladsmuir Parish Council.

LORD ADAM.—This is an action brought by the Parish Council of the City Parish of Edinburgh against the Parish of Gladsmuir for relief of certain advances made by them on account of a pauper lunatic, Mrs Grant.

The facts relating to the personal history of the pauper are few, and are not disputed.

David Grant, the pauper's husband, was born in the parish of Gladsmuir. On the 28th August 1891 he went to reside at Block A, Begg's Buildings, in what was then the parish of South Leith. He resided there till the 15th of May 1895, a period of three years, eight months, and two weeks. On that date that part of the parish of South Leith in which Begg's Buildings were situated was, by an order of the Secretary of State for Scotland, transferred to, and made part of, the present City Parish of Edinburgh.

David Grant continued to reside after the transference in the same buildings until the 2d August 1898, when the pauper became chargeable—a period of three years, two months, two weeks, and three days.

It thus appears that David Grant, when his wife became chargeable, had resided continuously for a period of upwards of six years in the same buildings, which, had there been no transference, would have given him a residential settlement in South Leith.

The question, therefore, in this case, is as to the transference of the continuity of the residence of David Grant. If it is to be considered as a continuous residence in the City Parish, then that parish will be liable, as in that case Grant would have acquired a residential settlement there. But if Grant's residence is to be considered as divided into two parts, one before and one after the transference, then Gladsmuir will be liable as the birth settlement, as in that case Grant would have resided in the City Parish for less than four years.

This necessitates an inquiry into the alterations made by the orders of the

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dences to be added must, I apprehend, be continuous. But there cannot be made five years' continuous residence in any one parish in this case.

"The effect of the first three years' residence in St Cuthbert's was wholly lost when the paupers went to the Old City Parish, and the residence for three years in the Old City Parish was lost when the paupers returned to St Cuthbert's, and that residence in St Cuthbert's could not be conjoined with the previous residence in St Cuthbert's. It may, perhaps, be that the residence in the united parish might be held to continue the later residence in St Cuthbert's, although I express no opinion to that effect, seeing that it was only a part of St Cuthbert's, and not the whole of it, which was joined to the united parish. But, assuming it to be so, the beginning of that residence cannot be put further back than May 1894, and the paupers became chargeable in April 1898, which gives a continuous residence in St Cuthbert's and the new parish of less than four years. There is no principle on which the residence in the Old City Parish can be added to that.

"I am therefore of opinion that the parish of birth has not established that the paupers acquired a residential settlement in the City Parish, and that the pursuers are entitled to decree as concluded for."

The Lord Ordinary's judgment in this case was adhered to by the First Division on 20th March 1901.

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Secretary of State for Scotland on the areas of the several parishes affected by these orders.

By the 3d section of an order which came into effect on the 15th May 1895, it was provided that the portion of the parish of South Leith situated within the municipal boundaries of the City of Edinburgh should cease to be part of that parish. Begg's Buildings were situated within this part of the parish, and, therefore, ceased to be situated in the parish of South Leith.

The order deals similarly with portions of other adjoining parishes, and then by section 6 provides that the City Parish of Edinburgh, and the portions of the other parishes previously dealt with, including the portion of the parish of South Leith situated within the municipal boundaries of the city of Edinburgh, shall be united into one parish, to be called the City Parish of Edinburgh.

It is necessary to have in view that, by an order of the same date, and coming into effect at the same date as the order previously mentioned, and obviously a part of the same scheme for the rearrangement of the parishes, it was provided, by section 5, that portions of various parishes therein specified, and including that portion of the parish of South Leith which is situated within the municipal boundaries of the burgh of Leith, and that portion of the parish of South Leith which is landward, shall be united into a parish to be called the Parish of Leith.

I understand that the portions of the parish of South Leith so dealt with in the two orders embraced the whole area of the parish, so that the effect of the orders is that subsequent to 15th May 1895 no parish of South Leith existed, part being merged in the new Parish of Leith, and part in the new City Parish of Edinburgh.

I may observe, that under these orders the St Cuthbert's and Canongate Combination was treated in exactly the same way as South Leith, part of it becoming merged in the new City Parish of Edinburgh and the remainder in the Parish of Leith—so that it also became extinct.

The Lord Ordinary is of opinion that this case is ruled by the case of *M'Graw*, being the first branch of the case of the *City Parish of Edinburgh* v. *The City Parish of Glasgow*,[1] and so it would be if the facts, as we now know them, had been fully before the Court in that case. But that was a special case, in which it appears to have been stated that the St Cuthbert's and Canongate Combination had been united, with portions of other parishes, into one parish forming the new City Parish of Edinburgh, and the Court could only deal with the case on the facts as stated. But however that may be, it would seem that the differences which might exist between a case where the whole of a parish was united to another parish, and a case where a part only of a parish was so united, were not in view of the Court in deciding that case. But the case is certainly an authority to this extent, that a parish which has ceased to have a separate existence, by union with another parish, must be considered, in a question of parochial settlement, as a still existing parish. I venture to repeat what I said in that case—"If the previously existing parishes were to be considered

[1] 25 R. 385.

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as no longer existing, it would seem to follow that all settlements previously acquired in these parishes, whether by residence or birth, must also cease to exist. Suppose, for example, that a pauper who had a settlement in any of the united parishes became chargeable in any other parish in Scotland, that parish apparently could not obtain relief, because, in the view of the City Parish of Edinburgh, the parish which ought to relieve it has no longer a legal existence." It was held accordingly that parishes united were united subject to all their existing rights and liabilities at the time of their union, and that these were transferred to the new parish.

There is no difficulty in applying that principle where an entire parish comes to form part of another parish. But it cannot be applied in terms and without modification to the case, like the present one, where the old parish is divided, and one part united to one parish, and the other part to another parish.

We cannot hold that all the liabilities of the old parish pass to each of the new parishes. But I think it may be modified by apportioning, so far as that can be done, the liabilities of the old parish between the divided parts, and that this may be practically attained by treating for settlement purposes each part of the divided parish as if it had previously been a distinct parish. This would provide for the settlement of all questions of birth settlement, because it would always be known in what part of the area of the old parish a person had been born. It would probably also provide for most questions of residential settlement—but, no doubt, in that case a difficulty might arise from the necessary residence having been partly in one part of the divided parish and partly in the other.

Applying, accordingly, the rule of *M'Graw's* case [1] to the circumstances of the present case, the result is that the pauper has a residential settlement in the City Parish, and that Gladsmuir must be assoilzied.

LORD M'LAREN.—I concur.

LORD KINNEAR.—I have considerable difficulty in this case, and am sorry not to be able to accept the conclusions at which your Lordships have arrived. The difficulty arises from the operation of the orders authorised by Act of Parliament in breaking up one entire parish into fragments, each of which is to be made part of some other parish, without making any provision for the adjustment of rights of settlement in the course of maturing in the extinguished parish. The rule for the adjustment of such rights proposed by Lord Adam is no doubt a very good one, and I am not able to suggest a better, but, however convenient or equitable it may be, my difficulty in accepting the rule is that it is a rule of the Court's own making, and seems to me to encroach to an alarming extent on the functions of the Legislature. The Legislature says that a parish shall be broken up so as to leave no fragment of the original parish, but makes no alterations on the existing law of settlement such as it is supposed would be necessary to make the system satisfactory and symmetrical. The conclusion is not to my mind that Parliament intended that the Courts of law should complete the system by making new regulations for the acquisition of a residential settlement in

[1] 25 R. 385.

No. 115. Mar. 20, 1901. City Parish of Edinburgh Parish Council v. Gladsmuir Parish Council.

the new circumstances. The Legislature either intended the rules laid down by the Poor-Law Act to apply to the new state of things, or else failed to advert to the expediency or necessity of providing a new series of regulations; and in either case the Poor-Law Act stands unrepealed and unaltered. In these circumstances the only duty of this Court is to apply the law of the Poor-Law Act to the actual facts, and see if there is any difficulty in determining the rights which have now arisen, or whether the provisions of the Poor-Law Act are not plainly applicable to the new facts. It appears to me that in the application of the plain words of the statute there is no difficulty in arriving at a consistent and logical result. The Act of 1845[1] says that no person shall be held to have acquired a settlement by residence unless such person has resided in a parish for five years continuously, and without begging or receiving parochial relief. The question therefore is, has the pauper in question resided, subject to these conditions, for five years in any parish, so as to give him a residential settlement there, and the answer must be in the negative. He has not lived for the requisite period in South Leith before it was absorbed, and has not lived long enough in the new parish—the City Parish of Edinburgh—to acquire a settlement there since his involuntary change of parish. He has then no residential settlement, because he has not satisfied the statutory conditions, and the only consequence is that in any question of relief it is necessary to fall back on his settlement of birth. This does not appear to me to be a very startling proposition, and it is in accordance with the views of the Court in the case of *Galashiels*.[2] The Lord Ordinary says that the importance of that decision is diminished. I am not sure that I understand this observation, but whether the importance of the case is great or small, the principle involved is perfectly clear, and of general application. If a man has ceased to reside in a parish, it is of no consequence whether his cessation of residence was caused by his removing from the parish, or by operation of an Act of Parliament by which the house in which he lives, and the ground on which it is built, has been severed from that parish and thrown into another. In either case, his residence in the original parish comes to an end, and his rights of settlement must be determined with reference to that fact.

In the *Galashiels* case,[2] the only question was whether the residence of a pauper in a parish to which the piece of land on which he actually had his home had been newly attached upon a change of boundaries, had destroyed his previously acquired settlement. It was held that it had not, because the period of time since the union of the land in question with the new parish had not been long enough to deprive the pauper of his settlement. The pauper had a residential settlement in Melrose, which would have been lost if he had left Melrose for Galashiels and lived in Galashiels for a sufficient time. But as matter of fact he did not live in the latter parish for a sufficient time to deprive him of a settlement already acquired. I think the general rule there followed is as clearly applicable to the present case, nor do I think there is any authority opposed to this view, although I appreciate the observation of Lord Adam that the case of *M'Graw*[3]

[1] The terms of the Act are quoted at p. 765, note.
[2] 19 R. 758. [3] 25 R. 385.

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would have been such an authority had it been decided on the facts as actually existing. But it was a special case, and was decided on the facts set forth in the statement of the case. The scope of the decision as an authority is accordingly limited to a decision on the facts as assumed. I do not think the Court considered, in the case of *M'Graw*,[1] the question we have here to deal with, but I see the force of Lord Adam's observation that the considerations to which he gave effect in his opinion in the case of *M'Graw*[1] present obstacles to the adoption of the view which, in my opinion, is the just view in this case.

It is true that we are not concerned with the case of a right actually acquired, but still, if we proceed on the recognition of the fact that South Leith no longer exists, no doubt the same principle applies as if a completed settlement had been acquired. I do not see any serious difficulty in applying the statutory rule to such circumstances. The effect of the statute in putting a stop to the acquisition of a settlement by residence, or in bringing a settlement already acquired to an end, is not a result of such a startling character as to justify a Court in refusing to apply the plain words of the statute. After the parish ceases to exist as a separate entity there are no rates, no parochial authority, and therefore no claim of relief can be made good in the absence of these constituents. What really takes place is this:—A pauper had a right to relief against a certain parish, that parish has gone out of existence, and the consequence is that there is no longer a debtor in the claim for relief. The pauper is entitled, in the first instance, to relief in the parish where he is found, but that parish has no recourse against a non-existing parish, in which, before it ceased to exist, the pauper had acquired a residence, but must fall back on the parish of birth. That may or may not be equitable, and may or may not disturb the symmetry of the parochial system, but it is the effect of an Act of Parliament, and, in my opinion, the Court have no power to redress the inequity, if such there be, or to restore the symmetry of the system.

What we have to do is, therefore, to apply the plain words of the statute, from which it follows that, legally, the pauper had no residential settlement in South Leith, which had ceased to exist, or in the City Parish, which had not existed for the requisite period. This being so, I am not able to concur in the result which your Lordships have reached.

LORD PRESIDENT.—I concur with Lord Adam and Lord M'Laren.

THE COURT adhered.

R. ADDISON SMITH, S.S.C.—JOHN ELDER, S.S.C.—Agents.

No. 116.
Mar. 20, 1901.
Duke of Sutherland.

DUKE OF SUTHERLAND, Petitioner.—*Balfour.*

Parent and Child—Aliment—Advances from income of pupil's estate for his maintenance—Trust—Powers of Trustees.—A pupil, thirteen years of age, an heir to an earldom, was possessed of funds held by trustees for his behoof, which yielded an income of £2500.

In a petition presented by his father, with concurrence of the trustees, the Court *authorised* and *ordained* the trustees to make payment to the petitioner of any sums that should be disbursed by him, not exceeding

[1] 25 R. 385.

No. 116. £600 for each of the next two years, and not exceeding £700 for the third year, for the pupil's education and maintenance.

Mar. 20, 1901. Duke of Sutherland. 1st Division.

THE MARQUESS OF STAFFORD, as next heir of entail of his father, the Duke of Sutherland, in the earldom and estates of Sutherland, became entitled from time to time after 1895 to certain sums as the value of his expectancy under applications for the disentail of certain portions of the estate.

The Marquess being a pupil, securities over the estate for these sums were taken in the names of certain trustees for his behoof. There were no trust purposes.

The income yielded by the trust-estate was over £2500.

In 1901, the Marquess of Stafford being then thirteen years old, the Duke of Sutherland presented a petition craving the Court to authorise and ordain the trustees to pay to him out of the free income of the ward's estate two sums of £407, 0s. 5d. and £643, 8s. 5d., being the amounts expended by the petitioner during the years 1899 and 1900 respectively in the maintenance and education of the ward, "and furthermore to authorise and ordain the said trustees to make payment to the petitioner out of the free annual income of such sum as your Lordships shall consider fitting to meet the increasing cost of educating and maintaining the said Marquess of Stafford during such future period as your Lordships may consider right and proper."

The petition was brought with the concurrence of the trustees. There was no averment in the petition as to the ability or inability of the Duke of Sutherland to pay for his son's education and maintenance.

A remit was made to the Hon. James W. Moncreiff, W.S., to inquire into the facts stated in the petition, and to report as to the propriety of granting the power craved.

From the report under this remit it appeared, in addition to the facts above stated, that the Marquess of Stafford was in the course of receiving his education at a private school in England, and that he came home or travelled during his holidays. It was proposed that in the course of one or two years he should leave the preparatory school and complete his education at Eton or some other public school.

The Reporter suggested that if the Court approved of the report they might authorise and ordain the trustees, "out of the free annual income of the trust funds in their hands, to make payment to the petitioner of (1) the two sums of £407, 0s. 5d. and £643, 8s. 5d., mentioned in the prayer of the petition; (2) any sums that may be disbursed by the petitioner during the next three years 1901, 1902, and 1903, in the education and maintenance of the said Marquess of Stafford, not exceeding, say, £600 for each of the years 1901 and 1902, and not exceeding, say, £700 for the year 1903; with liberty to the petitioner at the end of that period to apply to the Court for such further order as may be necessary."*

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* The report further bore,—"I may add that I am satisfied as to the propriety of granting the authority craved for payment of these sums, or such other sums as your Lordships may determine, out of the revenue of this large fund which came to the Marquess from his father disentailing these portions of his estate, and it is only reasonable that the Marquess should bear the greater part of the expenses of his own education and maintenance. Other applications, as your Lordships are aware, have been

No. 116.

Mar. 20, 1901. Duke of Sutherland.

LORD PRESIDENT.—It appears that the Marquess of Stafford has in recent years received in respect of the value of his expectancy, under applications to disentail portions of the entailed estate, securities for £90,665, 12s. 3d., producing an income of over £2500 per annum. The expenses incurred by the Duke of Sutherland in the education of the Marquess up to April 1899 have been repaid to him by the trustees, who hold the securities on behalf of the Marquess. The Duke now asks for a further payment to him in respect of the increasing expense of the education and maintenance of the Marquess, the alternative being that the income of the fund would be added to the accumulations which are being made for his behoof.

It appears to me, looking to the authorities, that the application is one which may reasonably be granted, and as regards the amount I do not think, in view of the position of the Marquess and the necessary expense of his education, that the reporter has erred in his estimate of the sum required.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

THE COURT pronounced this interlocutor:—"The Lords having considered the petition, together with the report by the Honourable James Moncreiff, and heard counsel for the parties, authorise and ordain the concurring petitioners, Donald M'Lean, Thomas Murray Mackay, and Cecil Chaplain, trustees for behoof of the Right Honourable George Granville Sutherland Leveson-Gower, Marquess of Stafford, to make payment out of the free annual income of the trust funds in their hands for behoof of the said Marquess, to the petitioner the Most Noble Cromartie Sutherland Leveson-Gower, Duke and Earl of Sutherland, of (1) (*a*) the sum of £407, 0s. 5d., being the amount disbursed by the said petitioner the Duke of Sutherland in the education and maintenance of the said Marquess for the year 1899 subsequent to April of that year; and (*b*) the sum of £643, 8s. 5d., being the amount disbursed for the same purpose for the year 1900; (2) any sums that may be disbursed by the said petitioner during the next three years, 1901, 1902, 1903, in the education and maintenance of the said Marquess of Stafford not exceeding £600 for each of the years 1901 and 1902, and not exceeding £700 for the year 1903, with liberty to the said petitioner at the end of that period to apply to the Court for such further order as may be necessary, and decern," &c.

MACPHERSON & MACKAY, S.S.C., Agents.

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granted by the Court in similar circumstances, and I refer to some of these authorities undernoted.[1] At the same time it is right to point out there are adverse views in the opinions of the Judges in the case of *Fairgrieves*."[2]

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[1] Scott, Dec. 23, 1870, 8 S. L. R. 260; Stewart's Trustees, Feb. 21, 1871, 8 S. L. R. 367; Edmiston, July 11, 1871, 9 Macph. 987, 43 Scot. Jur. 545; Seddon, March 18, 1893, 20 R. 675.

[2] Fairgrieves v. Henderson, Oct. 30, 1885, 13 R. 98.

No. 117. PARISH COUNCIL OF DUNBLANE AND LECROPT, Pursuers (Reclaimers). —*Dundas, K.C.—C. N. Johnston.*

Mar. 20, 1901. Dunblane and Lecropt Parish Council v. Logie Parish Council.

PARISH COUNCIL OF LOGIE, Defenders (Respondents).—*Guthrie, K.C. —Cook.*

Poor—Residential Settlement—Alteration of boundaries of parishes—Adjustment Order—Local Government (Scotland) Act, 1889 (52 *and* 53 *Vict. c.* 50), *secs.* 49 *and* 51.—Keirfield, part of the parish of Lecropt, was transferred to the parish of Logie by an order under the Local Government Act, 1889, on 15th May 1891. By an Adjustment Order in August 1898, the parish of Logie was required to relieve the parish of Lecropt of advances it "may have made since 15th May 1898, or may be called upon to make, on account of any pauper whose claim is derived (1) from birth in the transferred area prior to 15th May 1891, or (2) from residence for the statutory period in the said area prior to" said date.

C, a person who had at 15th May 1891 acquired by residence in Keirfield a settlement in the parish of Lecropt, continued to reside in Keirfield for four years and twenty-six days after the transfer, *i.e.*, till 10th June 1895, when he became a pauper.

In an action by Lecropt against Logie for relief of advances made since 15th August 1898 for C's widow on the ground that C had resided in the transferred area for the statutory period prior to 15th May 1891, *held* (*aff.* judgment of Lord Low) (1) that the Adjustment Order could not be construed as imposing liability on the parish of Logie for all persons who had acquired a settlement in Lecropt at the date of the transfer, but only for such of them as had retained their settlement at the date when their claim of relief emerged, and (2) that as C had been for four years and a day absent from Lecropt when he became a pauper he had no claim against that parish, and therefore that Lecropt had no claim of relief against Logie.

Inspector of Poor of Galashiels v. *Inspector of Poor of Melrose*, May 12, 1892, 19 R. 758, *followed*.

1ST DIVISION. Lord Low.

BY order, dated 13th December 1890, the Boundary Commissioners for Scotland transferred to the parish of Logie a portion of the parish of Lecropt, including the district known as Keirfield. The transference came into operation on 15th May 1891. Lecropt Parish, so far as not annexed to Logie, was by order of the Secretary for Scotland, dated 22d August 1898, united with the parish of Dunblane into one parish, to be called the Parish of Dunblane and Lecropt.

In 1891 the parochial boards of Logie and Lecropt entered into an agreement, to take effect from 15th May 1891, and endure for five years, under which a sum of £20 per annum was to be handed over to Lecropt, in lieu of poor-rates from the transferred area of that parish, and Lecropt was to continue to maintain the paupers having their settlement in said transferred area.

On the expiry of the said agreement in 1896, Lecropt Parish made a representation to the Secretary for Scotland, under section 5 of the Local Government Act, 1889, craving an adjustment of liabilities as between that parish and the parish of Logie. Upon this application an inquiry was held, and thereafter the Secretary for Scotland issued the Adjustment Order No. XIX., dated 18th August 1898, ordering as follows:—"The Parish Council of Logie shall assume responsibility for and shall relieve the Parish Council of Lecropt of all advances which the latter body may have made since 15th May 1898, or may be called upon to make, for or on account of any pauper whose claim is derived (1) from birth in the transferred area prior to the 15th day

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of May 1891, or (2) from residence for the statutory period in the said area prior to the last-mentioned date."

John Carmichael, who was born at Netherton, in that portion of Lecropt Parish which afterwards formed part of the united parish of Dunblane and Lecropt, was on 10th June 1895 admitted as a lunatic pauper by Lecropt. He had then resided for about thirty years continuously in the Keirfield district in the area transferred to Logie. He died on 13th September 1895, survived by a widow and four children, who continued to be chargeable on the parish.

In this action the Parish Council of Dunblane and Lecropt sued the Parish Council of Logie for repayment of a sum of £30, 7s. 6d., the amount expended by them in the maintenance of the widow and four children of Carmichael for the period from 15th May 1898 to 2d December 1899.

It was admitted that the settlement of Carmichael at the time of his death determined that of his wife and children. The question as to Carmichael's settlement depended on the effect of the above orders taken along with the provisions of section 76 of the Poor-Law Amendment (Scotland) Act, 1845.*

The pursuers pleaded;—(2) On a sound construction of the Adjustment Order, No. XIX., the pursuers are entitled to recover from the defenders the sums sued for as advances made in respect of paupers whose claim is derived from residence for the statutory period in the said transferred area of Keirfield prior to said 15th May 1891.

On 22d June 1900 the Lord Ordinary (Low) assoilzied the defenders from the conclusions of the summons.†

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* The Poor-Law Amendment (Scotland) Act, 1845 (8 and 9 Vict. c. 83), enacts, sec. 76,—

"That from and after the passing of this Act no person shall be held to have acquired a settlement in any parish or combination by residence therein unless such person shall have resided for five years continuously in such parish or combination, and shall have maintained himself without having recourse to common begging either by himself or his family, and without having received or applied for parochial relief; and no person who shall have acquired a settlement by residence in any parish or combination shall be held to have retained such settlement if during any subsequent period of five years he shall not have resided in such parish or combination continuously for at least one year."

† "OPINION.— . . . The question in this case relates to the liability, after 15th May 1898 (the date mentioned in the order), for the family of one John Carmichael, who became a pauper lunatic on 10th June 1895, which was during the currency of the agreement of 1891. Carmichael was born in a part of the parish of Lecropt which was not transferred to Logie, and he had resided for some thirty years in the area which was transferred. He was relieved by Lecropt, and died in September 1895, leaving a widow and children, who continued to be chargeable. I do not know, and I do not think it necessary to inquire, upon what ground precisely Lecropt relieved Carmichael, but they may have relieved him either because under the agreement they had become bound during its currency to relieve all paupers becoming chargeable within the transferred area, just as if it had not been transferred, or they may have relieved him as his birth parish, recognising the case as one which did not fall under the agreement.

"Now, on 15th May 1891, the transferred area ceased to be part of Lecropt, and became part of Logie, and thereafter Carmichael was resident in Logie Parish. When, however, he became chargeable he had only resided in Logie for a period of four years and a few weeks,—a period which

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The pursuers reclaimed.

Argued for the reclaimers;—The Lord Ordinary's judgment involved the extravagant proposition that a person who had lived for thirty years in the same house had not acquired a residential settlement. His judgment proceeded on the theory that a transference by an order under the Local Government Act, 1889, of an area from one parish to another was to have the same effect as if all the persons in the transferred area had voluntarily migrated from the one parish to the other. This theory depended on the first *Galashiels*[1] case; but that case, so far as establishing a general rule, had been discredited.[2] The true principle was that where an area was added to a parish, that parish became on the one hand entitled to the poor-rates leviable from that area, and as a counterpart took over the liabilities attaching to settlements acquired by birth or residence in that area.[2] There was no logical distinction between the case where a part of a parish was transferred while the rest of it continued to exist as a separate parish, and the case where it was absorbed by division between two parishes. In *M'Graw's*[2] case an examination of the orders by which the new City Parish of Edinburgh and the new City Parish of Leith were formed, shewed that the parish of St Cuthbert's became extinct under these orders; part of it was absorbed in the Edinburgh City Parish and part in the City Parish of Leith. In this case part of the parish of Lecropt was added to Logie in 1891, and the remainder was handed over to Dunblane in 1898, so that the circumstances were truly the same as in *M'Graw's*[2] case, which thus was a conclusive authority in the pursuers' favour. If the principle contended for was applicable, then, apart from the Adjustment Order, Logie was liable as the parish of residence. But in any event the words of the Order were plain, and it was immaterial whether they correctly represented the respective liabilities of the parishes at common law or not. Effect must be given to the Order according to its terms, which clearly implied that

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lost to him any residential settlement which he might have acquired elsewhere, but which did not give him a settlement in Logie.

"These are the matters of fact to which the Adjustment Order must be applied, and the question is whether in that state of the facts Carmichael's claim to be relieved by Lecropt was derived from residence in the transferred area for the statutory period prior to 15th May 1891. I am of opinion that it was not. If Lecropt relieved Carmichael, not as his birth parish, but on account of his residence in the transferred area, it must have been because in their view the agreement bound them to deal with paupers in the transferred area as if it had never been transferred. Upon that view of the agreement Lecropt was bound to relieve Carmichael because he had been resident in the transferred area for five years prior to the date of his chargeability. The agreement, however, is now at an end, and the case must be dealt with in view of the actual fact, that Carmichael resided for more than four, but less than five years, in Logie, prior to the date when he became chargeable. That being so, it seems to me that his residence for the statutory period in Lecropt before he became resident in Logie could not be the ground of any claim against the former parish.

"I am, therefore, of opinion that the defenders are entitled to be assoilzied."

[1] Inspector of Poor of Galashiels v. Inspector of Poor of Melrose, May 12, 1892, 19 R. 758.

[2] Parish Council of City Parish of Edinburgh v. Parish Council of City Parish of Glasgow (M'Graw's case), Jan. 7, 1898, 25 R. 385.

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Lecropt was to be relieved from the maintenance of all persons who, prior to the transfer, had acquired a settlement by residence in the transferred area.

Argued for the defenders;—The defenders were not liable to relieve the pursuers either under the Adjustment Order of 18th August 1898 or apart from it. The Order did not apply, except to claims which were valid claims against Lecropt, in respect either of birth or residence in the transferred area. If Lecropt had a good answer to the claim as at the date when Carmichael became chargeable—10th July 1895—on the ground that his settlement in Lecropt had been lost by non-residence, then no claim of relief could be maintained against the parish of Logie. Thus the question came to be, was the pauper's settlement which, at the date of the transfer of Keirfield to Logie, he possessed in Lecropt, lost by his subsequent residence for more than four years in the same place but in a different parish. This point was decided in the defenders' favour in the first *Galashiels*[1] case. The rule established by that case was that liability attached to the old parish for four years after the transference, but as soon as four years and a day had elapsed a resident in the transferred area lost his residential settlement in the old parish, and for a year, until he gained a settlement in the new parish, he fell back on his settlement of birth. This rule was consistent with the decision in *M'Graw's*[2] case. In that case St Cuthbert's Parish ceased to exist, and there was no parish left to carry on the corporate life; in this case Lecropt did not cease to exist at the date of the transfer, and it could not be said that Logie as a parish authority carried on the life of Lecropt. The pauper had ceased to reside in the parish of Lecropt for four years and twenty-six days, and had thus lost his residential settlement in that parish, and with it all claim to maintenance against Lecropt. This being so, Lecropt could not claim relief from Logie under the Adjustment Order in regard to a liability which had never attached. Nor was Logie liable, because the pauper had not resided in it for the requisite period after the transfer.

At advising,—

Lord Adam.—This is a claim by the united parishes of Dunblane and Lecropt against the parish of Logie for repayment of a sum of £30, 7s. 6d., being the amount expended by them on the maintenance of a pauper, Mrs Carmichael, the widow of John Carmichael, and her four children, from 15th May 1898 to 2d December 1899. There is no dispute as to the amount if due.

John Carmichael was born at Netherton, in the parish of Lecropt. On the 10th June 1895 he was admitted to the poor-roll as a pauper lunatic by Lecropt. Prior to that date he had resided at Keirfield in that parish for about thirty years continuously without having had recourse to begging or applied for or received parochial relief. Carmichael died on 13th September 1895, when his widow acquired or retained his settlement, whatever that might be.

By an order dated 13th December 1890, which came into operation on 15th May 1891, the Boundary Commissioners of Scotland transferred a part of the parish of Lecropt to the parish of Logie. Thereupon the parishes of Logie and Lecropt entered into an agreement, to take effect from

[1] 19 R. 758. [2] 25 R. 385.

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15th May 1891 and to endure for five years, by which in respect of an annual payment of £20 to be made by Logie to Lecropt, the latter parish was to maintain the paupers having their settlement in said transferred area. The language used does not appear to be very accurate, because a pauper has not a settlement in any particular area of a parish, but in the parish itself. No doubt, however, the parties understood what was meant.

When the agreement came to an end in 1896 it appears that Lecropt took steps to have the liabilities of the respective parishes as regards their paupers adjusted. The result was that the Secretary of State for Scotland issued an Adjustment Order dated 18th August 1898, ordering as follows:—"The Parish Council of Logie shall assume responsibility for and shall relieve the Parish Council of Lecropt of all advances which the latter body may have made since 15th May 1898, or may be called upon to make for or on account of any pauper whose claim is derived (1) from birth in the transferred area prior to 15th May 1891, or (2) from residence for the statutory period in the said area prior to the last-mentioned date."

These proceedings seem to have settled all questions between the two parishes as regards liability for paupers, and put an end to all claims except such as could be established under the Adjustment Order. The claim now made by the pursuers for relief of advances made by them on account of Mrs Carmichael is accordingly insisted on in respect of that order, and the question which we have to decide is, whether the claim is derived from Carmichael's birth or residence for the statutory period in the part of the parish of Lecropt transferred to Logie.

Carmichael, as we have seen, was born at Netherton in Lecropt, but not in the part of the parish which was transferred to Logie. The question therefore is reduced to this, whether the claim for relief is derived from Carmichael's residence in the transferred area for the statutory period prior to 15th May 1891.

In order therefore to succeed in the claim it appears to me that Lecropt must shew that Carmichael, at the time he became a pauper and received relief had an existing residential settlement in Lecropt in respect of his residence in the transferred area for the statutory period prior to 15th May 1891.

Now, Carmichael had undoubtedly a residential settlement in Lecropt on the 15th May 1891 derived from his residence in the transferred area for the statutory period prior to that date, and after its transference to Logie he continued to reside in the transferred area. He had resided there after the transference for four years and twenty-six days, when he became a pauper and received parochial relief. If this residence is to be considered as residence in the parish of Logie, the result is, as the Lord Ordinary points out, that Carmichael, when he became a pauper, had lost the residential settlement which he had acquired in Lecropt, but had not acquired a residential settlement in Logie, not having resided there for the statutory period of five years necessary to give a residential settlement.

Now, I do not see how this residence of four years and twenty-six days in the transferred area can be considered otherwise than as residence in the parish of Logie. The effect of the transfer was that the transferred area ceased to be part of the parish of Lecropt and became part of the

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arish of Logie, while Lecropt remained a distinct parish, with its parish ouncil, parochial machinery, debts, and liabilities as before. It cannot be eld that Carmichael, while thus in fact resident in the parish of Logie, as nevertheless constructively resident in the parish of Lecropt because e continued to reside in a part of the parish of Logie which had once been part of Lecropt.

The case of *Galashiels* v. *Melrose*[1] is a direct authority to the contrary, nd in my opinion rules this case.

The result is that Carmichael when he became a pauper had no residential ettlement either in the parish of Logie or in Lecropt, and that the parish iable for the advances made to him, and after his death to his widow and hildren, was the parish of his birth, which was the parish of Lecropt. The pursuers therefore can have no claim for relief for any part of these dvances from the defenders, who were never liable for them.

I think the Lord Ordinary's interlocutor should be adhered to.

The LORD PRESIDENT, LORD M'LAREN, and LORD KINNEAR concurred.

THE COURT adhered.

DUNDAS & WILSON, C.S.—DUNCAN SMITH & M'LAREN, S.S.C.—Agents.

No. 118.

Mar. 20, 1901.

Guthrie v. Boase Spinning Co., Limited.

SUSAN GUTHRIE, Appellant.—*Wilson, K.C.*—*Wilton.*
BOASE SPINNING COMPANY, LIMITED, Respondents.—*Watt, K.C.*—*Cook.*

Master and Servant—Workmen's Compensation Act, 1897 (60 *and* 61 *Vict. cap.* 37), *sec.* 1, *subsec.* (2) (*c*)—"*Serious and wilful misconduct*"—*Breach of rule of factory.*—A woman employed in a spinning-mill was injured through attempting to clean a teaser card-machine, at which she was working, while it was in motion. It was the rule and practice of the factory, known to the woman, that no cleaning of machinery was to be done unless the machinery was stopped.

Held that the injuries to the woman were attributable to her serious and wilful misconduct within the meaning of sec. 1, subsec. (2) (*c*), of the Workmen's Compensation Act, 1897, and consequently that her employers were not liable to her in compensation under the Act.

2D DIVISION. Sheriff of Fife and Kinross.

SUSAN GUTHRIE, mill-worker, Leven, having claimed compensation under the Workmen's Compensation Act, 1897, from the Boase Spinning Company, Limited, Leven, the claim was referred to the arbitration of the Sheriff-substitute at Cupar (Armour), who disallowed the claim, and, at the request of the claimant, stated a case for appeal.

The case set forth that the following facts were admitted or proved:—

"(1) That on 18th August 1900, about 7·30 o'clock A.M., the appellant received injuries at a teaser card-machine, wrought in the hand-hackling shop of the respondents' factory, whereby she lost her right arm.

"(2) That said injuries were sustained by the appellant starting the machine contrary to the rule after mentioned, and immediately thereafter removing the guard—viz., the lid of the stour-box, and proceeding to clean out the stour-box with her hand, although a brush was provided for the purpose. The stour-box was underneath the machine,

[1] 19 R. 758.

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and inside the frame thereof. In doing so her hand was caught between the large cylinder and the stripper cylinder underneath the machine and her arm drawn in.

"(3) That said cylinders were well fenced and guarded and the working of the machine simple.

"(4) That, while it was the duty of the appellant to clean her machine, it is the rule and practice of the factory that the machine should only be cleaned three times a day, when the machinery is stopped for that purpose, and further it is a strict rule and practice that no cleaning of machinery is to be done unless the machinery is stopped. Of this rule and practice the appellant was aware. Copies of the rule were posted in the machine-room, but not in the hand-hackling shop where the appellant was working on the day of the accident. The machine-room and the hand-hackling shop form one department under the same foreman. The appellant had been employed in the machine-room for a period of nearly five years.

"(5) That at the time of the accident there was no occasion for the appellant cleaning the machine, or the stour-box, which was a part thereof, and in any case she could have stopped the machine with little or no trouble. The ordinary time for cleaning the machine—viz., before the next meal hour, or 9 A.M.—had not arrived.

"On these facts I held that the accident, although arising out of and in the course of the appellant's employment, was occasioned by the appellant, contrary to the above rule and without necessity, having removed the guard—viz., the lid of the stour-box—and attempted to clean the machine or the stour-box while the machine was in motion, and that the appellant's injuries were attributable to her serious and wilful misconduct in the sense of the Act. I therefore disallowed her claim."

The following question of law was, *inter alia*, stated:—"(2) Upon the facts stated, was the injury to the appellant attributable to serious and wilful misconduct within the meaning of the said Act?"[1]

Argued for the appellant;—The appellant's breach of the rule that the machinery must be stopped before cleaning did not in the circumstances amount to "serious and wilful misconduct." Breach of a rule was not necessarily serious and wilful misconduct.[2] In *Callaghan* v. *Maxwell*[3] there was breach of a positive and specific order to the person injured, whereas breach of a general rule of the factory might amount, and on the facts here did amount, to nothing more than mere negligence, if even that.[4]

The respondents were not called upon.

LORD JUSTICE-CLERK.—It appears from the case that there is a strict rule and practice in this factory that no cleaning of machinery is to be done unless the machinery is stopped. Of this rule and practice the appellant was aware. She had been employed in the machine-room for a period of nearly five years. The way in which the accident occurred was this:—The appellant, having started the machinery, immediately removed the

[1] Workmen's Compensation Act, 1897 (60 and 61 Vict. cap. 37), sec. 1, subsec. (2) (*c*).

[2] M'Nicol v. Speirs, Gibb, & Co., Feb. 24, 1899, 1 F. 604.

[3] Jan. 23, 1900, 2 F. 420.

[4] The appellant also referred to Dailly v. John Watson, Limited, June 19, 1900, 2 F. 1044.

guard, and although a brush was provided for the purpose she proceeded to clean out the machinery with her hand. In doing so her hand was caught in the machinery, and she received the injuries on account of which she claims compensation. That in these circumstances her injuries were attributable to serious and wilful misconduct on her part I can have no doubt whatever. I therefore think the Sheriff-substitute was right in disallowing her claim.

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LORD YOUNG, LORD TRAYNER, and LORD MONCREIFF concurred.

THE COURT answered the second question in the affirmative, and dismissed the appeal.

DAVID R. M'CANN, S.S.C.—CUTHBERT & MARCHBANK, S.S.C.—Agents.

UNION BANK OF SCOTLAND, LIMITED, Appellant.—*Dundas, K.C.*—*Pitman.*
INLAND REVENUE, Respondents.—*Jameson, K.C.*—*A. J. Young.*

No. 119.
Mar. 20, 1901.
Union Bank of Scotland, Limited, v. Inland Revenue.

Revenue—Inhabited House Duty—Different tenements occupied solely for business—The Customs and Inland Revenue Act, 1878 (41 *Vict. c.* 15), *sec.* 13, *subsecs.* (1) *and* (2).—The Customs and Inland Revenue Act, 1878, enacts sec. 13, subsec. (1)—"Where any house being one property shall be divided into and let in different tenements, and any of such tenements are occupied solely for the purposes of any trade or business. . . . the Commissioners may give relief from duty. (2) Every house or tenement which is occupied solely for the purposes of any trade or business, or of any profession or calling by which the occupier seeks a livelihood or profit, shall be exempted from the duties [on inhabited houses] by the said Commissioners upon proof of the facts to their satisfaction, and their exemption shall take effect although a servant or other person may dwell in such house or tenement for the protection thereof."

A house of four storeys owned by a bank was occupied as follows:—The first floor by a firm of writers to whom it was let, and the other three floors by the bank, the ground floor being used as the offices of the bank and the second floor as the official residence of the bank accountant. Access to all the floors from the street was by a door which opened into a vestibule. In the vestibule there was a door to the bank office, a front stair leading to the first floor, and a door to a passage leading to the bank-agent's room and to a back stair, which was the access to the second floor. There was a door between the two stairs, which was kept locked. The first and second floors were each shut off from the staircase by outer doors on the landings. From the bank-agent's house on the second floor there was a bolt in connection with the lock of the safe in the bank office.

The whole house, with the exception of the first floor, having been assessed for Inhabited House Duty, the bank appealed, and maintained that the ground floor being occupied solely for the business of banking was entitled to exemption. *Held*, on the facts, that there were such means of internal communication and such structural connection between the bank offices and the house of the agent, and also such identity of occupation, that the bank premises could not be regarded as a separate tenement in the sense of sec. 13 of the Customs and Inland Revenue Act, 1878.

1ST DIVISION. Exchequer Cause.

THE UNION BANK OF SCOTLAND appealed to the Commissioners for the General Purposes of the Income-Tax and Inhabited House Duty Acts against an assessment made upon them for Inhabited House Duty for the year 1900-1 on £70, the annual value of bank and house situated in English Street, Dumfries, of which they were proprietors.

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The following were the facts as found or admitted:—

"(2) The whole premises are under one roof. These premises consist of four floors (viz., sunk, ground, first, and second floors). Of these the second and ground floors and the whole of the sunk floor, with the exception of a store, which form the subjects of appeal, are occupied by the proprietors, *i.e.*, the bank, while the first floor and a store on the sunk floor are let to and occupied by a firm of solicitors, all in manner after described:—

"(1) Access to the ground floor from English Street is obtained by the front door of the building. This door opens into a vestibule. From this vestibule a stair, afterwards called the front stair, leads to the first floor of the building, a door opens into the telling-room of the bank, and another door opens into a passage from which access is obtained (*a*) to the agent's room; (*b*) to a washing-house; (*c*) to the stair connecting the ground and sunk floors; (*d*) to the back stair which connects the ground and second floors; and (*e*) to the back doors of the building. The bank safes are situated between the agent's room and the telling-room, and there is a door forming a direct access between those two rooms.

"(2) The second floor wholly consists of a dwelling-house occupied by the bank accountant *ex officio*. From this dwelling-house a door opens on to the back stair, which forms the communication to the ground floor. This stair gives access to the second floor only. From the bank accountant's house on this floor there is a bolt in connection with the lock of the bank safe for the cash, which bolt controls the opening of the safe.

"(3) The sunk floor consists of (*a*) a store-room used in connection with the bank offices, (*b*) a coal cellar, (*c*) a wood cellar, (*d*) a small cellar not assigned to any special use, and (*e*) a store-room used by a firm of solicitors who are tenants of the office on the first floor.

"(4) The washing-house upon the ground floor is used by the accountant as part of the premises occupied by him *ex officio* as his dwelling-house, and he has, along with the bank, the joint use of the coal cellar and the wood cellar on the sunk floor.

"(5) The whole of the first floor (with the exception of the space occupied by the back stair leading from the ground floor to the second floor) is let as an office to and is occupied by a firm of solicitors. From this floor a door opens on to the front stair, which forms the access to the vestibule on the ground floor. This stair gives access to the first floor only, and the occupiers of the office on that floor have the exclusive use of it. Half-way up this stair there is a door communicating with the back stair, but it has been kept locked continuously for the last two years, *i.e.*, since the first floor ceased to be occupied by the former agent of the bank. Inhabited House Duty has not been charged on the rent of the first floor since it has been separately let as an office."

"After hearing parties, the Commissioners were unanimously of opinion that the assessment had been properly made on the subjects entered in the Valuation-roll as 'bank and house' of the annual value of £70, and dismissed the appeal."

The Union Bank required the Commissioners to state a case, which they did, setting forth the facts given above.

Argued for the Union Bank;—The premises occupied for the business purposes of the bank were exempted from duty because they were occupied solely for the purposes of business. The view that the occupation of subjects, rather than their physical structure, was the

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proper test of liability was not excluded by the case of *Langston*.[1] It was the true test, the actual separate and exclusive use made of a subject being of more importance than its construction. Taking, however, in combination the structural test and the occupation, there was here a separate tenement. There was nothing either legally or physically to prevent a separate let of the second floor, or of the ground floor, just as in fact there was a separate let of the first floor. Each was in fact a separate tenement. There was nothing to take the subjects out of the definition of "tenement" of the Lord President (Inglis) in the case of *Russell*.[2] *Corke* v. *Brims*[3] was no doubt under subsec. (1) of section 13, but the circumstances were very similar to those of the present case. There was certainly no greater physical separation there than here. In *Smiles* v. *Crook*[4] there was less.

Argued for the Inland Revenue;—The present case was different from *Langston*[1] in that here there was not only internal communication, but also a direct business connection. On the facts—and it was really a question of fact—it was clear that there was at once unity of building and identity of occupation. There were not here two separate tenements according to the definition of tenement by the Lord President (Inglis) in *Russell* v. *Coutts*,[2] a definition which had been approved by the House of Lords in *Langston*.[1] The agent was not a casual tenant, but was where he was just because of his connection with the bank, for its protection and convenience. *Corke* v. *Brims*[3] was a decision on subsec. (1) of sec. 13, and did not apply. Subjects very like those in question had been frequently refused exemption.[5] There must be complete structural severance.[6]

At advising,—

Lord M'Laren.—In this case the Union Bank appeals against an assessment for Inhabited House Duty in respect of premises occupied by the bank in English Street, Dumfries. The whole premises are under one roof, and they consist of a basement, a ground floor, and first and second floors. The first floor is let to a firm of solicitors as writing chambers, and duty is not claimed by the Crown as upon this floor. The rest of the building is occupied by the proprietors, the Union Bank of Scotland, the ground floor being the bank office where its business is transacted, and the second floor being the official residence of the accountant of the bank.

Access to the various floors is provided by internal staircases. The bank apartments open separately into the lobby on the ground floor.

The first floor, as to which no claim is made, is shut off from the staircase by an outer door at the landing; and the second floor is also shut off from the staircase by an outer door. From the bank accountant's house on this floor there is a bolt in connection with the lock of the safe in the bank office, which bolt controls the opening of the safe. These are the material facts as stated in the printed case.

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[1] Grant v. Langston, June 24, 1898, 25 R. 1040, May 28, 1900, 2 F. (H. L.) 49.

[2] Russell v. Coutts, Dec. 14, 1881, 9 R. 261, at p. 265.

[3] Corke v. Brims, July 7, 1883, 10 R. 1128.

[4] Smiles v. Crook, March 6, 1886, 13 R. 730.

[5] Clerk v. British Linen Co., June 17, 1885, 12 R. 1133; Campbell v. Inland Revenue, Feb. 21, 1880, 7 R. 579.

[6] Chapman v. Royal Bank of Scotland, 1881, L. R., 7 Q. B. D. 136.

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The bank claims exemption from taxation for the premises occupied for the transaction of its business. The exemption is claimed, alternatively, under the 1st and 2d subsections of section 13 of the Revenue Act, 1878 (41 and 42 Vict. cap. 15).

I think it is sufficiently clear that in such a case no claim of exemption can be admitted under the terms of the 1st subsection. The condition of a claim under subsection 1 is that "a house being one property shall be divided into and let in different tenements." Now, the only part of this bank property which is let is the first floor. It appears to me to fulfil the prescribed condition, but I do not express an unqualified opinion as to this, because the Crown has not made a claim.

No other part of the building is let; the bank accountant is not a tenant, but occupies the second floor as part of his emoluments, and presumably only while he continues in his employment. On this part of the argument I shall say no more, except to point out that in the case of *Grant* v. *Langston*[1] Lord Davey calls attention to this point and says—"Two conditions are required. It (the house) must be both divided into and also let in different tenements."

The effect of the second subsection calls for more careful consideration. It is in effect a general exemption of every house or tenement which is occupied solely for the purposes of any trade, business, profession, or calling, and then it is added that the exemption shall take effect although a servant or other person may dwell in such house or tenement for the protection thereof. In order that the bank may have the benefit of this exemption it must be shewn that the part of the building which is appropriated to the purposes of its business is a "house or tenement" taken by itself, and independently of its physical connection with the part occupied as the accountant's house. In *Russell* v. *Coutts*[2] (1 Tax Ca. 469) the Lord President said,—"With reference to a case of this nature, the word 'tenement' in the statute means part of a house so structurally divided and separated as to be capable of being a distinct property or a distinct subject of lease." This definition was quoted with approval by two of the noble Lords who took part in the judgment in *Grant* v. *Langston*,[1] and I accept it as an authorised exposition of the enactment. But then we have to determine on the facts of this case whether the bank premises are thus structurally divided and separated from the bank house occupied by the accountant. One element which has been considered important is awanting. The bank premises are not shut off by a separate main-door from the rest of the building. The telling room and the manager's room each communicate directly with the lobby and staircase leading to other parts of the building, and in particular to the accountant's house. But, to my mind, the conclusive element is that there is not separate occupancy in any real sense. A residence is provided for the bank accountant, because it is considered inexpedient that the bank should be left unguarded, and this motive is very clearly traceable in the arrangement by which a bolt, passing right through the building from the bank safe, is controlled by the accountant from his sleeping apartment. This is structural connection; it is at least inconsistent with the notion of complete structural separation; and it is plain that while that connection

[1] 2 F. (H. L.) 49, at p. 53. [2] 9 R. 261, at p. 265.

xists the second floor could not be let to, or occupied by, a tenant who was not an officer of the bank. No. 119.

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Without going into farther detail on the facts of the case, my opinion is that there are such means of internal communication, and such structural connection between the apartments occupied directly by the bank and the apartments occupied by its accountant, and also such identity of occupation, as make it impossible to disassociate the two floors, and to treat the business premises as a separate tenement in the sense of the 13th section of the Act of 1878.

The LORD PRESIDENT, LORD ADAM, and LORD KINNEAR concurred.

THE COURT affirmed the determination of the Commissioners.

J. & F. ANDERSON, W.S.—SOLICITOR OF INLAND REVENUE—Agents.

SUMMER SESSION.

MRS ANN CUNNINGHAM, Appellant.—*Glegg*—*A. S. D. Thomson.* No. 120.
JAMES M'GREGOR & COMPANY, Respondents.—*Salvesen, K.C.*—*Younger.*

May 14, 1901. Cunningham v. M'Gregor & Co.

Master and Servant—Workmen's Compensation Act, 1897 (60 *and* 61 *Vict. cap.* 37), *sec.* 7, *subsec.* (2), *and First Schedule, sec.* (1) (*a*) (i.)—*Dependants*—"*Wholly*" *dependent—Husband and Wife.*—The widow of a workman who had been found entitled to compensation under the Workmen's Compensation Act, 1897, on account of her husband's death, on the footing that she was only partly dependent on him, appealed on the question whether she was wholly dependent on him. The facts stated were:—The husband had for the three years immediately preceding his death lived separate from his wife. His contribution to her support did not exceed £5 per annum. The appellant had no regular means of livelihood. In addition to what she received from her husband she was supported by her earnings from occasional employment, and by contributions from her relatives.

Held that the appellant was, within the meaning of the Workmen's Compensation Act, 1897, First Schedule, sec. (1) (*a*) (i.), wholly dependent on her husband at the time of his death.

2D DIVISION. Sheriff of Renfrew and Bute.

MRS ANN CUNNINGHAM, for herself, and as tutor and administrator-in-law to her son Patrick Cunningham, claimed compensation under the Workmen's Compensation Act, 1897, from James M'Gregor & Company, quarrymasters, Corrie, Arran, on account of the death of David Cunningham, the husband and father of the claimants. The claim was referred to the arbitration of the Sheriff-substitute (Martin), at Rothesay, who held that the claimant and her son were entitled to compensation, and proceeding on the footing that they were both only partly dependent on the deceased at the time of his death,*

* The Workmen's Compensation Act, 1897 (60 and 61 Vict. cap. 37), enacts:—

Sec. 7, subsec. (2), *inter alia*,—"'Dependants' means . . . (*b*) in Scotland, such of the persons entitled according to the law of Scotland to sue the employer for damages or *solatium* in respect of the death of the workman, as were wholly or in part dependent upon the earnings of the workman at the time of his death."

First Schedule, sec. (1), *inter alia*,—"The amount of compensation under this Act shall be—

"(*a*) Where death results from the injury—

"(i.) If the workman leaves any dependants wholly dependent upon

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awarded £15 as compensation, apportioning £10 of that sum to the widow and £5 to the son.

The claimant appealed. She maintained that she was wholly dependent on her husband at the time of his death. At the hearing on the appeal she did not dispute that her son was then only partly dependent on his father.

The case stated that the following facts were proved:—The husband, David Cunningham, met with an accident arising out of and while in the employment of the respondents at their stone quarry at Corrie, Arran, which resulted in his death upon the 11th day of July 1900. The average wage earned by him was £1, 8s. 10¾d. per week—amounting for 156 weeks to £225, 7s. 9d. He had during the three years preceding his death represented himself to be an unmarried man, and lived separate from his wife and family, without any arrangement for maintaining them. The average sum contributed by him towards their support did not exceed £5 per annum. The appellant had no regular means of livelihood other than occasional employment, and what was contributed by her relatives and the dole from her husband above mentioned. The son was earning a small wage.

In these circumstances the Sheriff-substitute held as matter of law that the appellant and her pupil child were not (within the meaning of the First Schedule of the statute, section (1) (*a*)), wholly, but only partly, dependent upon the deceased at his death, and were therefore entitled only to a sum reasonable and proportionate to the injury sustained by them. The Sheriff-substitute assessed the sum at £15, being three times the sum received by the appellant during the last year of her husband's life.

The following questions of law were stated:—"(1) Whether in the circumstances above stated the appellant and her pupil child were within the meaning of the statute, section (1) (*a*), partly dependent only? or (2) Whether in respect of the deceased's common law obligation of support they were wholly dependent within the meaning of the Act?"

Argued for the appellant;—The Sheriff-substitute was wrong in holding that the appellant was only in part dependent on her husband. She was legally dependent on him, and the fact that he had not fulfilled his obligation to support her did not make her cease to be dependent on him. If she had had independent means of support it

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his earnings at the time of his death, a sum equal to his earnings in the employment of the same employer during the three years next preceding the injury, or the sum of one hundred and fifty pounds, whichever of those sums is the larger, but not exceeding in any case three hundred pounds, provided that the amount of any weekly payments made under this Act shall be deducted from such sum, and if the period of the workman's employment by the said employer has been less than the said three years, then the amount of his earnings during the said three years shall be deemed to be 156 times his average weekly earnings during the period of his actual employment under the said employer;

"(ii.) If the workman does not leave any such dependants, but leaves any dependants in part dependent upon his earnings at the time of his death, such sum, not exceeding in any case the amount payable under the foregoing provisions, as may be agreed upon, or, in default of agreement, may be determined, on arbitration under this Act, to be reasonable and proportionate to the injury to the said dependants."

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would have been different, but in addition to the small sums sent by her husband, she had only occasional earnings, and was chiefly supported by the charity of her relatives, which last could not affect the present question.[1]

Argued for the respondent;—The Sheriff-substitute was right; at all events his determination, being on a question of fact, was final. It was a mistake to treat the question from the point of view of the common law obligation of support. The definition of "dependants" in section 7 of the Act shewed that. According to that definition, to be a "dependant," the person must in the first place have a common law right of action for damages or *solatium*, and secondly, must be wholly or partly dependent on the deceased. The question whether the second of these conditions was present was simply a question of fact,[2] to be determined without regard to the first or to the common law obligation of support, which in substance involved the same considerations as the first.[3] It was impossible to say that the appellant was in fact wholly dependent on her husband for support when she had not in fact wholly depended on him.

LORD JUSTICE-CLERK.—This is a peculiar case. From the facts stated by the Sheriff-substitute it appears that this man neglected his wife, and only contributed a small sum towards her support, but that she was wholly dependent on him I have no doubt. She was dependent on him for maintenance. The only facts stated to the contrary are, that certain relatives contributed to her support, and that she had occasional employment. If there was anything to shew that she was earning her own livelihood the case might be different; but there is no definite statement on that point, and we do not know what she earned. The whole facts seem to indicate that this is just the ordinary case of a wife dependent for her subsistence upon her husband. I think, therefore, that the case must go back to the Sheriff-substitute to settle what sum should be awarded to her on that basis.

LORD YOUNG.—I agree. Assuming the facts to be as stated in the case, I am of opinion that we must answer the question whether the appellant was wholly or partly dependent upon her husband as we are desired by the appellant. I can see nothing in that statement which displaces the legal presumption that a wife is wholly dependent on her husband. There might be facts which shewed that the case was otherwise, but these facts do not. I think, therefore, that the appellant was wholly dependent on her husband, and that the case must go back to the Sheriff to award her compensation upon that footing.

LORD TRAYNER.—I agree. The facts stated by the Sheriff-substitute satisfy me that the appellant was wholly dependent on her husband within the meaning of the Act, and that his pupil child was only partly dependent.

LORD MONCREIFF.—I am of the same opinion. I agree with the Sheriff-substitute in thinking that the child was not wholly, but only partly, dependent on the deceased at his death, because the child was then earning

[1] The appellant referred to Main Colliery Co. v. Davies, L. R. [1900], A. C. 358.

[2] Simmons v. White Brothers, L. R. [1899], 1 Q. B. 1005.

[3] Hanlin v. Melrose & Thomson, June 27, 1899, 1 F. 1012.

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a small wage; but as regards the widow I think that the conclusion which the Sheriff-substitute has reached is wrong. In coming to the conclusion that the widow was only partly dependent on the deceased at the time of his death the Sheriff-substitute has proceeded on the ground that because she had managed to exist without being supported by her husband, except to the extent of a sum not exceeding £5 a year, she was not wholly dependent on him. I think that that conclusion proceeds on an erroneous view of the statute. I think that a relative is "in part dependent" on the deceased in the sense of the statute only when the relative has some independent means of support of a more or less permanent and substantial character. Now, I think it is clear from what is stated in the case that the wife here had no regular and independent means of support. She had herself only occasional and precarious employment, and her main means of support were charitable contributions by her relatives and the small sums which she received from her husband, who was well able to support her had he chosen to do so. In these circumstances it is clear, in my opinion, that she was wholly dependent on her husband at the time of his death. I therefore agree that the question should be answered as your Lordship proposes.

THE COURT pronounced the following interlocutor:—"Sustain the appeal: Find that on the facts as stated the appellant was wholly dependent on her late husband, while the pupil child of the deceased was only partially dependent upon him; therefore recall the award of the arbitrator, and remit to him to award compensation in terms of the finding in this interlocutor, and decern: Find the appellant entitled to her expenses," &c.

HUTTON & JACK, Solicitors—MACPHERSON & MACKAY, S.S.C.—Agents.

No. 120*a*.
May 14, 1901.*
Easson's Trustees v. Mailer.

WILLIAM HAZELL AND ANOTHER (Easson's Trustees), Pursuers (Respondents).—*Sol.-Gen. Dickson—Chisholm.*
MARY MAILER, Defender (Reclaimer).—*Campbell, K.C.—Wilton.*

Expenses—Trust—Unsuccessful action by trustees against a residuary legatee—Liability of successful legatee's share of residue.—In an action by testamentary trustees for recovery of a sum of money alleged to form part of the trust-estate the Court held that the defender fell to be assoilzied, and that she was entitled to expenses. The defender, who was one of the residuary legatees under the trust-settlement, moved for a finding that no part of the expenses of the litigation should be paid out of her share of the residue.

The Court *granted* the motion.

2D DIVISION. Lord Pearson.

IN March 1900 the trustees acting under the trust-disposition and settlement of the late Thomas Easson, cork-manufacturer, Dundee, brought an action against Miss Mary Mailer, who had for the twenty-one years immediately preceding his death been Mr Easson's housekeeper. The summons concluded for payment of £500 received by the defender from Mr Easson during his lifetime, but alleged by the pursuers to belong to the trust-estate. The defence was that the £500 had been given by Mr Easson to the defender in recognition of her services as his housekeeper.

* Decided June 13, 1901.

After a proof the Lord Ordinary (Pearson) gave decree in favour of the pursuers. No. 120*a*.

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The defender reclaimed.

The Court delivered opinions to the effect that the defence had been proved, and that the defender fell to be assoilzied, and was entitled to expenses.

The defender, who was one of the residuary legatees under the trust-disposition, moved for a finding that no part of the expenses of the litigation should be paid out of her share of the residue.[1]

The pursuers opposed the motion.

LORD TRAYNER.—I have looked into the authorities, and I think that the rule is settled.

The LORD JUSTICE-CLERK, LORD YOUNG, and LORD MONCREIFF concurred.

THE COURT pronounced this interlocutor:—"Recall the interlocutor reclaimed against, and assoilzie the defender: Find the defender entitled to expenses, and remit, &c.: Declaring that no part of the expenses of the litigation are to be paid out of the share of the deceased Thomas Easson's estate falling to the defender."

DAVID MILNE, S.S.C.—WILLIAM COWAN, W.S.—Agents.

HENRY A. E. ROBERTS AND HIS CURATOR BONIS, Petitioners.—*Cunningham.* No. 121.

May 14, 1901.

Roberts.

Bankruptcy—Sequestration—Discharge of bankrupt—Procedure where bankrupt becomes insane—Nobile Officium—Bankruptcy (Scotland) Act, 1856 (19 *and* 20 *Vict. c.* 79), *secs.* 146, 147.—In a petition by a sequestrated bankrupt for his discharge, which was ultimately not opposed, the Lord Ordinary pronounced a deliverance finding the bankrupt entitled to a discharge, and appointing him to take the declaration required by section 147 of the Bankruptcy (Scotland) Act, 1856.

No declaration was made, the bankrupt having become insane. The bankrupt's curator bonis having been sisted as a party, the Court, on a report by the Lord Ordinary, *dispensed* with the declaration and *remitted* to the Lord Ordinary to grant the discharge.

1ST DIVISION. Lord Pearson.

THE estates of Henry A. E. Roberts, yarn-spinner, Galashiels, were sequestrated in 1894. In 1897 the bankrupt presented a petition for discharge under section 146 and 147 of the Bankruptcy (Scotland) Act, 1856.

This petition was opposed by the trustee, but ultimately his opposition was withdrawn, and the Lord Ordinary (Pearson), on 26th February 1898, pronounced the following interlocutor:—"The Lord Ordinary, in respect of no further appearance on behalf of the trustee, and that none of the creditors have appeared to state objections, finds the petitioner, Henry A. E. Roberts, entitled to discharge as craved in the prayer of the petition, and appoints him to appear and make a declaration in terms of the statute."*

[1] Cameron v. Anderson, Nov. 12, 1844, 7 D. 92, 17 Scot. Jur. 42; Adam & Kirk v. Turnbull's Trustees, Nov. 20, 1866, 5 Macph. 40, 39 Scot. Jur. 115; M'Laren on Wills and Succession (3d edit.), sec. 2328.

* The Bankruptcy (Scotland) Act, 1856 (19 and 20 Vict. c. 79), enacts:—Section 147—"If the bankrupt shall be found entitled to his discharge

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Thereafter the bankrupt became insane, and a curator bonis was appointed to him on 6th November 1900. The curator bonis thereafter lodged a minute craving to be sisted "as petitioner in room and place of" the bankrupt.

On 22d December 1900 the Lord Ordinary pronounced this interlocutor:—"Having considered the minute of sist . . . sists the said curator bonis as a party."

The curator bonis moved the Lord Ordinary either to allow the statutory declaration to be made by him to the best of his knowledge and belief, or alternatively to dispense with the declaration.

The Lord Ordinary, on 22d January 1901, reported the cause to the First Division, with the subjoined note.*

In addition to the authorities referred to in the Lord Ordinary's opinion, counsel for the petitioner cited in the Inner-House 2 Bell's Coms. 7th ed. p. 372.

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he shall make a declaration, or, if required by the trustee or any creditor, an oath, before the Lord Ordinary or Sheriff, that he has made a full and fair surrender of his estate, and has not granted or promised any preference or security, nor made or promised any payment, nor entered into any secret or collusive agreement or transaction, to obtain the concurrence of any creditor to his discharge; and if the bankrupt shall be at the time beyond the jurisdiction of the Lord Ordinary or Sheriff, or is by lawful cause prevented from coming before the Lord Ordinary or Sheriff, commission may be granted to any fit person to take such declaration or oath; and the Lord Ordinary or the Sheriff, as the case may be, on being satisfied with such declaration or oath, shall pronounce a deliverance discharging the bankrupt of all debts and obligations contracted by him for which he was liable at the date of the sequestration."

* "OPINION.—This petition for the discharge of a bankrupt was presented on 9th July 1897, and on 26th February 1898 the bankrupt was found entitled to his discharge.

"Thereafter the bankrupt became of unsound mind, and a curator bonis was appointed to him on 6th November 1900. But for this circumstance the next step would be for the bankrupt to make a declaration on oath, in terms of section 147 of the statute, that he 'has made a full and fair surrender of his estate, and has not granted or promised any preference or security, nor made or promised any payment, nor entered into any secret or collusive agreement or transaction to obtain the concurrence of any creditor to his discharge.'

"There is no provision in the statute for the case of the bankrupt not being of capacity to make the declaration.

"The curator bonis moved that I should appoint him to do so to the best of his knowledge and belief, and should thereupon pronounce the final deliverance of discharge. I thought it right to obtain a certificate as to the bankrupt's capacity, as the fact of his being under curatory did not necessarily negative his capacity to make such a declaration. The certificate now lodged bears—(1) that it would be injurious to his health to make such a declaration; and (2) that he is quite incapable of understanding the nature or effect of it.

"In the event of the death of a bankrupt without emitting a declaration, it has been held that it may be taken by his representative 'to the best of his knowledge and belief'—*Robertson's Trustees*, 1842, 4 D. 627; *Keiller*, 1842, 4 D. 742. The present case seems to fall within the same principle, and it would be unfortunate if, when all else is regular, it were impossible to authorise a step so obviously for the benefit of the estate. But as it is a *casus improvisus* under the statute, and may be regarded as an exercise of the *nobile officium*, I have thought it proper to report the case."

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LORD PRESIDENT.—This case is attended with some nicety, because it appears that the bankrupt has satisfied all the requirements of the statute, in so far as it is possible for a man mentally afflicted to do so. The sequestration was awarded as far back as 1894, and all the known estate has been got in and divided among the creditors, including certain estate which accrued to the bankrupt after the sequestration. In these circumstances the alternatives are either that the bankrupt shall never get his discharge, or that someone else shall make the declaration or oath required by section 147 of the Bankruptcy Act of 1856, in place of him, or that the Court should in the very special circumstances of the case dispense with that declaration or oath. It appears to me that the last-mentioned course is the proper one to follow, seeing that the declaration or oath required by section 147 relates to *facta propria* of the bankrupt, to things which he alone could know, or at all events to things as to which a curator bonis could not be expected to have any knowledge. The hypothesis is that all known estate has been got in, but that in case the bankrupt should have concealed some part of his estate, or done some other illegal acts, he should be required to swear that he has made a full disclosure, and has not granted or promised any preference or security, nor made or promised any payment, nor entered into any secret or collusive agreement to obtain the concurrence of any creditor to his discharge. That is an appeal to the bankrupt's individual knowledge and his conscience; and I think that we cannot well substitute a declaration by a curator bonis or any person in a similar capacity, seeing that such a person would not naturally know anything about the matters to which his declaration would relate. But it appears to me that the bankrupt should not be deprived of the benefit of his discharge when he has fulfilled all the requisites of the statute in so far as it is possible for a man in his position to do so, and if we have to exercise the *nobile officium* of the Court to enable him to obtain that discharge, I think the preferable course is to dispense with the declaration or oath required by section 147.

LORD ADAM.—I am of the same opinion. The bankrupt here has, so far as any third party can find out, made a full and fair disclosure of his estate, and all that the Act still requires is a declaration or oath by the bankrupt that he has made a full and fair disclosure, and has not made any secret arrangements with his creditors. Now, the bankrupt here is in a state of mind which makes it impossible for him to make such a declaration, and the question is whether we should in these circumstances dispense with the declaration required by the statute, or whether someone else should make the declaration for him. It seems to me preferable that the declaration should be dispensed with rather than that it should be made by a person not specified by the Act, and who, in a hundred cases out of a hundred and one, would know nothing about it. I think that would be a greater and unnecessary exercise of the *nobile officium*, and I agree that we ought in the present circumstances to dispense with the declaration.

LORD KINNEAR concurred.

LORD M'LAREN was absent.

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May 14, 1901. Roberts.

THE COURT pronounced this interlocutor:—"The Lords having considered the petition by the bankrupt, Henry Albert Edward Roberts, on the report of Lord Pearson (Ordinary), with the medical certificate of A. E. Henderson, M.B., C.M., No. 19 of process, and the motion of Stanley Roberts, curator bonis to the bankrupt petitioner, dispense with the declaration or oath required by section 147 of the Bankruptcy (Scotland) Act, 1856, and Acts amending and explaining the same: Remit to the Lord Ordinary to discharge the petitioner of all debts and obligations contracted by him for which he was liable at the date of his sequestration, in terms of the prayer of the petition."

GILLESPIE & PATERSON, W.S., Agents.

No. 122.

May 16, 1901. Jackson's Trustee v. William Dixon, Limited.

ARTHUR JACKSON (John Jackson's Trustee) AND OTHERS, Pursuers (Reclaimers).—*Campbell, K.C.—Deas.*

WILLIAM DIXON, LIMITED, AND OTHERS, Defenders (Respondents).—*Salvesen, K.C.—Hunter.*

Lease—Mineral Lease—Obligation on tenants fairly to work the minerals, with liberty to them to adopt the mode of working they might deem most advantageous.—A lease of coal and other minerals took the tenant and his heirs, assignees, and subtenants, bound "fairly and properly to work the said minerals, with liberty to him or them to adopt the long-wall, stoop-and-room, or any other mode of working the same, as he or they may deem most advantageous for the complete excavation of said minerals."

On the termination of the lease the landlord brought an action of damages against the tenants, averring that they had not fairly and properly worked the minerals, in respect that, having adopted the long-wall system of working, they had improperly worked the upper portion of the splint coal seam first instead of the bottom portion, with the result that the bottom portion was left covered with debris and broken strata, rendering it for the future completely unworkable, and so causing a large quantity of coal to be lost to the pursuer. The defenders pleaded that the action was irrelevant, in respect that by the above clause of the lease they were made sole judges of the proper method of working.

Held (*rev.* judgment of Lord Kyllachy) that the action was relevant.

Houldsworth v. *Brand's Trustees*, 2 R. 683, and *Guild* v. *M'Lean*, 25 R. 106, *distinguished.*

2D DIVISION. Ld. Kyllachy.

IN February 1900 Arthur Jackson, sole surviving trustee acting under the trust-disposition and settlement of the late John Jackson, of Barnhill and Little Udston, and William and John Jackson, who had succeeded respectively to the estates of Barnhill and Little Udston, under burden of certain provisions in the trust-disposition and settlement, brought an action against (1) William Dixon, Limited, and (2) the testamentary trustees of the late William Smith Dixon of Govanhill, concluding for payment of £3521, 6s. 8d. as damages for improper mineral working.

The pursuers averred;—(Cond 2) "By lease, dated 22d June and 20th July 1870, the said John Jackson let to William Smith Dixon, of Govan Colliery, Glasgow, and to his heirs, assignees, and subtenants, the whole coal, ironstone, limestone, fireclay, and all other mines, metals, and minerals in the lands of Little Udston, and that for the period of thirty-one years from and after the term of Martinmas 1867. The said William Smith Dixon entered into possession

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under and in virtue of said lease, from and after the term of entry thereunder. On 3d April 1873 the said limited company [William Dixon, Limited] was formed for the purpose of acquiring and taking over the whole trade, business, and undertakings of the said William Smith Dixon, including said lease, as from 1st September 1872, and the lease was formally assigned to the said company on 16th October 1873. The said limited company worked the coal, &c., in said lands until Martinmas 1898, when the said lease came to an end and notice to remove was given. By the said lease, the said William Smith Dixon, his heirs, executors, and successors, were taken bound, notwithstanding any and every assignation or subtack and intimation of the same, in payment of the rent and performance of all the obligations undertaken under the lease."

(Cond. 3) By the lease the tenant and his heirs, &c., were "taken bound 'fairly and properly to work the said minerals, with liberty to him or them to adopt the long-wall, stoop-and-room, or any other mode of working the same as he or they may deem most advantageous for the complete excavation of said minerals.' The first-named defenders, in working the splint coal seam, at first adopted the stoop-and-room system, by which the whole seam would have been exhausted had the stoops been extracted. But the system of working was soon after altered to the long-wall method. The change in the method of working took place after the lease had been assigned to the first-named defenders. No work was done in this portion of the mineral field by the said William Smith Dixon. Instead, however, of working the bottom portion of the seam first, and making the top portion of the seam a second working back towards the pit, the first-named defenders wrongously, improperly, and negligently worked the upper portion first, leaving the bottom portion of the seam unworked in the pavement, covered with debris and broken strata, rendering it in future perfectly unworkable. The first-named defenders did not work the said minerals fairly and properly, and the system they adopted, as above condescended on, was one which they knew, or ought to have known, was not advantageous for the complete excavation of said minerals. The first-named defenders worked the said minerals in the said improper and unfair manner with a view and result of making greater profits than they could have done had they worked the minerals fairly and properly. The defenders well knew that in working the minerals in the way they did a large quantity of coal would be lost. . . ."

(Cond. 4) "The system of working above condescended on was not a fair and proper working of the said minerals, and, in consequence of said improper working of the said minerals, the bottom portion of the seam has been left quite unworkable. This bottom portion is 3 feet 6 inches thick, and its area extends to 32·976 acres. The quantity of coal lost to the trust-estate in respect of this improper working amounts to 158,284 tons of coal and dross. . . ." (Cond. 5) "In addition, the first-named defenders wrongously and improperly left two ranges of pillars unworked in the splint seam on the Udston Colliery march. It was their duty to have removed the said pillars, or, at anyrate, to have left the workings in such a condition as would enable the pursuer to extract the said coal. It is now impracticable to win the coal contained in the said pillars. The quantity of coal and dross contained therein amounts to 39,792 tons, which, with the tonnage condescended on in article 4, amounts *in toto* to 198,076 tons. The pursuers believe and aver that, if the said coal had been extracted,

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there would have been lordship payable upon 105,640 tons of 22½ cwts. Calculating the royalties at the rates stated in the lease of 8d. per 22½ cwts., brings out a sum of £3521, 6s. 8d., which has been lost by the failure of the first-named defenders to work the said coals in a fair and proper manner. . . ."

The defenders referred to the lease for its terms, and averred "that by the lease the lessor had full power of inspection,* and at no time suggested to the defenders that they were not complying with the terms of their lease, although he was throughout fully aware of the mode and progress of the workings"; and further averred, *inter alia*, that "the entire workings of the minerals by the defenders have been skilfully conducted according to what they believe to be the most advantageous mode for the complete excavation of the coal."

The pursuers pleaded, *inter alia*;—(1) The defenders, William Dixon, Limited, being bound in terms of the said lease to work the coals in a fair and proper manner, and having failed to do so, with the result that the trust-estate administered by the pursuer Arthur Jackson has suffered loss and damage to the extent condescended on, the said pursuer, as trustee foresaid, is entitled to decree in terms of the conclusions of the summons.

The defenders pleaded, *inter alia*;—(2) The pursuers' averments being irrelevant and insufficient in law to support the conclusions of the summons, the action should be dismissed. (5) The pursuers and their authors having throughout been fully aware of the mode and progress of the defenders' working, and never having objected thereto, are now barred from insisting in the present action.

On 8th December 1900 the Lord Ordinary (Kyllachy) pronounced this interlocutor:—"Sustains the second plea in law for the defenders, and dismisses the action, and decerns: Finds the defenders entitled to expenses: Allows," &c.†

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* The clause in the lease founded on by the defenders was in the following terms:—"Declaring further that the said first party and his foresaids shall have full power and liberty to inspect the workings of the said minerals in the said lands either by themselves or by others to be employed by them for that purpose, and to make plans thereof for their own use, but that always at their own expense, and in such way and manner and at such times as shall not interfere with the operations of the said second party and his foresaids."

† "OPINION.—In this case I have considered the record with reference to the recent argument on relevancy, and I have come to the conclusion that the defenders, having by the lease been made the judges as to the method of working most advantageous to the complete excavation of the minerals, the pursuers have not made averments relevant to entitle them to the proof which they ask. It is not, in my opinion, the just construction of the lease that the defenders were bound to adopt a mode of working which should, in fact, or in the opinion of the Court, be most advantageous for complete excavation. Their obligation was to adopt the mode which they deemed most advantageous; and even assuming that their judgment might be reviewed on the ground that their professed judgment was not their real judgment, or, in other words, that they were dishonest, I find no averment, or, at all events, no averment sufficiently specific, to support an inquiry on that ground. Further, assuming that it is the just construction of the lease that, within the mode or method adopted, the defenders were bound without qualification to work 'fairly and properly,' I am unable to find in this record any averment, or, at all events, any sufficiently specific averment, of such unfair or improper working. . . ."

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The pursuers appealed, and argued;—It might be, although the pursuers did not admit it, that by the clause of the lease quoted in cond. 3 the tenants were made the sole judges of the system of working to be adopted, *i.e.*, as to whether it was to be the long-wall system, the stoop-and-room system, or some other system; but the clause also took the tenants bound, whatever system they adopted, to work the minerals "fairly and properly," and the question whether they had worked the minerals fairly and properly was not a question left by the lease to the judgment or opinion of the tenants, but was a question of fact to be settled, in the event of dispute, like any other question of fact arising on a contract. The case therefore was distinguished from the cases of *Houldsworth*[1] and *Guild*,[2] on which the Lord Ordinary appeared to have proceeded. The pursuers had relevantly averred that the defenders had not worked the minerals fairly and properly.

Argued for the defenders;—The Lord Ordinary's judgment was right. The pursuers under the lease had a full right to inspect the workings during the lease; and that being so they must be held to have known of, and to have acquiesced in, the method of working adopted by the defenders.[3] They were therefore barred from suing the present action.

LORD JUSTICE-CLERK.—I think that the interlocutor of the Lord Ordinary cannot be supported. The tenants obtained leave from the landlord to use any mode of working that they thought best, but whatever mode they adopted they were bound to work it fairly and properly in the interest of the landlord. It is alleged that the method which the defenders adopted was not fairly and properly worked. That is not a question of which we can judge. It is a question of skill and experience, and therefore I think that there must be inquiry. Mr Salvesen argued that the pursuer had acquiesced by allowing the method which the defenders had adopted in working the coal. I think that is also a question regarding which there must be inquiry. There may be cases where the landlord by his actings or by his silence has barred himself from saying that the system which is adopted is objectionable. But that question depends upon facts to be ascertained, and it is impossible until they are ascertained to determine whether they amount to acquiescence. The interlocutor of the Lord Ordinary should therefore be recalled, and the case remitted to his Lordship to allow a proof.

LORD YOUNG.—I do not see that there is cause for dismissing this case. The rights and obligations of the tenants are set forth in condescendence 3. They were taken bound "fairly and properly to work the said minerals." That is the obligation on them. But then it is assumed—and I think we have sufficient experience of such cases to know that it is rightly assumed—that there may be various modes of working, any of which may be adopted as a fair and proper mode of working the minerals. The lease goes on, "with liberty to him or them to adopt the long-wall, stoop-and-room, or any other

[1] Houldsworth v. Brand's Trustees, May 18, 1875, 2 R. 683.
[2] Guild v. M'Lean, Nov. 20, 1897, 25 R. 106.
[3] Faill v. Wilson, July 20, 1899, 36 S. L. R. 941, *per* Lord President at p. 944.

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mode of working the same as he or they may deem most advantageous for the complete excavation of said minerals." If there are several modes of working "fairly and properly," they may adopt any mode they choose on the ground that that is the most advantageous to them. Now, long-wall may be a fair and proper mode of working in certain places, and stoop-and-room in another, and so on. But then the case presented by the pursuers here is, that the objection is not to the mode of working—long-wall or stoop-and-room—but to the way in which that mode was worked out. I should think it within the landlord's right under the lease to object to long-wall or to stoop-and-room, or to any mode adopted, if it was not a fair and proper mode of working at a particular place. But it is unnecessary to consider that, for it appears to me clear enough in this case that what the pursuers mean to say is—"We are not objecting to the mode you adopted—that might have been worked fairly and properly—but we are objecting to the manner in which you practically worked out that mode of working— to the way in which you worked it." I have no hesitation in agreeing with your Lordship in the conclusion that the Lord Ordinary's interlocutor should be recalled, and the case remitted to him with instructions to allow inquiry.

LORD TRAYNER.—I am of the same opinion. I think the Lord Ordinary has perhaps erred by applying to this case the principle recognised in the cases of *Houldsworth* [1] and *Guild* [2] which have been referred to. I do not think that these cases apply here. The provision of the lease which gives the defenders the right to work the minerals imposes on them the obligation to work them "fairly and properly." It gives the tenants the right to select the mode of working—that is, it may be long-wall, or stoop-and-room, or any other mode they think most advantageous. But the obligation remains untouched, that whatever mode they adopt that mode must be worked "fairly and properly." Now, the pursuers aver, I think quite sufficiently, that the defenders have failed to fulfil that obligation—that they did adopt a certain mode of working, but that they did not work it "fairly and properly," and that the improper way of working which they adopted resulted in damage to the pursuers, for which they seek reparation. I am therefore of opinion that the pursuers have stated a relevant case. The defence of acquiescence which was urged upon us may be a complete answer to the pursuers' case, but at the present stage we cannot determine that question. That defence is entirely reserved to the defenders.

LORD MONCREIFF.—I am of the same opinion. The case must be decided on the terms of the clause of the lease which is quoted in condescendence 3, the true meaning of which your Lordships have stated. I do not think the case is touched by the decisions in the cases of *Houldsworth* [1] and *Guild*.[2]

THE COURT recalled the interlocutor of the Lord Ordinary and remitted to him to allow a proof.

CARMICHAEL & MILLER, W.S.—W. & J. BURNESS, W.S.—Agents.

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[1] 2 R. 683. [2] 25 R. 106.

PETER MACLEOD CRAN (Chamberlain of the City of Aberdeen), Pursuer (Appellant).—*Dundas, K.C.—Clyde.*
JOHN WATT, Defender (Respondent).—*Salvesen, K.C.—A. M. Anderson.*

No. 123.
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City of Aberdeen v. Watt.

Statute—Construction—Time—"Week"—Advertisement in Newspaper "for two successive weeks"—Police—Street—Assessments—Notice—Aberdeen Municipality Extension Act, 1871 (34 *and* 35 *Vict. cap. cxli.*), *sec.* 145.—The Aberdeen Municipality Extension Act, 1871, which empowers the Town-Council to cause streets to be paved with granite, and makes provision for the recovery of the expense thereof from the frontagers in proportion to their frontage, by section 145 enacts that the Town-Council shall, three weeks before proceeding with the work of paving, "cause a notice of their intention so to do to be inserted in at least one of the newspapers published in the city for two successive weeks, and such notice shall be and be deemed sufficient intimation to all the parties liable for the expense of such works."

Held that a notice which had been inserted in an Aberdeen daily newspaper on Friday in one week, and on Wednesday in the following week, was a notice which had been inserted "for two successive weeks," within the meaning of the above enactment.

2D DIVISION. Sheriff of Aberdeen, Kincardine, and Banff.

IN July 1900 Peter Macleod Cran, chamberlain of the city of Aberdeen, raised an action in the Sheriff Court at Aberdeen against John Watt junior, advocate in Aberdeen, the owner of certain heritable property in Berry Street there, for payment of £35, 5s. 3d., as the proportion due by the defender of the expense incurred by the Town-Council in paving Berry Street with granite stones, in virtue of the powers contained in the Aberdeen Municipality Extension Act, 1871.

In defence, the defender, *inter alia* (Ans. 7), founded on section 145 of the Act,* and averred, "that at the date of said resolution [by the Town-Council in 1896, to cause Berry Street to be paved with granite stones] there were published in the city of Aberdeen two daily newspapers, viz., the *Aberdeen Journal* and the *Daily Free Press*, and that at the date of the passing of the said Act the *Journal* was published weekly on Wednesdays, and the *Free Press* bi-weekly on Tuesdays and Fridays. Explained and averred that, on a sound construction of said section, the Town-Council was bound either to cause their notice to be inserted in one or other of the daily papers each day (Sundays excepted) for two successive periods of seven days, or to insert the notice in four successive bi-weekly issues of the *Free Press* or in two successive weekly issues of the *Journal*, or, in any event, in the case of only one weekly insertion, the Town-Council was bound to insert

* The Aberdeen Municipality Extension Act, 1871 (34 and 35 Vict. cap. cxli.), secs. 143 and 144, empowers the Town-Council, in the cases specified, to cause the carriageway of streets to be paved with granite stones, and makes provision for the recovery of the expense thereof from the frontagers in proportion to the frontage of their lands abutting on the street.

Sec. 145 enacts,—" . . . The Town-Council shall, three weeks before proceeding with the laying out, forming, paving, macadamising, or otherwise making good of any footways, channels, or gutters, or carriageway of any street, at the expense of the owners of the lands before or opposite to which such works shall be executed, cause a notice of their intention so to do to be inserted in at least one of the newspapers published in the city for two successive weeks, and such notice shall be and be deemed sufficient intimation to all the parties liable for the expense of such works. . . ."

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the second notice not earlier than the 7th day—that is a full week—after the first, so that notice for two full and completed successive weeks or periods of seven days each might precede the currency of the statutory period of three weeks which had to elapse subsequent to advertisement of the notice before the contemplated work could be proceeded with. The Town-Council did not comply with any of the said courses, but, on the contrary, inserted their notice twice only, and that within a period of five days, viz., in the daily *Aberdeen Journal* of Friday, the 19th June 1896, and in the daily *Aberdeen Journal* of Wednesday, the 24th June 1896. In point of fact, the defender did not see the notice at all, and he was, from the failure of the Town-Council to advertise in terms of the statute, not aware till after the work was executed that any resolution had been come to by them under which it was intended to fix liability upon him."

The pursuer admitted the accuracy of the defender's averments regarding the dates of the publication of the Aberdeen newspapers, and the dates when the advertisement relating to the work in question appeared.

The pursuer pleaded, *inter alia*;—(1) The assessments specified in the condescendence having been duly imposed, and the defender being in respect thereof liable in payment of the amount sued for, and not having paid the same, the pursuer is entitled to decree against the defender as craved.

The defender pleaded, *inter alia*;—(4) Intimation by notice in terms of section 145 of the Act of 1871 being an essential condition of liability, and the Town-Council having failed, to the loss of the defender, to give such notice, no statutory liability has been imposed on the defender, and he ought to be assoilzied, with expenses.

On 8th January 1901 the Sheriff-substitute (Robertson), after hearing parties on the closed record, pronounced the following interlocutor (after findings in fact):—"Finds in law (1) that on a sound construction of said section 145 the notices inserted were not a sufficient compliance with its terms; (2) that there being a want of the statutory notice, the proceedings following thereon were inept, to the effect of entitling the Town-Council to do the work at the expense of defender, and to assess him therefor: Therefore assoilzies defender from the conclusions of the action, and decerns: Finds defender entitled to expenses: Allows," &c.*

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* "NOTE.— . . . At the time when the statute was passed there was no daily paper published in the city, the 'Free Press' was published twice a week, and the 'Journal' once a week every Wednesday. In 1896, when the notice in question here was inserted, both these papers were daily papers. What the Town-Council did was to insert a notice in the 'Journal,' on Friday, 19th June, and a second notice on the following Wednesday.

"The pursuer's contention is that he fulfilled the requirement of the statute, by inserting an advertisement in any day of two successive weeks, *e.g.* it would have been quite good to have inserted it on a Saturday and again on the following Monday, with only one day between.

"Defender's contention, on the other hand, is that the use of the word 'for' shews that it was intended that there should be either (*a*) where there was a daily paper, an insertion for each day of two weeks; or (*b*) where there was not a daily paper but a weekly one, there should be two insertions a week apart; or (*c*) in any event, if two insertions in a daily paper were sufficient, they must be a week apart.

"In my opinion defender's contention is right. It was argued for

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The pursuer appealed.

The undernoted authorities were cited at the hearing.[1]

In answer to a question from the Bench, *Clyde*, for the pursuer, stated the contract for the paving in question was signed on 20th August 1896, *i.e.*, more than five weeks after the date of the first advertisement on 19th June.

LORD YOUNG.—Two questions have been argued—the first as regards the true interpretation of clause 145 of the Aberdeen Municipality Extension Act, 1871, and the other as regards the consequences which would follow if it should be determined that the true construction has been given by the Sheriff-substitute. It is sufficient to decide the first question if we are of opinion, as I am, that the Sheriff is wrong in his interpretation of the clause which I have mentioned. I think (although the remark has more bearing upon the second question) that the provision of the statute is only directory. The town authorities are by the statute permitted to make such improvements upon the streets as they judge to be necessary, but they are directed before proceeding with the work to give notification of what they intend to do by publishing a notice thereof, as the clause expresses it, "to be inserted in at least one of the newspapers published in the city for two successive weeks." The statute provides that the expense shall be laid on the proprietors whose property adjoins the street, and it is certainly reasonable that these proprietors should have notice of what the proposed alterations are. Now, here, the Magistrates having come to the conclusion that in this particular street certain repairs and alterations were required, inserted a notice in two newspapers in successive weeks, one being published on Friday of one week and the other on Wednesday of the following week. A good deal has been said on the question whether the true meaning of the clause is not that there should be

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pursuer that the words 'for two successive weeks' referred to the newspaper, and not to the insertion. I do not agree. In my opinion, the common-sense ordinary meaning must be given to the clause which 99 people out of a 100 would give to it; and that is, that the notice must appear for two successive weeks in one of the papers published in the city. The statute does not say 'in' two successive weeks, but 'for,' and the natural meaning of that is that there shall be two periods of seven days each in which intimation is given before the commencement of the currency of the three weeks spoken of. If I am right in this, the intimation by notice was insufficient, and I fancy the whole proceedings following thereon must be regarded as inept.

"It was argued for pursuer that defender, while objecting to pay on the ground that he was being overcharged, had never raised this objection till the present action was raised, and further that he had suffered no prejudice. No doubt the first part of this is true, and it is at least questionable if any serious prejudice can be averred or proved; but the Town-Council's sole right to assess depends on the statute, and if the condition precedent to their proceeding to execute the works under their statutory powers is not fulfilled, I apprehend the whole proceedings following thereon must be inept. I must therefore, in the view I take, assoilzie the defender. (Case referred to, *Ferguson* v. *Rodger*, 12th June 1895, 22 R. 643)."

[1] Burton, July 17, 1850, 13 D. 40, 22 Scot. Jur. 583; Nisbet v. Cairns, March 12, 1864, 2 Macph. 863, 36 Scot. Jur. 423; Ferguson v. Rodger, June 12, 1895, 22 R. 643.

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publication on every day of two successive weeks. That contention was abandoned, not only on the good sense of the matter, but also on the ground that at the time when the Act was passed there was no such thing as a daily newspaper published in Aberdeen. But the respondent's contention latterly was that there must be two full periods of seven days each, and that the notice must be published once in one period and once in the other. The question really is, whether the town authorities proceeded on an admissible view of the clause in giving notice as they did, first on Friday of one week, and secondly on Wednesday of the succeeding week. The Sheriff-substitute has decided that this was a mistake on their part, and that this is a good defence to any of the street proprietors who are required to contribute their proportion of the expense of doing what the notice specified. I am of opinion that the Sheriff is wrong, and that the statute is satisfied by a notice published in one week on Friday, and upon Wednesday of the following week. Suppose there were a similar provision in an Act relating to Edinburgh, where we are familiar with a daily newspaper whose chief advertising days are Wednesday and Saturday, and suppose the town authorities were to publish a similar notice in the Saturday's issue of one week, and in Wednesday's issue of the following week—it would, I think, be a critical, even a malignant construction, to say that such notice did not sufficiently comply with the requirements of the statute. Here the street proprietors had every reasonable opportunity of seeing the notices which were published in successive weeks, and when no objection to the work was stated I think there is strong ground for the argument that they are bound to contribute their share of the cost. They, in fact, benefited from the work, but their argument is that they should bear no part of the expense, because the municipal authorities have made a mistake in regard to the notice. I think the authorities made no mistake, and I am therefore of opinion that the judgment of the Sheriff-substitute should be reversed.

LORD TRAYNER.—I abstain from expressing any opinion as to the effect which an insufficient statutory notice would have had on the validity of the assessment, because, in my opinion, that question does not here arise. In my opinion the notice given by the appellant was a sufficient fulfilment of the statutory requirement. The words of the Act are, that notice must be "inserted in at least one of the newspapers published in the city for two successive weeks." I take the word "week" in this clause (there being nothing in the context to indicate a different meaning) as signifying a calendar week—*i.e.*, the period beginning with Sunday and ending with Saturday. I do not think it means a period of seven days beginning on any one day and ending on the seventh day thereafter. In the present case the notice was inserted in a newspaper published on Friday in one week and in another newspaper published on Wednesday in the following week. These notices so published seem to me to be what the statute requires, namely, notice made in the city newspapers for two successive weeks, although there was not an interval of seven days between them.

I concur therefore in the view that this appeal should be sustained.

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LORD MONCREIFF.—Two questions have been argued in this appeal—(First) Whether the notice given by the Town-Council was sufficient; and (second) assuming that it was not sufficient, whether the result of that is to nullify the whole subsequent proceedings.

Upon the second question we did not hear a full argument, and I have formed no opinion with regard to it. With respect to the first question, I think the judgment of the Sheriff-substitute is wrong. From his note it would appear that the ground on which he proceeds is not exactly the same as that chiefly urged by the defender. The defender in his defences maintained three alternative constructions of section 145—first, that the notice must be inserted daily for two successive periods of seven days; or second, in four successive bi-weekly issues of the *Free Press*, or in two successive issues of the *Journal;* or in any event (and this I take to be the defence relied on), in the case of only one weekly insertion, that the second notice must be not earlier than the seventh day after the first.

The Sheriff's ground of judgment as stated is that there must be two periods of seven days each; and therefore (I gather) that before proceeding to repair the road the Town-Council were bound to allow two intervals—one of three weeks preceded by another of fourteen days—five weeks in all—during the latter of which there should be advertisement once a week in a newspaper published in Aberdeen. That question does not arise if, as we were told, fully five weeks elapsed before the work was begun, and therefore the real question is, whether the notice was bad owing to there being an interval of only five days between the advertisements. I think the statute means only that advertisement must be made once in each of two successive weeks, and that the Act is sufficiently complied with if the advertisement appear, say in one week on Friday, and in the following week on Wednesday. When this Act was passed there was no daily newspaper published in Aberdeen. There were two newspapers, one published weekly on Wednesday, and the other bi-weekly on Tuesday and Friday. In these circumstances it would surely have been a sufficient compliance with the Act if advertisement had been made in one newspaper on a Friday, and in the other on the following Wednesday. On the whole matter I am of opinion that the judgment of the Sheriff-substitute is wrong, and that the notice which was given was perfectly good.

The LORD JUSTICE-CLERK concurred.

THE COURT recalled the interlocutor appealed against, repelled the fourth plea in law for the defender, and remitted the cause to the Sheriff-substitute.

GORDON, FALCONER, & FAIRWEATHER, W.S.—MACPHERSON & MACKAY, S.S.C.—Agents.

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John Watson, Limited, v. Caledonian Railway Co.

JOHN WATSON, LIMITED, Applicants (Respondents).—*Dundas, K.C.*—*Clyde*—*Strain.*

THE CALEDONIAN RAILWAY COMPANY AND OTHERS, Respondents.—*Guthrie, K.C.*—*Cooper*—*Grierson.*

Process—Diligence—Railway—Complaints as to rates and charges—Traders' profits—Railway and Canal Traffic Act, 1894 (57 *and* 58 *Vict.*

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cap. 54), *sec.* 1.—The Railway and Canal Traffic Act, 1894, section 1 (1), enacts that where a railway company have since 1892 increased any rate or charge, "then if any complaint is made that the rate or charge is unreasonable, it shall lie on the company to prove that this increase of the rate or charge is reasonable." Section 1 (3) provides that the Railway and Canal Commissioners shall have jurisdiction to hear and determine any complaint with respect to any such increase of rate or charge.

A complaint having been brought before the Railway and Canal Commissioners under this section by one of a number of coalmasters complaining of an increase in the rates applicable to the carriage of coal, the railway company, before any inquiry had taken place, moved for a commission and diligence to recover the books, &c., of the applicants for a period of years preceding the application, in order to ascertain the profit or loss upon their trading for that period. The railway company maintained that they were entitled to the diligence in order to meet the case that the trade could not profitably be carried on if burdened by the increase of rates.

The Court (*aff.* the judgment of the *ex officio* Commissioner, Lord Stormonth-Darling) *refused* the commission and diligence.

1st Division. Railway and Canal Commissioners. Ld Stormonth-Darling.

AN increase in the rate or charge upon the carriage of coal, jointly agreed upon by the Caledonian, North British, and Glasgow and South-Western Railway Companies, came into operation on 1st January 1900.

On 19th November 1900, John Watson, Limited, coalmasters, Glasgow, one of the traders affected by the increase of the rates, presented an application to the Railway and Canal Commissioners against the three railway companies for (1) an order declaring that the increased rates and charges were unreasonable, and requiring the respondents to desist from charging them; (2) an order directing an inquiry into the damages sustained by the applicants by reason of the increase; (3) an order directing payment to the applicants of such damages.*

The applicants stated generally that the "rates and charges as increased in the manner hereinbefore referred to are unreasonable," and they claimed as damages the whole amount of the increase paid by them on their traffic since 1st January 1900.

In answer the respondents averred;—"(3) The respondents deny that the rates in question as increased are unreasonable. . . . Since the rates in operation prior to 1st January 1900 were fixed, and prior thereto, the working expenses of the respondents in respect of the applicants' traffic have greatly increased. Amongst other things there has been a steady shortening of the hours of labour, necessitating an increase in the number of employees and a continuous increase in wages, an increase in the price of plant, stores, material,

* The Railway and Canal Traffic Act, 1894 (57 and 58 Vict. cap. 54), enacts, section 1:—"(1) Where a railway company have, either alone or jointly with any other railway company or companies, since the last day of December one thousand eight hundred and ninety-two, directly or indirectly increased, or hereafter increase directly or indirectly any rate or charge, then if any complaint is made that the rate or charge is unreasonable, it shall lie on the company to prove that the rate or charge is reasonable, and for that purpose it shall not be sufficient to shew that the rate or charge is within any limit fixed by an Act of Parliament or by any provisional order confirmed by Act of Parliament . . .

"(3) The Railway and Canal Commissioners shall have jurisdiction to hear and determine any complaint with respect to any such increase of rate or charge. . . ."

fuel, and other articles used by the respondents, new and onerous statutory obligations laid on the railway companies, improvements in the facilities and conveniences afforded in respect of coal traffic, additional capital expenditure by the railway companies in connection with the accommodation of coal traffic, and generally a material alteration in the method of conducting coal traffic, thereby adding substantially to the cost of working such traffic.

"4. The respondents require, and are justly entitled to, the addition to their revenues which the increases will provide, and such increases have not had a prejudicial effect upon the business of the applicants, and have not proved a burden thereon."

These statements were denied by the applicants.

Before any inquiry had taken place, the respondents moved Lord Stormonth-Darling, the *ex officio* Commissioner, to grant a commission and diligence for the recovery of documents from the applicants. The specification, as amended at the hearing before the First Division, called for "all books, accounts, abstracts, statements, reports, returns, and other documents or writings made or kept by or on behalf of the applicants or their predecessors in business from 1897 [in the original specification "from 1871"], that excerpts may be taken therefrom for each of the years from 1897 to 1900, both inclusive."

1. Of all entries shewing or tending to shew—"(*a*) The quantities of coal, coal-nuts, coke, culm, gum, duff, peas, beans, dross-nuts, or other descriptions of small coal or dross, and the different descriptions and qualities thereof, sold by the applicants or their said predecessors from each of their collieries and pits, and the prices (pit and otherwise) charged and received by the applicants and their said predecessors for such minerals. (*b*) The quantities and prices of such minerals despatched from said collieries by the railways of the respondents, or any of them, as distinguished from the remainder of such minerals, and by whom the railway rates and charges were borne and paid."

2. Of all entries shewing or tending to shew "the total expenditure, including lordships, royalties, wayleaves, oncost, and cost of working and raising the minerals incurred by the applicants or their said predecessors in carrying on their business as coalmasters at or from the collieries mentioned in the application, and in working, winning, and marketing their foresaid coal and other minerals."

3. Of all entries shewing, or tending to shew, the gross and net profits or losses of the applicants or their said predecessors accruing from their business as coalmasters carried on at or from the collieries mentioned in the application, and the appropriation of such profits.

4. Of all entries shewing, or tending to shew, the amount and objects of or relative to capital expenditure by or on behalf of the applicants or their said predecessors at or in connection with each of their collieries mentioned in the application.

Similar applications were made by other coalmasters, including the Lothian Coal Company, Limited, and the railway companies made similar motions for a diligence in these applications.

On 31st March 1901 Lord Stormonth-Darling refused the commission and diligence.*

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* "OPINION.—I have here to deal with a call for documents which confessedly raises a question of principle, and one of considerable importance

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The respondents appealed to the First Division, and argued;—The Lord Ordinary had held that the whole line of inquiry suggested in the diligence was irrelevant. According to his view, while it was relevant to inquire into the position of the railway company's business, it was not relevant to make any such inquiry in the case of the traders. The proper standpoint was that an inquiry into the reasonableness of the increased rates involved the position of the trade of both parties. If, for instance, the trader could shew that his trade was not in a position to bear the burden of the increased rate, this would surely be a relevant consideration for the Commissioners, and, if this were so, the respondents were entitled to such information as would enable them to meet this contention.[1] It was not necessary to extend such an inquiry to the whole trade; it was only against traders complaining of the increased rates that it ought to be allowed. The respondents averred that the increase in the rates had not had a prejudicial effect upon the business of the applicants, and this statement was denied. It was essential that they should get materials to determine this disputed question of fact.

The argument for the applicants sufficiently appears from the

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to the proper working of section 1 of the Traffic Act of 1894. That section throws upon railway companies the *onus* of proving to the satisfaction of this Commission that the increase of any rate made by them since 31st December 1892 is reasonable, and there are certain well ascertained methods of doing so.

"But I think it has never been recognised as among these methods for the railway company complained against to inquire into the business affairs of the trader complaining, into the volume of his trade, the cost at which he carries it on, or the profit which he makes on it. It would be very strange if considerations of that kind were held to be relevant, because railway rates are not fixed with reference to the poverty or riches of individual traders, but in order to yield a fair remuneration to the companies themselves for the services which they render. That is entirely consistent with Lord Selborne's view in *The Canada Southern Railway* case (8 App. Cas. 723), because when he speaks of examining a rate 'with reference to the service rendered and the benefit to the person receiving that service,' he is arguing against the notion of testing the reasonableness of a rate by the profits of the railway company, and assuredly he gives no countenance to the notion of testing it by the profits of the trader. I agree with Mr Justice (now Lord Justice) Collins, that 'the reasonableness of the rate is not to be tried by its effect upon the trade of the persons who have to pay it'—(*Rickett, Smith, & Co.'s* case, 9 B. and M. at p. 114). Certainly if the condition of the trade in any particular class of goods is to any extent a legitimate subject of inquiry, that inquiry must be directed to the condition of the trade in general, and not to the profits or losses of any particular applicant.

"It is of course a mere accident that these applicants produce an article which forms a large item in the expenditure of every railway company. An increase in the price of coal may form a most important consideration in judging whether an increase in a railway rate is justifiable. But the companies have in their own possession the proper means of proving that, and the proof of it will not be helped by the books of the applicants.

"What the specification really does is to propose a searching examination, extending over thirty years, into every detail of the business carried

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[1] Canada Southern Railway Company v. International Bridge Company, 1883, 8 App. Cas. 723, *per* Lord Selborne, 731.

opinion of the Lord President. They cited the undernoted authorities.[1]

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LORD PRESIDENT.—The proceeding, in which this question arises, has been instituted under the Railway and Canal Traffic Act of 1894, section 1 of which in effect provides, that in the event of railway companies raising the rates which have been authorised for carriage on their lines, the *onus* shall rest upon them of proving to the satisfaction of the Commission that any increase of rates made by them since 31st December 1892 is reasonable. The railway companies must therefore, in this proceeding, justify the raising of their rates, or, in other words, must prove that the rates which they are claiming from the traders are reasonable. As the initial *onus* is thus laid upon them, it will be for them to adduce such evidence as they think fit, in support of the proposition that the raising of the rates is reasonable, and if they tender no such evidence, the traders may possibly lead no proof and say that as no attempt has been made to prove that an increase is reasonable, the Commission should refuse to sanction it. On the other hand, if the railway companies establish a *prima facie* case for the increase of the rates, it will be for the traders to adduce such evidence as they think fit to disprove the reasonableness of the increased rate which the railway companies propose to charge. Now, what the railway companies ask for is a diligence of a very comprehensive character, although it has been greatly restricted to-day. The first call was for excerpts of documents of certain kinds for each of the years from 1871 to 1900, both inclusive. That, I understand, is now limited to the period from 1897 to 1900, and, besides that, the last three articles of the specification are withdrawn. But four articles remain, subject to the limitation as regards time, to which I have just referred, and these articles are certainly very wide. The first calls for "all books, accounts, abstracts," and so on, "kept by or on behalf of the applicants or their predecessors in business" for the period from 1897 to 1900, which would shew the whole particulars and details of the business of every one of the applicants. The production of the documents called for would not only reveal their profits but everything connected with their business. Now, that is *prima facie* a kind of discovery for which authority should not be granted unless some very cogent reason is adduced for giving access to the most private documents of the applicants.

The issue in the case, as I have already stated, is whether the increase of the rates is reasonable. Now that, as I have also pointed out, has to be proved by the railway companies who have raised the rates, and in the course of that inquiry the companies will doubtless lead evidence on all the

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on by the Lothian Coal Company and their predecessors—their output, their prices, their cost of working, their capital expenditure, their profits or losses, and many other things. If such a process were applied to each of the applicants in this congeries of cases, I do not know when the inquiry would end. Even if relevant, such a call would be objectionable, as being altogether out of proportion to the question in dispute. But it seems to me to be wholly irrelevant, and I therefore disallow the entire specification."

[1] Rickett, Smith, & Company v. Midland Railway Company, 1893, 9 Browne & Macnamara, 107; Smith & Forrest v. London and North-Western Railway Company, May 18, 1900—not yet reported.

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matters which they say make an increase of the rates reasonable. Among other things, the cost of giving the service will no doubt be gone into, and that seems to me to be a proper element to take into account. The cost of giving the service will involve a consideration of the prices which the companies pay for the things which they require and use, and also of the wages which they pay to the servants whom they employ, in giving it. The prices which the companies now require to pay for coal, for example, which are said to be about double what they paid when the rates were fixed, will be a perfectly legitimate element for consideration. The companies say further that the cost of the service otherwise is greater, and in particular that their men work shorter hours, and that larger numbers of them are now required to do the same work, than when the rates were fixed. All these things may be very pertinent to the question whether the increase in the rates is or is not reasonable. But the companies have in their own books all the materials for such lines of inquiry, and they now claim to be admitted into the full knowledge of all that relates to the business of their customers, the applicants—the most secret things which traders keep to themselves—the conditions of their businesses, whether they are profitable, and if so, the amount of the profit, and if they are unprofitable, the amount of the loss. While the value or benefit of the service, as well as its cost, may be a proper matter for consideration, we have not been referred to any authority for granting such an application, and it seems to me that we should not give any countenance to the idea that such an application should be granted, seeing that it could be allowed only upon the view that all the particulars of the trade of each particular coalmaster or trader who had carriage done for him by the companies were material or relevant to the question of the reasonableness of the rate. Such an inquiry would doubtless reveal very different conditions in the businesses of the different traders, and the granting of the inquiry would suggest that the rates should vary according to the amount of profit that was being earned by the traders, or, to take an extreme case, that, if a trader was not making any profit, he should get his goods carried at a rate lower than that charged to a successful trader. The fact that the particulars asked must differ in each case seems to shew the inapplicability of the inquiry to what must be a general rate fixed by companies in exercise of the power to increase their rates on proving justification for doing so. One can see that when the companies have proved their grounds for increasing the rate, it will be open to the traders to put forward their evidence, and in proposing that we should refuse this diligence, I do not in the least suggest that there may not be ample scope for cross-examination of the traders when they say that the increased rates are not reasonable. It is not necessary for us now to decide what questions may be put in cross-examination, but if part of the case of the traders is to be that the trade cannot bear the particular rates, as it has sometimes been expressed, one can see that considerable latitude in cross-examination may be allowed to the companies. But by granting this diligence we would seem to assume that it was, or might be, a material element in the justification of a particular rate that some traders were making large profits, and that is an idea to which I do not think we should give countenance. The real issue being whether the rate is reasonable, it appears to me that the trading history,

even for four years, of each particular trader is not legitimate matter for inquiry, although, as I have already said, if the traders come and give evidence that their trade cannot bear the rates, very considerable latitude in cross-examination of them may be allowed to the companies, and possibly the companies may also be permitted to adduce rebutting evidence.

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For these reasons I think that we should refuse the specification *in toto*.

LORD ADAM and LORD KINNEAR concurred.

LORD M'LAREN was absent.

THE COURT refused the appeal.

DRUMMOND & REID, W.S.—JAMES WATSON, S.S.C.—Agents.

MRS JEANNIE LAMONT, Pursuer (Respondent).—*Salvesen, K.C.*—*T. B. Morison.*
JOHN BURNETT, Defender (Appellant).—*Kennedy*—*A. M. Anderson.*

No. 125.
May 21, 1901.
Lamont v. Burnett.

Contract—Jus quæsitum tertio—Promise.—A sent an offer to B's agent to purchase a hotel belonging to B at the price of £7000. Enclosed with the offer was a letter from A to B's agent, in which A wrote, *inter alia*,—"I will be pleased to give to Mrs B a sum of not less than £100 as some compensation for the annoyance and worry of the past few days, and for kindness and attention to me on my several visits to" the town in which the hotel was situated. B wrote accepting the offer "as supplemented by your letter."

A paid £7000 to B, and entered into possession of the hotel, but declined to pay £100 to Mrs B, who brought an action against A for that sum.

Held that the pursuer was entitled to decree for the sum sued for.

2D DIVISION. Sheriff of Perthshire.

ON 19th March 1900 John Burnett, hotel-keeper, sent to James S. Butchart, advocate, Aberdeen, agent for Donald Lamont, proprietor of the Royal Hotel, Crieff, an offer to purchase that hotel. The offer bore, *inter alia*,—"The purchase price shall be seven thousand (£7000) pounds sterling, payable on the 15th May 1900, which will be the date of my entry, but possession will only be given me on the 28th day of May 1900."

The offer was enclosed in a letter, dated 19th March 1900, in the following terms:—"I herewith inclose you my offer for the Royal Hotel, Crieff. I make it conditional, that should another place in Ayrshire fall to me on Friday the 23, to withdraw this offer on that date, and should you not hear from me on Friday the 23 March, the offer to be binding. Further, I will be pleased to give to Mrs Lamont a sum not less than one hundred pounds as some compensation for the annoyance and worry of the past few days, and for her kindness and attention to me on my several visits to Crieff."

On 24th March 1900 Mr Butchart sent this stamped letter of acceptance:—"I am now instructed to accept your holograph offer, dated March 1900, as supplemented by your letter of 19th inst., for the Royal Hotel, &c., Crieff, and the bargain is therefore closed."

Burnett having entered into possession of the hotel, paid £7000 to Lamont as the price, but declined to pay the £100 mentioned in the letter of 19th March.

Mrs Lamont then, with consent and concurrence of her husband, brought an action against Burnett in the Sheriff Court at Perth for payment of £100.

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The pursuer founded on the foregoing correspondence, and averred (Cond. 4) that the contract thereby constituted "was implemented by the seller, relying on the faith of the defender fulfilling his said engagement, to pay the pursuer the said sum of £100. The defender has paid £7000 as stipulated for the said hotel, but has not paid the pursuer the said sum of £100, and, although payment has been applied for, he refuses or unreasonably delays to make payment."

The pursuer pleaded, *inter alia;*—1. The defender having agreed, as part of the said contract of sale, to pay the pursuer the sum of £100, and the conditions of sale having been fulfilled to him, decree should be pronounced as craved. 2. *Separatim*, The defender having promised by his said letter to pay the sum of £100 to the pursuer, decree should be pronounced as craved.

The defender pleaded, *inter alia;*—1. No title to sue. 2. The action is irrelevant and incompetent. 4. The defender should be assoilzied, in respect (1) that he made no promise; (2) that he made no promise to pursuer; (3) that the letter containing the alleged promise was never delivered to her; (4) that the language of said letter imposes on the defender no obligation known to the law; (5) that the alleged promise was not part of the said contract of sale.

On 10th December 1900 the Sheriff-substitute (Sym) pronounced this interlocutor:—"Finds that it is admitted that the defender is now proprietor of the Royal Hotel, Crieff, formerly the property of the pursuer's husband; that, in sending on 19th March 1900 to J. S. Butchart, advocate, Aberdeen, agent for the pursuer's husband, the formal offer, No. 10 of process, made by him to purchase said hotel, he sent the accompanying letter, No. 7 of process, wherein he wrote,—'Further, I will be pleased to give to Mrs Lamont (the pursuer) a sum not less than one hundred pounds as some compensation for the annoyance and worry of the past few days, and for her kindness and attention to me on my several visits to Crieff'; that the said J. S. Butchart replied on 24th March 1900 by the following stamped letter (No. 13 of process), viz.:—'I am now instructed to accept your holograph offer, dated March 1900, as supplemented by your letter of 19th inst., for the Royal Hotel, Crieff, and the bargain is therefore closed': Finds in law that, on a sound construction of these writings, there was an offer made to and accepted by the said J. S. Butchart, containing a stipulation in favour of the pursuer, upon which she is entitled to sue and to have decree upon the principle of *jus quæsitum tertio:* Therefore repels the defences, and ordains the defender to pay to the pursuer the sum of £100, with interest thereon from the date of citation till payment: Finds the pursuer entitled to expenses," &c.

The defender appealed, and argued;—The clause of the letter of 19th March 1900 mentioning the £100 was not part of the contract for the sale of the hotel, and did not become so in consequence of the letter of acceptance of 24th March. The pursuer's first plea in law therefore was bad. Her second plea also was bad. A bare promise to make a present could not be enforced in law. If the person to whom such a promise was made did something on the faith of the promise, then he might have an action for enforcement of the promise on the ground of *rei interventus*. But there was not here a relevant averment of *rei interventus*. All that was averred was that the seller had fulfilled his contract by giving the defender possession of the

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hotel. But if payment of the £100 was not part of the contract, fulfilment of the contract could not be *rei interventus*.[1]

The pursuer was not called upon.

LORD JUSTICE-CLERK.—The defender here made an offer to purchase the Royal Hotel, Crieff, from the pursuer's husband at the price of £7000. The offer was enclosed in a letter to the husband's law-agent, in which the defender says that he would "be pleased to give Mrs Lamont a sum of not less than £100 as some compensation for the annoyance and worry of the past few days, and for her kindness and attention" to the defender. Now, whatever might have been said as to the meaning and effect of the passage I have just quoted from the defender's letter had it stood alone, I think all doubt is removed by the letter of acceptance of 24th March, which completed the bargain for the sale of the hotel. The acceptance is in these terms—(His Lordship quoted the letter of March 24th). I think that that is an acceptance not only of the offer but of the letter in which the offer was enclosed. Now, the defender when he gets the acceptance does not repudiate the construction which Mr Butchart in his reply put on the offer and its accompanying letter. On the contrary, he entered into possession of the hotel without saying anything, and only now says that he will not pay the £100 to the pursuer. I think that on receiving the acceptance of 24th March he became bound to pay £100 to the pursuer if thereafter he took advantage of the rest of the agreement by taking the hotel. I think therefore that the judgment of the Sheriff-substitute is right and should be affirmed.

LORD YOUNG.—I am of the same opinion. I do not think that the defence here is unarguable. I think that it is quite an arguable point. A little difference in the expression of the letter of 19th March 1900 would have led—at least would have led me—to another conclusion. A letter which merely said that the writer would have the pleasure of sending the recipient's wife a present—a new dress or whatever it might be—would not, I think, give rise to a right of action for fulfilment of the promise in the letter. But in the present case I think that the £100 mentioned in the defender's letter is really part of the price of the hotel. It is really part of a business transaction. Now, the offer with the letter which accompanied it was accepted by the pursuer's husband, and this acceptance created, in my opinion, a *jus quæsitum tertio* in the wife for this £100 entitling her to sue for it. The husband, I think, might have sued for it also, but I have no doubt that when the husband's law-agent writes to the defender accepting the defender's offer "supplemented by your letter of 19th instant," he means supplemented as part of a business transaction, and that the wife has a title to sue for payment of the £100 mentioned in the letter, just as her husband might have sued for the £7000 specified in the offer as the price of the hotel.

LORD TRAYNER.—I can easily conceive it possible to express a letter in

[1] *Authorities.*—Cambusalang West Church Committee v. Bryce, Dec. 15, 1897, 25 R. 322; Morton's Trustees v. Aged Christian Friends' Society, Nov. 9, 1899, 2 F. 82.

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such terms as would amount to the expression merely of an intention or a promise to give—as would not amount to an obligation for the fulfilment of which an action would lie. I do not think that we have a case of that sort here. I have no difficulty in construing the letter of 19th March 1900, and the offer which it encloses. I think that it comes to this,—"I offer to pay £7100 for the hotel, £7000 to be paid to you and £100 to your wife." I think that that is quite plainly the meaning of the offer and the letter enclosing it, and it certainly was the meaning understood by the seller of the hotel, for his acceptance is in these terms—(His Lordship quoted the letter of 24th March). That shews what the understanding of the person receiving the offer was, and if it was not the defender's intention that payment of £100 to the wife should form part of the bargain, it plainly was his duty to intimate that to the seller immediately on getting the letter of acceptance. Instead of that he retains the letter of acceptance, completes the transaction, enters into possession of the subjects, and says nothing. In these circumstances I think the defender is bound to pay £100 to the pursuer in addition to £7000 to her husband. In a word, I think the defender offered £7000 plus £100 as the purchase price; that that offer was accepted; that it has been acted upon; and that the defender cannot now go back on the transaction so completed.

LORD MONCREIFF.—I am of the same opinion. I do not see how the defender can get over the acceptance of 24th March 1900. I think that the defender, by his letter of 19th March and the offer accompanying it, intended to offer for the hotel on the footing of paying £7000 to the husband and £100 to the wife. But whether the defender intended that or not, there is no doubt that it was the understanding of the seller, this pursuer's husband, for the acceptance on his behalf is in these terms—(His Lordship quoted the letter of 24th March 1900). I read that as meaning,—"I accept your offer of £7000 for the hotel, provided you add £100, to be paid to Mrs Lamont, as you proposed." I think that that is plainly the meaning of the acceptance, and if the defender intended to dispute that construction of his offer he ought to have done so at once. Instead of which he acquiesced in the acceptance, and acted upon it by entering into possession of the hotel. I think it is now too late for him to go back.

THE COURT adhered.

MACPHERSON & MACKAY, S.S.C.—W. R. MACKERSY, W.S.—Agents.

No. 126.

May 28, 1901. Gerard Trustees v. Magistrates of Monifieth.

JAMES FAIRWEATHER LOW AND OTHERS (the Gerard Trustees), Petitioners.—*Wilton.*

THE PROVOST, MAGISTRATES, AND COUNCILLORS OF MONIFIETH, AND OTHERS, Respondents.—*A. S. D. Thomson—Lyon Mackenzie.*

Charitable Trust—"Cottage Hospital"—Application for a scheme by trustees who have full discretion—Competency.—A testator directed his trustees to apply the residue of his estate "in the establishment of a cottage hospital for the parish of M." The trustees having presented a petition for the settlement of a scheme for the equipment of a small hospital for the surgical and medical treatment of persons suffering from injuries and non-infectious diseases, answers were lodged by the Magistrates of the burgh

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of M. and by the Parish Council of the parish of M. objecting to the scheme on the ground that the existence of a large hospital in a town adjacent to the parish of M. rendered the existence of the small hospital inexpedient and unnecessary, and suggesting the establishment of either (1) a cottage hospital for infectious diseases or (2) a home or almshouse.

The Court, being of opinion that the institution of the cottage hospital proposed by the trustees was within their powers, *repelled* the answers.

Observations per Lord M'Laren on the circumstances in which the Court will entertain an application for the settlement of a scheme by trustees who have full powers to apply trust funds to purposes of benevolence.

1ST DIVISION.

THIS was a petition presented by the trustees of the deceased Reverend James Gerard Young, minister of Monifieth, for the settlement of a scheme for the administration of the residue of Mr Young's estate.

The following was the purpose to which the truster desired the residue to be devoted :—"The purpose to which I desire my funds to be devoted is the establishment of a cottage hospital for the parish of Monifieth—a useful and valuable institution, as has been proved in other parishes. In order to take the first step towards providing the said cottage hospital I hereby appoint the following trustees . . . requesting them, if willing to accept office, to do everything in their power to carry out the object of the trust funds thus committed to them; while not desirous to dictate to the trustees, I have to request that the trust thus created may be known as the 'Gerard Trust.'"

The petitioners stated that they were desirous of carrying out the direction of the truster. "But, as the testator has created the Gerard Trust in indefinite language, and without prescribing the machinery for its permanent administration, the qualifications of the beneficiaries, or the precise nature of the institution as regards its capacity or management, the petitioners feel that they would not be in safety to incur the responsibility of erecting and endowing such an institution, and framing regulations for its management under their supervision, without obtaining the sanction of the Court to their proposed scheme of administration."

The petitioners further stated that the estimated amount of the residue was £7850, that of this sum they proposed to apply £1850 in erecting and equipping a cottage hospital in and for the parish of Monifieth for the surgical and medical treatment of persons suffering from injuries and non-infectious diseases.

A detailed scheme was appended to the petition which the petitioners asked the Court to settle as a scheme for the administration of the "Gerard Trust."

Answers were lodged for the Provost, Magistrates, and Councillors of the burgh of Monifieth, for the Provost, Magistrates, and Councillors of the burgh of Broughty-Ferry (which was almost entirely within the parish of Monifieth), and for the Parish Council of Monifieth.

The respondents submitted that to establish a cottage hospital as proposed by the petitioners was not carrying out the purpose of the truster; that the truster knew that the Dundee Royal Infirmary was a large and splendidly equipped hospital, and freely admitted patients from Monifieth; and that a cottage hospital would be of little or no value to the parish.

They submitted that the testator's intention would best be met by a cottage hospital for infectious diseases from Monifieth. "The

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respondents further believe that the testator's intentions would alternatively be met by providing what might appropriately be called a 'Home' for cases of distress, whether from injury, disease, or bodily infirmity, from growing age or otherwise, *e.g.*, paralysis, general debility, chronic ailments, the aged and infirm, and generally all cases of persons physically unable to provide for their natural wants and comforts, including cases in which the applicants might be able to contribute partially to their own support, but still be unable to provide for themselves necessary home comforts and medical and other attendance, while being at the same time not proper subjects for parochial relief."

The Court having remitted the petition and answers to Mr Ewan Macpherson, advocate, to report, Mr Macpherson, on 14th May 1901, lodged a report.* At the hearing, the undernoted cases were referred to by the parties.[1]

LORD PRESIDENT.—The question submitted for our decision arises under the first codicil to the will of the testator, in the third head of which he

* Mr Macpherson, *inter alia*, reported:—"The powers given to the trustees are absolute, and it might well be that they would be quite entitled thereunder to carry out such scheme absolutely at their own discretion. The testator by the appointment of trustees has certainly created a machinery for carrying out the trust, leaving the details to the discretion of the gentlemen in whom he shewed that he had every confidence. They prefer, however, to ask for the guidance of the Court, and, looking to the practice of the Court, it humbly appears to me that your Lordships will not refuse to give them such guidance. I may refer on that point to the cases of *The Magistrates of Dundee* v. *Morris* (The Morgan Hospital Case), 8th Feb. 1861, 23 D. 461; *The Presbytery of Deer* v. *Bruce*, 22d March 1867, 5 Macph. (H. L.) 20; *Caird*, 3d July 1873, 10 S. L. R. 546, and 25th Feb. 1874, 1 R. 529; and *Clephane* v. *Magistrates of Edinburgh*, 26th Feb. 1869, 7 Macph. (H. L.) 7. . . .

"The respondents . . . propose two alternative schemes, viz., a cottage hospital primarily devoted to the treatment of cases of infectious diseases; or an institution in the nature of a 'Home,' such as 'Dorward's Home of Refuge,' at Montrose. . . .

"But it appears to me that if there were room for doubt as to the intention of the testator, your Lordships would not accept the respondents' first proposal, for the very reason advanced by them in answer 4 in support of it, viz., that 'each district under the Public Health (Scotland) Act, 1897, sec. 66, must now provide an infectious diseases hospital,' and, I may add, may be required to do so by the Local Government Board. The result of devoting the present trust fund to such a purpose would virtually amount to nothing more or less than a relief *pro tanto* of the rates. That is a purpose to which, as was pointed out in the cases of *The Kirk-Session* v. *The School Board of Prestonpans*, 28th Nov. 1891, 19 R. 193, and *The Governors of Jonathan Anderson Bequest*, 12th March 1896, 23 R. 592, the Court will not sanction the application of a charitable bequest.

"The above reasoning, with the exception of this last point, appears to me to apply with equal force to the respondents' alternative proposition. They have furnished me with information as to 'Dorward's Home of Refuge,' from which I find that in that institution between forty and fifty deserving paupers are maintained free, while others are kept who are paid for by the Parish Council, and when there is room in the house accommodation is given to private boarders."

[1] Caird, Feb. 25, 1874, 1 R. 529; Allan v. Stiell's Trustees, Nov. 22, 1876, 4 R. 162; Tudor on Charities (3d ed.), 123.

says—"The purpose to which I desire my funds to be devoted is the establishment of a cottage hospital for the parish of Monifieth—a useful and valuable institution as has been proved in other parishes." He continues—"In order to take the first step towards providing the said cottage hospital I hereby appoint the following trustees," whom he names, requesting them "to do everything in their power to carry out the object of the trust-funds thus committed to them; while not desirous to dictate to the trustees, I have to request that the trust thus created may be known as the 'Gerard Trust.'" The testator had plainly full confidence in the trustees, whom he armed with the power and charged with the duty of carrying out the trust.

Now, where the trustees are armed with such large powers, we would be very slow to interfere with what they did unless it was plain that it was not within the powers conferred by the testator, or in other words was *ultra vires*. The trustees accepted the trust, they appear to have addressed themselves to the performance of their duties, and in article 9 of their petition they say that they propose to apply a portion of the funds under their charge "in erecting, furnishing, and equipping a cottage hospital in and for the parish of Monifieth for the medical and surgical treatment of persons suffering from injuries and non-infectious diseases to relief of which such institutions are generally confined."

The trustees have interpreted their powers in this way, and the first question which arises is, whether what the trustees say they propose is within or beyond their powers. I am of opinion that it is within their powers, and if it is within their powers, it would not be either competent or proper for us to review or control the exercise of powers which they possess, even if we held a different opinion as to the best mode of administering the trust. This would, in my judgment, be a quite sufficient reason for not interfering with what the trustees propose to do.

But it may not be improper, at the same time, to refer to the contentions which have been put forward by the respondents, especially as their answers have been considered by Mr Macpherson, the reporter, along with the other papers. They put forward two rival schemes;—the one is a hospital for the treatment of infectious diseases, and the other is a home for cases of distress, whether from injury, disease, bodily infirmity, or other similar causes. If I be right in the view I have just expressed, it is not necessary to decide whether it would or would not be within the powers of the trustees to carry out either of these schemes. It is enough to say that what the trustees have elected to do is within their powers, although something else might also have been within their powers. But at the same time it is not to be left out of view, as the reporter points out, that the first of the rival schemes proposed would be simply a mode of relieving the rates by applying the funds left by the testator towards providing for cases which the law requires to be provided for out of the rates, a thing which is certainly against right administration in the ordinary case, though we are not called on to express an opinion as to whether it would or would not be *ultra vires* of the trustees. The second alternative is to provide a home, which either means a poorhouse or something exceedingly like a poorhouse. If it means a poorhouse, the objection would again arise that the bequest should not be applied to a purpose which the law requires to be provided

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for by the rates. We do not, however, require to consider these questions if I be right in thinking that what the trustees propose is undoubtedly within their powers. It therefore appears to me that the best course will be to make a finding that what the trustees propose is within their powers, and to send the case back to Mr Macpherson to complete his report.

LORD ADAM concurred.

LORD M'LAREN.—I am of the same opinion. It will not be supposed that in taking this course the Court is giving any encouragement to the notion that trustees who are empowered to apply money to charities or purposes of benevolence are to throw the administration of their trust upon the Court. But where a difference of opinion in matters material exists between the trustees and persons who would have a recognised title to appear and contest the administration, such as the chief local authorities of the district in which the charity is to be founded,—where such a difference of opinion exists, it would seem that trustees are entitled for their exoneration to obtain a judicial interpretation of the trust either under a declarator or under a petition to approve of a scheme. I think the reporter has very judiciously abstained from entering upon details in the meantime, and has brought before the Court the question whether the purpose to which the trustees propose to apply this money is a purpose consistent with the will of the testator, or whether the scheme proposed in the answers is what the testator intended. I have no doubt whatever that in proposing to establish such a cottage hospital as had been found useful in other parishes the testator meant an institution of the character which the trustees now propose to establish, and therefore I agree with your Lordship, that after a further report we should give our sanction to the present scheme either as it stands or, it may be, in an amended form, but substantially on the lines which the trustees have put before us.

LORD KINNEAR.—I also concur. I think it was very proper, and it has been very useful, that the public bodies who have put in answers should appear in such a case and lay their views before the Court; but having considered these views, I agree with your Lordship that the scheme proposed by the trustees is entirely in accordance with the will of the testator, and that nothing has been brought before us that would justify us in refusing to give effect to that scheme or enforcing any different scheme upon the trustees. With reference to the competing schemes suggested by the respondents, I do not find it necessary to consider whether these are entirely contrary to the intention of the testator or not. But I have very grave doubt whether the first alternative which they propose is so exactly in conformity with the will as the trustees' proposal is, because it proposes to introduce a restriction upon the purpose to which the cottage hospital, if established, shall be devoted, for which I can find no authority in the will itself. And I have even a stronger doubt whether the second alternative suggested by the respondents is within the will at all, because whatever question there may be as to the particular kind of cottage hospital which the testator had in view, I think there can be no doubt that it was at least a cottage hospital for the treatment of persons suffering from disease, and that it was not

intended to be either a poorshouse or an almshouse for the reception of poor persons who could partly contribute to their own support. I find nothing in the will to favour that second alternative at all, and I therefore agree that, with the finding which your Lordship proposes, the petition should be sent back to the reporter with instructions to proceed in the execution of the original remit.

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THE COURT repelled the answers, and of new remitted to Mr Macpherson to proceed with the previous remit, and found no expenses due to or by either party.

DAVIDSON & SYME, W.S.—HUTTON & JACK, Solicitors—Agents.

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THE STANDARD LIFE ASSURANCE COMPANY, Appellants.—*Dundas, K.C.—Blackburn.*
J. ALLAN (Surveyor of Taxes), Respondent.—*Sol.-Gen. Dickson—Young.*

Revenue—Income-Tax—Revenue earned abroad—Constructive remittance—Income-Tax Act, 1842 (5 *and* 6 *Vict. cap.* 35), *sec.* 100, *Schedule D, Case iv.*—The Income-Tax Act, 1842, sec. 100, provides that the duty chargeable under Schedule D, case iv., in respect of interest from colonial or foreign securities, is to be computed on the sums "which have been or will be received in Great Britain."

Where interest derived from the foreign and colonial investments of a proprietary insurance company was not remitted home, but was retained in the countries where it was earned, and was invested or otherwise applied there, *held* (*diss.* Lord Young) that by being entered in the company's accounts, and taken into account in estimating the amount of profit to be divided by way of bonus, dividend, or otherwise, it was not constructively received in this country so as to be chargeable with duty under case iv. of Schedule D of the Act.

Forbes v. *The Scottish Provident Institution*, Dec. 17, 1895, 23 R. 322, *followed.*

Scottish Mortgage Co. of New Mexico v. *Inland Revenue*, Nov. 19, 1886, 14 R. 98, *distinguished.*

Gresham Life Assurance Society v. *Bishop*, L. R. [1901], 1 Q. B. 153, *disapproved.*

2D DIVISION. Exchequer Cause.

THE STANDARD LIFE ASSURANCE COMPANY appealed to the Commissioners of Income-Tax for the county of Midlothian, against an assessment under case iv., Schedule D, of the Income-Tax Acts,* for the year 1899-1900, on the sum of £123,674, being the amount of interests accruing to them in Canada, India, Denmark, and Hungary, for the year ending 15th November 1898, which, according to the

* The Income-Tax Act, 1842 (5 and 6 Vict. cap. 35), sec. 100, enacts,—"The duties hereby granted, contained in the Schedule marked D, shall be assessed and charged under the following rules:— . . ."

Schedule D, fourth case,—"The duty to be charged in respect of interest arising from securities in the British plantations in America, or in any other of Her Majesty's dominions out of Great Britain, and foreign securities, except such annuities, dividends, and shares as are directed to be charged under Schedule C of this Act.

"The duty to be charged in respect thereof shall be computed on a sum not less than the full amount of the sums (so far as the same can be computed) which have been or will be received in Great Britain in the current year, without any deduction or abatement."

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company's contention, were not received in this country. The interests actually accrued amounted to £136,841 odds, from which for assessable purposes the sum of £13,167 fell to be deducted, leaving the sum stated.

The Commissioners, except to the extent of a sum of £1962, 10s. 5d. of bank-deposit interest received abroad, which they held did not come within the fourth case of Schedule D, dismissed the appeal.

The company obtained a case, from a joint minute of admissions in which the following facts appeared:—

"2. The Standard Life Assurance Company is a proprietary company, which commenced business in 1825, and was established in 1832 by the Act 2 Will. IV. cap. 81. . . .

"3. . . . In addition to their business in the United Kingdom, the company carry on a large amount of life assurance business abroad, particularly in Canada, India, Denmark, and Hungary, and had during the year ending 15th November 1898 investments of considerable amount in each of these four countries. Of said investments, the sum of £672,566, 18s. 10d. in Canada, and £8333, 6s. 8d. in Hungary, was invested under the control of the respective government officials of said countries against the due fulfilment of the company's obligations there.

"4. The head office of the company is in Edinburgh. The supreme control of the management and administration of the company's affairs is vested in a board of directors there. The company have boards of directors, local managers, and offices in Montreal for Canada, Bombay and Calcutta for India, and Buda-Pesth for Hungary, with the power of accepting risks without reference to the board of directors at the company's head office in Edinburgh. All investments, however, must be referred to head office, and be sanctioned there before acceptance. In Copenhagen for Denmark there is an advisory board, offices, and local officials, but all business, whether as to lives or investments, must be referred to the head office in Edinburgh."

Art. 5 stated that for the year ending 15th November 1898 the interests earned in the said four countries amounted to £136,841, 11s. 6d. Art. 8 set forth that this sum formed part of the "interests" entered in the revenue account of the company for the year ending at said date, as given up to the Board of Trade in terms of the Life Assurance Companies Act, 1870 (33 and 34 Vict. cap. 61), sec. 5. It appeared however (Art. 7) that "no part of the said Canadian, Indian, Danish, and Hungarian receipts was remitted to the United Kingdom *in forma specifica*, during the year ending 15th November 1898, the whole being retained in the countries where they arose, and so far as not required for meeting claims and other outgoings, invested or otherwise applied there."

It was further stated;—"9. By virtue of the principles upon which life insurance companies are conducted, the whole finances, including both capital and income, of the Standard Company are annually concentrated in the revenue account, in which is entered everything received and everything paid by the company. In this account and in point of fact there is no discrimination between the Standard Company's income and the company's capital. When the directors of the company have any payments to make they are entitled to make them out of the first and readiest moneys which may come into their hands belonging to the company. . . . During the year ending 15th November 1898, the directors of the Standard

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Company paid all their liabilities in the United Kingdom out of the funds in the United Kingdom at their disposal. It was unnecessary to draw upon the foreign receipts for this purpose, and as a matter of fact they did not do so. . . .

"10. As appears from said revenue account, the company's common fund amounted as at 16th November 1897 to £8,665,384, 15s. 1d., and at 15th November 1898 it had increased to £8,989,724, 11s. 2d., the difference (£324,339, 16s. 1d.) being excess of receipts over claims and expenses. This excess or surplus arising annually is (less such balance as may be added to reserve, or carried forward or otherwise kept undivided) finally divisible quinquennially (*a*) amongst those policy-holders entitled to bonuses, and (*b*) amongst the company's shareholders.

"11. . . . The last quinquennial investigation took place as at 15th November 1895, and the next will take place as at 15th November 1900. At these quinquennial investigations stock is taken of the company's assets and liabilities. From the sum total of the funds and investments is deducted the amount of the company's net liability (actuarially ascertained) upon the assurance and annuity contracts, and the liability to the shareholders for paid-up capital and reserve. The difference of the sum by which the former exceeds the latter represents the profits of the quinquennium. The profits of the quinquennium 1890-5, so far as not added to reserve, carried forward, or otherwise kept undivided, were, after the completion of the investigation, mainly distributed by way of bonuses, then declared upon policies, and to a much less extent by way of the dividend paid to the shareholders of the company for each of the succeeding five years, including the year ending 15th November 1898. In addition to the distribution of profits or surplus made at the end of each quinquennium, the company find it necessary in a measure to anticipate the results of the quinquennium, and they are in use, as circumstances shew prudent, to allow bonuses during the intermediate years both to parties entitled to policies which have matured and become claims in the interim, and also to their shareholders. In this way intermediate bonuses were paid upon policies which had become claims, and a bonus was paid to the company's shareholders for the year ending 15th November 1898."

It was further admitted that the making of investments and the earning of interest were necessary parts of the ordinary business of the Standard Life Insurance Company, and the investments that that company had abroad during the year ending 15th November 1898, and the foreign interest earned by it specified in the fifth article of the preceding joint minute of admissions, were respectively made and earned by the company in the ordinary course of its business and as a necessary part thereof. The foreign interest is regularly included in the company's annual revenue account as a distinct source of income, and was duly taken into account in arriving at the amount of the profit earned by the company available for distribution by way of bonus, or dividend, or otherwise as set forth in the tenth and eleventh articles of the said joint minute.

Argued for the appellants;—The case was indistinguishable from the case of *Forbes*,[1] which decided that where, as here, interest was not remitted home, but was retained abroad and used there, merely

[1] Forbes v. Scottish Provident Institution, Dec. 17, 1895, 23 R. 322.

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bringing it into account in this country did not subject it to duty under case 4 of Schedule B. The only distinction between the cases was that in the one case it was a mutual, and in the other a proprietary company, a distinction which, in a question as to the liability to duty on interest earned, was immaterial. Before there was liability there must be remittance or its equivalent. An example of the latter was *The Scottish Mortgage Company of New Mexico* v. *Commissioners of Inland Revenue*,[1] which was a case of true constructive remittance, in no way conflicting with the case of *Forbes*,[2] and indirectly a strong authority in favour of the appellants. The course adopted with regard to the foreign interest in that case was an expedient to save the trouble and expense of remitting it from abroad. Capital sums raised on debenture in this country were used for payment of dividends in place of the interest earned abroad. Unless these payments out of capital had been a proper *surrogatum* for the interest earned abroad they could not legally have been made. It was only this expedient that enabled the interest to remain abroad, and accordingly, though not remitted *in forma specifica*, it was held to have been remitted constructively. These were both cases decided on a consideration of case 4 of Schedule D, and direct authorities here. There were decisions arising out of case 5 of Schedule D which supported the same view.[3] As against these cases there were only the English cases quoted by the respondent, which turned not on case 4 but on case 1 of the schedule, and therefore did not apply. Further, the case of *Gresham*,[4] which was mainly relied on, proceeded on an erroneous conception of the decisions in the cases of *Forbes*[2] and *The Scottish Mortgage Company*,[1] which it professed to follow, and in any event could not stand against these cases.

The appellants stated further that they desired to reserve their right to maintain in a higher Court the argument rejected by the Court of Appeal in England in the case of the *Clerical Medical and General Life Assurance Society* v. *Carter*,[5] and by the First Division of the Court of Session in Scotland in the case of *The Scottish Mortgage Company*,[1] to the effect that where the earning of interest is a necessary part of the business of a company, such interest does not fall to be assessed under case 4, but under case 1 of Schedule D.

Argued for the respondent;—The case of *Gresham*[4] was indistinguishable from and proceeded on a consideration of all the authorities quoted in the present case. It did not follow the case of *Forbes*,[2] but was the independent decision of the English Judges, which they said was also the view of the Scotch Judges in *Forbes*.[2] This was a single business conducted and managed by a home office. Everything in the revenue account was either capital or income, and interest must be income. No disposal of profits was possible except on the authority of the home office. In these circumstances investments made abroad with revenue earned abroad were just equivalent to

[1] Scottish Mortgage and Land Investment Company of New Mexico v. Commissioners of Inland Revenue, Nov. 19, 1886, 14 R. 98.

[2] 23 R. 322.

[3] The Bartholomay Brewing Company (of Rochester) v. Wyatt, and Nobel Dynamite Trust Company v. Wyatt, reported together, L. R. [1893], 2 Q. B. 499; Colquhoun v. Brooks, L. R. (1889), 14 A. C. 493 (Lord Herschell, p. 510, and Lord Macnaghten, p. 515).

[4] Gresham Life Assurance Society v. Bishop, L. R. [1901], 1 Q. B. 153.

[5] L. R., 22 Q. B. D. 444.

sending money home and sending it out again. No doubt it was not sent home *in forma specifica*, but taking it into account was sufficient, if taken in so as to bring out the amount dealt with. It was paid to the company in this country when it was dealt with according to its orders. It was not necessary that the money should be actually received in this country. It was taken into account in estimating, and went to swell the amount of, the profits, and the question whether income-tax was exigible or not could not depend on how the profits were afterwards disposed of. What was paid in dividends and bonuses was swelled by these foreign interests, and having been so taken into account and dealt with they must be held to have been remitted home. This case was on all-fours with the *Scottish Mortgage Company*.[1] The case of *Forbes*[2] was not applicable to the case of a proprietary company carrying on business in the countries where its funds were invested. It was a case of a mutual insurance company, with no shareholders, carrying on business only in the United Kingdom. In that case the ground of decision was that the money, although brought into account, was not so brought in order to strike a balance, as here, for the purpose of paying bonuses and dividends.[3]

At advising,—

LORD JUSTICE-CLERK.—The controversy here between the Standard Life Assurance Company and the Inland Revenue, which we are called upon to decide, arises under Schedule D, case 4, of section 100 of the Income-Tax Act of 1842, which relates to the duty to be charged in respect of interest arising from foreign securities which is to "be computed on a sum not less than the full amount of the sums (so far as the same can be computed) which have been or will be received in Great Britain in the current year, without any deduction or abatement." The whole question turns on the words "which have been or will be received in Great Britain." The facts, as stated in the case, are that the appellants had in foreign countries and in India large sums invested under the control of the government officials of these countries, as security for the due fulfilment of the appellants' obligations in these countries. The question relates to the receipts from these investments in certain countries, and the case states that no part of these "was remitted to the United Kingdom *in forma specifica* during the year ending 15th November 1898, the whole being retained in the countries where they arose, and so far as not required for meeting claims and other outgoings, invested or otherwise applied there."

These sums entered the appellants' revenue account for the year submitted to the Board of Trade under the Life Assurance Companies Act, and it is the annual practice to include these interests in the appellants' revenue account, and they are taken into account in arriving at the amount of profit made by the company.

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[1] 14 R. 98.

[2] 23 R. 322.

[3] The respondent also made reference to the following cases:—Universal Life Assurance Society v. Bishop, 1899, 4 Tax Cases, 139; Norwich Union Fire Insurance Company v. Magee, 1896, 3 Tax Cases, 457; Apthorpe v. Peter Schoenhofen Brewing Company, 1899, 4 Tax Cases, 41; St Louis Breweries v. Apthorpe, 1898, 4 Tax Cases, 111; Frank Jones Brewing Company v. Apthorpe, 1898, 4 Tax Cases, 6.

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The directors of the appellants' company paid all their liabilities in Great Britain out of funds in their hands in that country. No part of the proceeds of the foreign investments was applied for that purpose, or was distributed among the proprietors.

The real question in the case is whether the words of case 4 in Schedule D, "received in Great Britain," apply to these proceeds. The respondent maintains that they do, they having entered the revenue accounts of the appellants, and that that amounts to their having been received in this country. In support of this view, he appeals to the English decision in the case of *The Gresham Life Assurance Society* v. *Bishop*,[1] and to the case of *The Scottish Mortgage Company of New Mexico* v. *The Inland Revenue Commissioners*.[2] The latter of these two cases seems to me to be essentially distinguishable from the present case. In the *New Mexico*[2] case the company saved the expense of the actual transmission of money—I do not mean in specie, but in the ordinary course of mercantile business from abroad—for the payment of dividends by the expedient of using capital sums raised on debenture loans in this country to pay the dividends, and using the profits in the foreign country instead of the debenture money for investment abroad. In that case plainly the interests earned in the foreign country were brought into account and applied in Great Britain. The company could not legally divide the debenture money as profits, and the investments made abroad were truly representative of the debenture money, and the debenture money applied in Great Britain was truly an application of the profits made abroad. Therefore that money was as truly "received in Great Britain" as if it had been remitted *in forma specifica*, or by the usual modes of transmission by which specie transmissions are avoided. But the "receiving in Great Britain" was indisputable. That case therefore does not in essential particulars resemble the case we are dealing with. The case of the *Gresham Assurance Society*[1] has a much closer resemblance to the present. The learned Judges who decided it seem to have considered that the view they took in that case was supported in the case of *Forbes* v. *The Scottish Provident Institution*,[3] decided in the First Division of this Court. I cannot agree with that view. The case of *Forbes*[3] seems to me to be in direct conflict with the decision in the case of *Gresham*,[1] and, if rightly decided, to rule the present case. The rubric of that case, which very correctly represents the decision given, is:—

"Where interest derived from the colonial investments of a society for mutual assurance was not remitted home, but was reinvested abroad, *held* that by being entered in the society's accounts it was not constructively remitted to this country so as to be chargeable with duty under case 4 of Schedule D of the Income-Tax Act, 1842."

That seems to be an exact description of the present case.

In that case, as in this case, the sums of profit made in the foreign country were entered in the company's statement of affairs. The question is whether that fact alone, which, as the Lord President points out, is common to all business persons and companies having investments out of the kingdom, constitutes receiving of the sums in Great Britain—in other

[1] L. R. [1901], 1 Q. B. 153. [2] 14 R. 98. [3] 23 R. 322.

words, does information to the investment-holder that he has made that profit on his foreign investment *ipso facto* constitute a receiving of it here? I am of opinion that it was rightly held in the case of *Forbes*[1] that it did not, and therefore that in this case, which seems to me to be practically identical with it, the decision of the Commissioners was wrong.

LORD YOUNG.—I agree with the opinion expressed by the Commissioners here, and think the appeal ought to be refused.

LORD TRAYNER.—I think the decision of the Commissioners is wrong. The duty for which that decision finds the appellants liable is a duty on interest arising from securities in His Majesty's dominions out of Great Britain, and from foreign securities. But such interest is only liable for duty on the amount thereof "received in Great Britain," and it appears to me that no part of the interest on which duty is now claimed was ever received in Great Britain. The contrary is set forth in the seventh article of the case before us, where it is stated that no part of the interest in question was remitted to the United Kingdom, but was retained and applied in the country where it arose. I do not fail to notice that this statement is qualified by the expression that the interest was never remitted "*in forma specifica*," and that "the foreign interest is regularly included in the company's annual revenue account as a distinct source of income, and was duly taken into account in arriving at the amount of the profit earned by the company available for distribution by way of bonus or dividend," &c. These facts are not inconsistent with the fact that the interest was not received in Great Britain. I concede that, in order to make the foreign interest liable in duty, it is not necessary that it should be remitted "*in forma specifica*," if that means remitted in coin. Anything equivalent to money, or which can be turned into money, will do. Nothing of that kind occurred here. The only thing which was done was that the foreign branches reported so much interest earned and obtained, which appeared in the appellants' accounts as part of their assets. But that asset was kept where it was earned and got, and there applied. It was not needed for any disbursement (either in dividend or otherwise) which the appellants had to make in Great Britain, and in fact was not so applied (art. 9 of the case). In the words of the Lord President in *Forbes*'[2] case,—"There is nothing, as far as appears, done with the colonial interests in question except to leave them where they are." I cannot distinguish this case in principle from *Forbes*'[1] case, and I am prepared now to repeat the decision there given.

I respectfully dissent from the judgment given in the case of *Gresham*.[3] I venture to think that there is no room for the view that the statute contemplates or provides for any "constructive" remittance. I think there is no remittance provided for except actual remittance—not necessarily money or coin, but of something equivalent in the market to money, and that can there be turned into money. I cannot hold that a mere report by a foreign or colonial branch to the head office in Great Britain, that so much interest has been earned and is retained, is a remittance either constructive or real. In the decision in the case of *Gresham*[3] a reference is made to the case of

[1] 23 R. 322. [2] 23 R. 327. [3] L. R. [1901], 1 Q. B. 153.

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Scottish Mortgage Company of New Mexico,[1] decided in the First Division of this Court in 1886, as being a decision "exactly in point." I think, with great deference, that that is not so. In my view the two cases are essentially different. In the *New Mexico*[1] case the facts were that the company had raised capital by debenture in this country, which they could not legally apply in payment of dividends, and which was intended for foreign investment; that at the same time they had interest earned abroad, which could be, and was at that time to be, applied in dividends in this country. But instead of sending the debenture capital abroad for investment and receiving the foreign interest at home for payment of dividends, they directed the holders of the foreign interest to invest it, and to that extent the capital at home would be retained and applied in payment of dividends. The one was the *surrogatum* for the other. In short, what the company did was this: they held the money in their hands to be interest, and used it as such in Great Britain, directing that an equivalent sum should be held abroad as capital, and used there as such. In this way the company did get money in this country out of foreign interest to pay their dividends, and did pay it. I think that case quite consistent with the case of *Forbes*.[2] The facts are essentially different. But the facts in *Forbes'*[2] case and the present case appear to me to be the same, and the result (as in *Forbes'*[2] case) is that the foreign interests, "left where they are," are not liable in duty.

LORD MONCREIFF.—Although the statute which we have to interpret was passed in 1842, there are few decisions to guide us. Two Scottish and two English cases were chiefly relied on. The earlier in date of the Scottish cases, *The Scottish Mortgage Company of New Mexico* v. *M'Kelvie*,[1] is claimed by the Surveyor as an authority in his favour; the appellants, on the other hand, found on the later case of *Forbes* v. *Scottish Provident Institution*.[2]

The English decisions, both of which were decided within the last year, are *The Gresham Life Assurance Society* v. *Bishop*,[3] and *The Universal Life Assurance Society* v. *Bishop*.[4] They are both adverse to the appellants; but however worthy of respectful consideration they may be, they are not binding on us; and, moreover, they seem to a certain extent to have proceeded on a misapprehension of the decisions of this Court in the cases of *The Scottish Mortgage Company of New Mexico*[1] and *Forbes*.[2]

We have therefore to interpret the statute for ourselves, with the aid of such light as those decisions and the opinions of the learned Judges who decided them afford.

The Crown's claim is made under the 4th case, section 100, Schedule D, of the Statute of 1842. The duty to be charged on securities out of Great Britain is to be "computed on a sum not less than the full amount of the sums (so far as the same can be computed) *which have been or will be received in Great Britain* in the current year, without any deduction or abatement." The words to be construed are "which have been received in Great Britain." The words "or will be received" do not, in my opinion, affect the question. They simply provide for an estimate based upon the practice and require

[1] 14 R. 98.
[2] 23 R. 322.
[3] L. R. [1901], 1 Q. B. 153.
[4] 81 L. T. R. 424.

ments of the taxpayer, this being necessary because the return has to be made before the expiry of the financial year.

Parties are agreed on the facts of this case; and amongst the facts admitted are the following:—"First, that the whole of the interests earned abroad, amounting to £136,841, 11s. 6d., were retained in the countries where they arose, and so far as not required for meeting claims and other outgoings, invested or otherwise applied there." Thus the interests in question were not remitted to or received in Great Britain during the year of assessment.

The second point (which is also a matter of admission) is that it was unnecessary to draw on the foreign receipts in question for the purpose of paying the company's liabilities or dividends and bonuses in the United Kingdom. The appellants had ample funds in this country which they were entitled to use for all these purposes.

In my opinion these facts are sufficient to exempt the interests in question from taxation under the 4th case, which, as I read it, requires that the interests to be taxed must either have been actually remitted to and received in Great Britain, or, according to the practice and requirements of the trader, should have been remitted during the year of assessment. This view receives corroboration from the terms of the 108th section of the statute, which prescribes the places at which profits on foreign or colonial possessions or securities (taxed under the 5th case) which are "*imported into Great Britain*," are to be charged. Those words are used in the same sense as "received" in the 4th case.

It remains to consider the grounds on which the Surveyor contends for a wider construction of the 4th case. Towards the close of his argument the learned Solicitor-General (unless I entirely misapprehended his answers to questions from the Bench) pleaded his case as high as this, that if a trader or investor in this country, to whom interest on foreign securities becomes due, sends directions to his agent abroad not to remit the interest to this country, but to invest it or pay debts with it abroad, or directs the debtor to pay the money into bank abroad, or indeed gives any directions for its disposal, such interest must be held to have been "received in Great Britain." I was at first surprised at the answer, because it appeared to leave no case to which the limiting words in the 4th case could apply; but I must assume that the Crown's argument required it.

Coming more closely to the facts of this case, the Crown's claim is mainly rested on this, that the interests accrued on foreign securities are regularly entered in the appellants' revenue account for the year, and go to swell the profits for the year, according to the amount of which the dividend and bonus for the year are fixed and paid. It is therefore argued that those interests, having been brought into account and constructively applied in payment of liabilities, or in payment of dividend and bonus, must be held to have been "received" in this country. The answer is that, although the interests on foreign securities are necessarily entered in the annual revenue account, and taken into consideration in ascertaining the amount of the profits and arranging for their division, they are not, in point of fact, remitted to and received in Great Britain, and they are not required for the discharge of any of the appellants' liabilities or purposes here. It appears

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from the 9th statement that the company are entitled to treat, and uniformly treat, capital and income on precisely the same footing, and to make any payments which they are required to make out of the first and readiest moneys which come into their hands. Besides, there is nothing in the case to shew that the income actually received in this country was not sufficient for all payments which required to be made here. Thus in no sense were the interests in question received in Great Britain, they were not remitted, and they were not required.

Reliance is placed on the fact that the supreme control and management of the company's affairs is vested in a board at Edinburgh. I fail to see the relevancy of this consideration. The statute assumes that the person entitled to the interest is resident in Great Britain; his liability depends on the interest reaching him there, and not upon the directions which he gives as to its application.

This brings me to *The Scottish Mortgage Company of New Mexico* v. *M'Kelvie*.[1]

It is impossible to read the anxiously expressed opinion of the Lord President Inglis without seeing that he regarded it as a very special case. The business of the company was carried on by borrowing money in this country at low rates and lending it on American securities at high rates, the profit consisting of the difference. The only money which was properly applicable to payment of dividends and liabilities in this country was the interest earned abroad upon foreign securities, which, accordingly, ought to have been regularly remitted to this country. Strictly speaking, the company had no right to apply the money which they borrowed in this country to those purposes; but, for the sake of convenience and to avoid trouble and expense, the company, instead of ordering all the interest to be sent home, and sending out all the borrowed money raised on debenture to be invested in America, retained out of the borrowed money a sum sufficient to pay all the working expenses in Great Britain, interest to debenture-holders and depositors, and a dividend, and directed an equivalent amount of the interest, which would otherwise have been remitted, to be retained abroad and invested. Thus one sum was set against the other, and formed a proper *surrogatum* for it. The Lord President concludes his opinion thus (page 102):—"So that, according to the way in which this company keeps its books, it has really converted a sum which was received in this country as capital into an equivalent for the interest upon the foreign securities, *and it represents in their books interests upon these foreign securities.* Now, in these circumstances, it appears to me quite impossible for the company to maintain that they have not received that interest. They have received it in this most proper sense of the term, that it enters their books in this country as such interest, and is paid away as such. I am therefore of opinion that the duty is rightly charged under the 4th case, and that the deliverance of the Commissioners ought to be affirmed."

The finding of the Commissioners, which the Court affirmed, was in these terms (page 100):—"19. The Commissioners found (1) that the profits of the company were of the nature described in the third clause,

[1] 14 R. 98.

Schedule D, section 2, of 16 and 17 Vict. cap. 34; (2) that the assessment fell to be imposed on the full amount of the sums which had been received in the United Kingdom in the year of assessment, and that, according to the rule in the 4th case, section 100, of 5 and 6 Vict. cap. 35, duty was chargeable on the profits of the company, which had been brought into account in their books in Glasgow, in so far as such profits had been applied to the payment of interest, dividends, debit balance, and preliminary expenses, in respect that, by being so brought into account and applied, they must be held to have been received in this country in exchange for an equivalent sum raised in this country and invested abroad, but not upon the profits which had been carried forward, even although such profits had been brought into account in the books of the company at Glasgow, in respect that they had not yet been actually dealt with and applied as money received in this country."

The difference in the facts from those in the present case will at once be observed. Here it was not necessary that the interests should be remitted, and they were not dealt with as having been remitted, because there were ample funds which, according to the practice and powers of the company, they were in use legitimately to apply to all payments to be made in Great Britain or elsewhere. In my opinion, the true explanation of the judgment in *The Scottish Mortgage Company of New Mexico*[1] is that it proceeded upon the footing of bar or estoppel. The funds raised in this country for the purpose of investments abroad could not legally be applied in payment of debts and liabilities due in this country, and, therefore, the company could not be heard to plead that the interest which was entered in their books as having been received had not been remitted.

The material facts in *Forbes'* case[2] were simply these: The directors had lent out considerable sums in Australia and elsewhere out of the United Kingdom. The interest derived from these loans in the year 1892 amounted to £90,359, 8s. 9d. That interest was wholly deposited with the company's bankers in the country where it was collected; and not being required to meet charges against the common fund in the United Kingdom, it was not remitted to this country *in forma specifica*, but, in terms of the institution's power, it was lent out as opportunity offered in the name of the corporation. It formed part of the interest entered in the revenue account of the institution for the year ending 31st December 1892, as given up to the Board of Trade in terms of the Life Assurance Companies Act, 1870 (33 and 34 Vict. cap. 61), section 5. No distribution of surplus took place in the year 1892, the last septennial investigation into the affairs of the institution having taken place in 1887, when, out of a surplus amounting to £1,051,035, 8s., £350,345 had been retained, and £700,690 apportioned among the participating members.

It was held that, upon these facts, the case for the Crown failed. Lord President Robertson said (page 327):—"On the alternative argument on case 4 of Schedule D, I think the facts fail the Crown. There is nothing, as far as appears, done with the colonial interests in question except to leave them where they are. The phrase 'constructive remittance,' in the second

[1] 14 R. 98. [2] 23 R. 322.

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query in these cases, is one which, if used at all, requires to be carefully guarded. As employed in the present argument, it would practically obliterate the limitation in the rule of case 4. Every man and every company having foreign or colonial investments of course knows of the interest arising from them, takes note of it, and enters it in any statement of affairs which may require to be made up. But this will never make the interest 'received in the United Kingdom.' The *New Mexican* case[1] was totally different."

These words seem to me exactly to fit the present case. They have been interpreted by the respondent as meaning, merely, that all that was done in *Forbes'* case[2] was that the interest entered the corporation's accounts. But that is not so, because it appears from the statement of admitted facts with reference to which the Lord President was speaking, that the interest was not only left abroad, but, as here, "was lent out as opportunity offered in name of the corporation."

The only difference that can be suggested is that, as there was no division of surplus during the year of assessment, the foreign interest had not been taken into consideration for the purpose of fixing the amount and division of profits. But that is surely not a material fact. The fact that the taxpayer takes note of the amount of interest received abroad in regulating his expenditure (whether in payment of dividend or otherwise) cannot affect the question, unless the interest either has been or should have been remitted in order to meet the expenditure.

I therefore regard the case of *Forbes*[2] as an authority of our own Court in favour of the appellants.

The facts in the case of *Gresham*[3] closely resemble those in the present case, as appears from the concise statement of them in the rubric:—"An insurance society carried on their business in the United Kingdom, and, by means of local agents or managers, in foreign countries. The business was entire and indivisible, and was managed by a board of directors in London. The society possessed funds invested in foreign countries in which they did no business. The interest on these investments was either reinvested in those countries, remitted directly to other foreign countries for investment, or remitted to London. They also possessed funds invested in foreign countries in which they carried on business. The interest on these investments was either reinvested in those countries, applied in establishment and other charges in those countries, remitted direct to other foreign countries for investment or for the general purposes of the society, or remitted to London. Yearly accounts were prepared in which all the interest on investments in foreign countries was included, and out of the profits shewn by the accounts a dividend was paid yearly to the shareholders. The surplus funds of the society divisible as profits were ascertained by actuarial valuation once in three years, and all the interest on investments in foreign countries was included in the triennial account."

On these facts the Court of Appeal held that all the interest on foreign investments was received in the United Kingdom within the meaning of

[1] 14 R. 98. [2] 23 R. 322.
[3] L. R. [1901], 1 Q. B. 153.

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the 4th case. They did so on the ground that the terms of the statute were sufficiently satisfied by a receipt in account. All their Lordships held that the Scottish case, *The Scottish Mortgage Company of New Mexico*,[1] was an authority directly in point, and they all agreed in distinguishing the case of *Forbes*.[2] Speaking of the former case, the Master of the Rolls, after stating that in his judgment the true meaning of the 4th case was satisfied by a receipt in account, adds :—"And I think that is the reading of it arrived at by the Judges in the Scottish case—*Scottish Mortgage Company of New Mexico* v. *Inland Revenue Commissioners*.[1] They did not put this in so many words, but they came to the conclusion in that case that there had been a receipt in account of foreign dividends, and they held, that being so, that the Crown was entitled to income-tax upon the dividends so received." Lord Justice Collins is of the same opinion, and he further states that, as he reads the Lord President's opinion, the latter did not proceed on the footing that the corporation was barred from saying that the interest had not been received. Lord Justice Stirling is of the same opinion.

For reasons which I have already stated, I think their Lordships were mistaken as to the import of the decision in that case. No doubt it was decided that in that case the cross-entry in the corporation's books was equivalent to receipt of foreign interest; but that was solely on account of the peculiar circumstances of the case which I have described.

Then as to the decision in the case of *Forbes*,[2] their Lordships all treated it as proceeding on the footing that there was nothing in the case except that the interest appeared in the annual account. But here again I think their Lordships were mistaken.

On the whole matter I am of opinion that the deliverance of the Commissioners, which I have no doubt was greatly influenced by the English cases, is in this respect erroneous.

THE COURT reversed the determination of the Commissioners and ordered the income-tax which had been paid in accordance with that determination to be refunded with interest at 4 per cent from the date of payment till repaid.

DUNDAS & WILSON, C.S.—P. J. HAMILTON GRIERSON, Solicitor of Inland Revenue—Agents.

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M'Neill's Trustees v. Watson.

ALEXANDER M'NEILL AND OTHERS (M'Neill's Trustees), Petitioners (Appellants).—*F. T. Cooper.*
ROBERT WATSON, Respondent.—*Cullen.*

Police—Regulation of Buildings—Street—"Court"—Width of Court—Entrance to Court—Burgh Police (Scotland) Act, 1892 (55 *and* 56 *Vict. cap.* 55), *secs.* 4 *and* 152.—Sec. 4 of the Burgh Police (Scotland) Act, 1892, contains, *inter alia*, the following definition :—"(10) 'Court,' where by the context it applies to a space contiguous to buildings, shall mean a court or recess or area forming a common access to lands and premises separately occupied, including any common passage or entrance thereto."

Sec. 152 enacts that it shall not be lawful to form any "court" unless the same shall be at least 36 feet wide.

[1] 14 R. 98. [2] 23 R. 322.

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In a petition to the Dean of Guild in a burgh for warrant to erect dwelling-houses, the petitioners proposed to form a court, of the statutory width, opposite the houses, but with an access from the public street by a passage through the petitioners' property, 22 feet in width.

Held (*dub.* Lord Young) that the passage must be taken to be part of the court, and must therefore be of the statutory width of at least 36 feet.

Hamilton Model Lodging-House Company, Limited, v. *Watson*, 2 F. 431, *followed*.

Opinion (*per* Lord Young) that the decision in that case was deserving of reconsideration.

2D DIVISION. Dean of Guild Court, Hamilton.

ALEXANDER M'NEILL AND OTHERS, trustees under deed of trust granted by Mrs Mary M'Neill, applied to the Dean of Guild of Hamilton for warrant to erect two tenements of dwelling-houses on a piece of ground belonging to the petitioners, situated at Bertram Lane, Greenfield, Hamilton. The plans shewed that the buildings would form a court which would be a *cul-de-sac*, 36 feet in width in front of the proposed buildings, but with the entrance (which was from Bertram Street through the petitioners' property) only about 22 feet in width for a distance of about 40 feet from the street. The court and entrance together would be about 211 feet in length. The petitioners described the entrance to the court as a lane or passage.

Objections were lodged by Robert Watson, Master of Works, *inter alia*, on the following ground:—"(1) The proposed 'new street, or part thereof, or court,' being only 22 feet wide at its junction with Bertram Street, and widening to 36 feet in width in front of the proposed new tenements, does not comply with section 152 of the Burgh Police (Scotland) Act, 1892, which provides, 'It shall not be lawful to form or lay out any new street, or part thereof, or court within the burgh, unless the same shall . . . be at least 36 feet wide for the carriageway and foot-pavements.'" *

On 31st January 1901 the Dean of Guild pronounced this interlocutor:—"Finds (1) that the petitioners intend to erect two tenements of two storeys in height, and a single apartment of one storey in height in a proposed new street or court to be formed off Bertram Street;

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* The Burgh Police (Scotland) Act, 1892 (55 and 56 Vict. cap. 55), enacts, sec. 152—"From and after the date when this Act comes into force within the burgh it shall not be lawful to form or lay out any new street or part thereof or court within the burgh, unless the same shall (measuring from the buildings or intended buildings therein at the level of the surface of the boundary of such street) be at least 36 feet wide for the carriageway and foot-pavements, . . . and provided also that for the purposes of this enactment a street shall not include a mews or other lane which may be made 12½ feet wide, or such other width according to the use to be made thereof, of which the Commissioners shall judge, and shall fix the width accordingly; but in no case shall the dwelling-houses fronting such lane exceed in height one and a half times the width of the lane. . . ."

The following definitions in section 4 of the Act were also referred to:—

"(10) 'Court,' where by the context it applies to a space contiguous to buildings, shall mean a court or recess or area forming a common access to lands and premises separately occupied, including any common passage or entrance thereto."

"(31) 'Street' shall include any road, highway, bridge, quay, lane, square, court, alley, close, wynd, vennel, thoroughfare, and public passage or other place within the burgh used either by carts or foot-passengers, and not being or forming part of any harbour, railway or canal station, depot, wharf, towing-path or bank."

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(2) that the width of the said new street, as shewn on the plans, is 22 feet at the entrance from Bertram Street, but widening out to 36 feet in front of the proposed new buildings; (3) . . . and (4) that the said 'new street, or part thereof, or court,' does not comply with the provisions of section 152 of the Burgh Police (Scotland) Act, 1892: Therefore, what is sought being in contravention of the said Act, refuses to grant the warrant craved, and finds no expenses due to or by either party, and decerns."*

The petitioners appealed, and argued;—The plans were in conformity with the statute. The court *ex adverso* of the proposed buildings was 36 feet wide, but the entrance to the court, which was not part of the court itself, but a lane through the petitioners' property, need not, under section 152 of the Act, be wider than 12½ feet. The access in the case of the *Hamilton Model Lodging-House Company*,[1] relied on by the respondent, was of quite a different character.

Argued for the respondent;—The court and the entrance thereto must be treated as a *unum quid*, and must be not less than 36 feet wide. The case was ruled by the case of the *Hamilton Model Lodging-House Company*.[2]

LORD JUSTICE-CLERK.—In this case I have been unable to see any ground for interfering with the decision of the Dean of Guild Court.

The statutory provision seems to me to be clear to the effect that if buildings are to be erected such as may be erected in a street, the street must be of a certain breadth. Buildings of a certain height and character may not be erected unless the street is of that width. In the present case it is proposed to erect buildings in what is a *cul-de-sac*, and at the place at which they are proposed to be built a sufficient width can be left. But the only access to this space by which traffic can come there is a passage between two buildings, which is only 22 feet wide. Now, is this place to be held a street? As to that I think there can be no doubt. It practically formed a court, as there is no direct passage through it. But under the statutory definition (31 in the definition clause of the Burgh Police Act, 1892), street includes, among other things, a court, and after enumerating almost every conceivable inhabited place, the same definition includes any "public passage or other place within the burgh used either by carts or foot-passengers." But further, the clause of the Act of 1892 on which the respondent founds expressly speaks both of a street and a court, and expressly requires that the width shall not be less than 36 feet.

LORD YOUNG.—But for the decision referred to by the Dean of Guild,

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* "NOTE.— . . . The Dean of Guild is of opinion that the present case is ruled by the decision in the *Hamilton Model Lodging-House Company, Limited*, v. *Watson*, 2 F. 431. The probability of buildings on the opposite side of the said new street or court cannot be wholly ignored, and it is also to be noted that the buildings proposed to be erected are to be separately occupied."

[1] Hamilton Model Lodging-House Co., Limited, v. Watson, Jan. 23, 1900, 2 F. 431.

[2] 2 F. 431. The respondent also referred to Couper v. Surveyor of Maryhill, March 6, 1891, 18 R. 642.

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the decision in the case of *Hamilton Model Lodging-House Company*,[1] I would have been disposed to differ from the judgment of the Dean of Guild. I think that decision is deserving of reconsideration. But understanding that all your Lordships are of opinion that that case was well decided, and that the Dean of Guild could not have acted otherwise than he did upon it, I do not think it would be in any way useful for me to say more on the subject.

LORD TRAYNER.—I think that the Dean of Guild has come to a sound conclusion on the case before him, and indeed I do not think he could have reached any other conclusion without disregarding the decision pronounced in this Court in the case of *The Hamilton Model Lodging-House Company*[1] to which he refers. I think that that decision rules the present case.

LORD MONCREIFF.—I have considerable sympathy with the appellants, because the effect of the Dean of Guild's judgment is to prevent them from making a beneficial and what appears to be a harmless use of their ground. But the terms of the 152d section of the Burgh Police Act of 1892, as it has been interpreted by this Court, are I think fatal to the appellants' proposal. That section declares that it shall not be lawful to form or lay out any new street or court unless the same shall be at least 36 feet wide. Now, the street shewn on the plan *ex adverso* of the proposed buildings is 36 feet wide, but the entrance to it from Bertram Street is only 22 feet wide. It was explained to us that in a previous application a builder was allowed to form that entrance of that restricted width on the assurance that it would only be used in connection with a mews lane.

Now, I think we must consider the street and entrance as *unum quid*, and if that is done the requirements of the statute have not been complied with. This is the view which was taken by the First Division of the Court in the recent case of *The Hamilton Model Lodging-House Company, Limited*, v. *Watson*,[1] and I think that we should follow that judgment.

THE COURT dismissed the appeal.

CLARK & MACDONALD, S.S.C.—CARMICHAEL & MILLER, W.S.—Agents.

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Murray's Trustees v. Murray.

ANDREW MACPHERSON AND ANOTHER (Mr and Mrs Murray's Marriage-contract Trustees), AND OTHERS, First Parties.—*Baxter—Guy.*
DAVID BETSON MURRAY, Second Party.—*Wilson, K.C.—Graham Stewart.*
MISS JESSIE HENDERSON AND ANOTHER, Third Parties.—*Baxter—Guy.*

Marriage-Contract—Jus Relicti—Married Women's Property (Scotland) Act, 1881 (44 *and* 45 *Vict. cap.* 21), *secs.* 6 *and* 8.—By antenuptial contract of marriage, dated in 1877, between spouses who were married in that year, the husband bound himself to pay to his wife, if she should survive him, £25 in name of mournings and interim aliment, and the wife, on her part, conveyed to trustees the sum of £450, for payment of the interest to herself during her life, and on her death to her husband during his life if he should survive her, and on the death of the longest liver of the spouses, for pay-

[1] 2 F. 431.

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ment of the principal sum to the children of the marriage and their descendants equally *per stirpes*, and if there should be no issue or descendants of issue "then the whole balance of said trust-estate remaining under the management of said trustees shall be paid to the heirs, executors, and successors whomsoever of the said" wife, it being declared that "the said revenue and interests" appointed to be paid to the wife and the husband should be wholly alimentary, and should not be subject to the *jus mariti* or other right whatever of the husband, and should not be subject to his debts or deeds, or liable to the diligence of his creditors.

The marriage was dissolved by the death of the wife in 1899. No children were born of the marriage. The wife left a *mortis causa* settlement disposing of her whole property, and, *inter alia*, bequeathing to third parties, on the death of her husband, the £450 conveyed by her to the marriage-contract trustees.

The husband claimed one-half of the whole moveable estate left by his wife, including one-half of the £450 conveyed by her to the marriage-contract trustees, as falling to him *jure relicti* under section 6 of the Married Women's Property (Scotland) Act, 1881, and he also claimed the liferent of the balance of the £450 thereafter remaining in the hands of the marriage-contract trustees.

Held by the whole Court that the legal rights of the husband in the £450 conveyed to the marriage-contract trustees were restricted to the liferent provision, and did not include any part of the fee of the £450:—

Per the Lord President, Lord Young, Lord Adam, Lord M'Laren, Lord Kinnear, Lord Trayner, and Lord Moncreiff, on the ground that it was *pars contractus* between the spouses that the fee of the £450 should, "failing the issue of the marriage," be paid to the "heirs, executors, and successors whomsoever" of the wife; and that by section 8 contracts between spouses were protected from the operation of the Act;

Per the Lord Justice-Clerk, Lord Kyllachy, Lord Low, and Lord Pearson, on the ground that "according to the law and practice of Scotland," a wife's claim to *jus relictæ* is excluded from any part of her husband's moveable estate over which a liferent has been conferred upon her by a marriage-contract, and that under section 6 the same rule applied, *mutatis mutandis*, to a husband claiming *jus relicti*;

Per Lord Stormonth-Darling, on both the preceding grounds;

Per Lord Kincairney, on the ground that the wife had, in the exercise of the power to bequeath for which she had contracted in the marriage-contract, conferred rights on the legatees, and that to disturb these rights by sustaining the husband's claim to one-half of the fee would be to make the Married Women's Property (Scotland) Act, 1881, "affect" a contract between the spouses within the meaning of section 8 of the Act.

Fotheringham's Trustees v. *Fotheringham*, 16 R. 873, *Simons' Trustee* v. *Neilson*, 18 R. 135, and *Buntine* v. *Buntine's Trustees*, 21 R. 714, *considered*.

2D DIVISION. Whole Court.

MR DAVID BETSON MURRAY, teacher in Aberdeen, was married to Miss Mary Henderson on 25th December 1871. By antenuptial contract of marriage between the intended spouses, dated 23d December 1871, Mr Murray bound himself to pay £25 to his intended wife, in case she should survive him, in name of mournings and interim aliment; for which causes, and on the other part, Miss Henderson disponed and made over the sum of £25 in cash, and the sum of £425 contained in a bond and disposition in security, to James Henderson and others, and to the survivors and survivor of them, as trustees for the following purposes, viz.:—"*First.* That the said trustees and their foresaids shall continue the investment under said bond so long as they consider it expedient, . . . they always consulting the said Mary Henderson while she survives before completing the

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new investments which may be made; and that they shall pay over the free interest and revenue of said investments to the said Mary Henderson during all the days of her life, and upon her receipt alone, which it is hereby declared shall be a sufficient discharge to the said trustees therefor; and after her death they shall pay the said revenue and interest to the said David Betson Murray in the event of him surviving her, during all the days of his life after her decease: *Second.* On the death of the longest liver of the said Mary Henderson and David Betson Murray, the said trustees shall finally uplift the said principal sum of £450 sterling, and shall pay and divide the same amongst the child or children of the said intended marriage, if any be, in such proportions as the spouses by a writing under their joint hands, or failing such joint writing, as the survivor by a writing under his or her hand may appoint, or failing such appointment, equally amongst the said children, share and share alike, the issue of any child predeceasing succeeding equally among them to their parent's share; and if at the death of the longest liver of the said spouses there be no issue of the said intended marriage or descendants of such issue in existence, then the whole balance of said trust-estate remaining under the management of said trustees shall be paid to the heirs, executors, and successors whomsoever of the said Mary Henderson: Declaring hereby that the said revenue and interests appointed by these presents to be paid by the said trustees to the said Mary Henderson and David Betson Murray, as above set forth, shall be wholly alimentary, and shall not be subject to the *jus mariti* or other right whatever of the said David Betson Murray, nor shall the same be subject to his debts or deeds, or liable to the legal diligence of his creditors for debts contracted or to be contracted by him: Further, in the event of there being a child or children of the said marriage, it shall be in the power of the said trustees to make advances out of the stock or principal of the sums forming the trust-estate for the education and outfitting in the world of such child or children from time to time as the said trustees may see fit, such advances not to exceed in whole one-half of the principal sums invested by the trustees at the time, and on such advances the party in right of the liferent interest shall suffer from thenceforth the necessary abatement of interest or revenue payable to her or him."

The marriage was dissolved, by the death of Mrs Murray, on 8th February 1899.

No children were born of the marriage.

Mrs Murray left a *mortis causa* settlement, dated 19th September 1895, by which she nominated executors, and, after directing payment of debts, she in the second place bequeathed certain legacies of specific subjects, including legacies to her husband and to her sister Jessie Henderson:—"*In the third place,* I appoint that in the event of my said sister surviving my husband, she shall enjoy the liferent of the funds held by the trustees under the marriage-contract entered into between me and my said husband, and of which funds, there being no children of the said marriage, I have the power of disposal, and that during all the days of her life, and on her death, in the event of her surviving my said husband, or on his death, in the event of her predeceasing him, the said funds shall be paid over to the managers for the time being of the Aberdeen District Queen Victoria Nursing Association for behoof thereof: *In the fourth place,* I leave and bequeath to my said sister and my cousin, Mrs Catherine Henderson or

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Dallas, equally between them, share and share alike, the whole residue and remainder of my means and estate, said means and estate having been acquired by me subsequent to the passing of the Married Women's Property (Scotland) Act, 1881, and being consequently held by me exclusive of the *jus mariti* of my said husband."

In June 1900 a special case was presented to which the parties were (1) Andrew Macpherson and another, as the surviving assumed trustees under Mr and Mrs Murray's antenuptial contract, and also as executors under Mrs Murray's *mortis causa* settlement; (2) Mr Murray; and (3) Miss Jessie Henderson and the Aberdeen District Queen Victoria Nursing Association.

The questions of law were:—"(1) Whether, for the purpose of determining the second party's legal rights in his deceased wife's estate, the marriage-contract funds fall to be treated as part of the moveable estate belonging to her at her death? (2) In the event of the foregoing question being answered in the affirmative—Whether the second party, in addition to his *jus relicti*, is entitled to the liferent of the balance of the marriage-contract funds?" *

In addition to the foregoing facts the case stated that, besides the funds held and administered by the first parties under the antenuptial contract of marriage (which had, on 9th December 1895, been invested, with consent of Mrs Murray, on a debenture for £450), Mrs Murray left moveable property amounting to about £190.

The case further stated that, pending the judicial determination of the questions in the case, the second party had not claimed or accepted the liferent provision in his favour contained in the marriage-contract, or the legacy in his favour contained in his wife's *mortis causa* settlement.

The first and third parties maintained that the second party, so far as concerned the funds held and administered by the first parties under the antenuptial contract of marriage, was entitled only to the liferent thereof provided therein in his favour, and that, so far as the moveable estate left by his wife not falling under the antenuptial contract was concerned, the second party was entitled either to the conventional provisions in his favour contained in her *mortis causa* settlement, or to one-half of the moveable estate not falling under the antenuptial contract in name of *jus relicti*.

The second party maintained (*a*) that the capital of the funds held by the marriage-contract trustees was *in bonis* of his wife at the time of her death; (*b*) that the *jus relicti* of the second party in the moveable

* The Married Women's Property (Scotland) Act, 1881 (44 and 45 Vict. cap. 21), enacts:—

Sec. 6. "After the passing of this Act the husband of any woman who may die domiciled in Scotland shall take by operation of law the same share and interest in her moveable estate which is taken by a widow in her deceased husband's moveable estate according to the law and practice of Scotland, and subject always to the same rules of law in relation to the nature and amount of such share and interest, and the exclusion, discharge, or satisfaction thereof, as the case may be."

Sec. 8. "This Act shall not affect any contracts made or to be made between married persons before or during marriage, or the law relating to such contracts, or the law relating to donations between married persons, or to a wife's non-liability to diligence against her person, or any of the rights of married women under the recited Act"—The Married Women's Property Act, 1877 (40 and 41 Vict. cap. 29).

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estate left by his wife (including the capital of the marriage-contract funds) was not excluded, discharged, or satisfied by the marriage-contract or otherwise; (*c*) that the second party was entitled, under the provisions of section 6 of the Married Women's Property (Scotland) Act, 1881, to one-half of the whole moveable estate, including the marriage-contract funds, and also to the liferent of the balance of marriage-contract funds thereafter remaining in the hands of the first parties under the antenuptial contract; and (*d*) that he was also entitled to immediate payment of the one-half of the whole moveable estate.

After a hearing before the Second Division, their Lordships pronounced the following interlocutor:—"In respect of the importance of the questions involved, and of the decisions in the cases of *Buntine* v. *Buntine's Trustees*, 21 Rettie, 714, and special case *Simons' Trustee*, 18 Rettie, 135, appoint the parties to prepare, print, and box to the Judges of this Division, and to the Judges of the First Division, and to the permanent Lords Ordinary, mutual minutes of debate, in order to the opinions of the whole Judges being obtained upon the questions of law stated in the special case,—said minutes to be lodged," &c.

The following is an epitome of the minutes of debate:—

Argued for the first and third parties;—The husband had no right to any part of the capital of the marriage-contract funds, but was entitled to an alimentary liferent of the whole of these funds. The contract was antenuptial, the most onerous known to the law. It was mutual, and not merely a conveyance by the wife in trust for purposes of administration and management. The provisions contained in it were protected by a trust. The contracting parties could not themselves have revoked the contract *stante matrimonio* had there been issue or the possibility of issue, and would have had to content themselves with the limited provisions of the deed.[1] One of the rights for which the wife contracted was that of naming "heirs, executors, and successors," without possible interference from her husband, and the consideration which the husband received therefor was a liferent of the whole fund, alimentary and protected from the diligence of his creditors, if he survived her. But he had bargained that he was to have no more than the liferent. It was therefore inconsistent with his contract that he should now claim the fee of one-half of the estate in the hands of the marriage-contract trustees and the liferent of the remainder. The purposes of the trust included the *holding* of the whole trust funds until the expiration of the liferents provided by the contract; it would be inconsistent with the expressed purposes of the trust were the trustees to part with one-half of the funds now. Further, it was one of the purposes of the trust, expressed in the form of a direction to pay, that on the expiration of the liferents the trust funds should be paid as thereby directed, and the trustees had been by the wife directed to hold for behoof of the third parties. The husband's claim would render this impossible. The husband's liferent was declared to be alimentary, and not subject to the diligence of his creditors. To give effect to his claim would be to remove this protection from his interest in one-half of the liferent of the wife's estate provided to him, and open one-half of the funds to the diligence of his creditors, contrary to the provisions of the contract. The husband's claim was based solely upon section 6 of the Married Women's

[1] Anderson v. Buchanan, June 2, 1837, 15 Sh. 1073; Menzies v. Murray, March 5, 1875, 2 R. 507.

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Property (Scotland) Act, 1881. To bring his claim within the scope of that section it was necessary to shew that the marriage-contract funds were moveable estate of the wife at the date of her death. The estate was not moveable estate of the wife within the meaning of the section, but was moveable estate held by trustees as the property of all the beneficiaries to the extent of their respective rights expressed in the contract. Further, by section 8 of the Act it was expressly provided that the Act should not affect any contracts made or to be made between married persons before or during marriage, or the law relating to such contracts. But for the Act the husband in the present case could take nothing but a liferent of the marriage-contract funds. To give effect to his present claim would therefore be to make the Act affect the contract. Besides, it was part of the consideration of the marriage and the contract that the wife was to reserve for her children or her own heirs, executors, and successors the capital of the marriage-contract funds. It was said that the husband's claim must receive effect in respect that there was no express renunciation of his legal rights of terce and *jus relicti*. But such renunciation was clearly implied from a fair construction of the whole terms of the deed as being the consideration for the ante-nuptial provisions made by his wife in his favour. The cases *Simons' Trustee* v. *Neilson*[1] and *Buntine* v. *Buntine's Trustees*,[2] appeared to be inconsistent. *Buntine's Trustees*[2] was rightly decided, and applied to the present case to the exclusion of the husband's claim.

Argued for the second party;—*Simons' Trustee* v. *Neilson*,[1] was identical with the present case, and was a direct authority in favour of the second party's claim to *jus relicti*. It was contended on the other side that *Simons' Trustee*[1] was overruled by *Buntine* v. *Buntine's Trustees*.[2] This was not so. The distinction was that in the case of *Buntine*[2] the trustees were directed, in the event of the wife's death without issue, to hold the fee for behoof of and at the absolute disposal of the wife or her heirs or assignees. As Lord Kinnear[3] said, "Under that contract the wife and her heirs have an absolute right to the whole of her estate." This, therefore, was held to be matter of contract, and to allow the husband one-half of the estate as *jus relicti* would have been to go against the provision of section 8 of the Married Women's Property Act, 1881, as the right of the wife's heirs under the contract would have been to that extent affected. In *Simons' Trustee*,[1] on the other hand, the direction was not contractual, but purely testamentary, and was merely intended to provide that in the event of there being no issue the estate was to be *in bonis* of the wife. There was no contract by the wife as in *Buntine*[2] that her heirs should have the absolute disposal of the estate in the event of there being no issue. The two decisions were therefore consistent. The case of *Simons' Trustee*[1] was well decided, and ought to be followed. The principle on which it proceeded had been applied in the previous case of *Fotheringham's Trustees* v. *Fotheringham*.[4] The cases of *Simons' Trustee*[1] and *Fotheringham's Trustees*[4] were both authorities for the proposition that under such a contract as that now in question there was no exclusion, express or implied, of the husband's right to *jus relicti*, a right which did not come into existence until after the date of the contract. Moreover, section 8 of the Act of 1881, which

[1] Nov. 20, 1890, 18 R. 135.
[2] March 16, 1894, 21 R. 714.
[3] 21 R. 723.
[4] June 27, 1889, 16 R. 873.

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provided that the Act should not affect contracts made between married persons, did not refer to deeds in the *form* of a contract, but to what was *in reality* a contract. A distinction was therefore to be made in the case of a marriage-contract between those provisions which were contractual and those which were merely testamentary, and which the spouses might put an end to at pleasure. In *Simons' Trustee*[1] the wife, in the event of there being no issue, was vested with the fee, and entitled to give it to whom she pleased. The estate was *in bonis* of her, and consequently yielded *jus relicti*. It was immaterial that there was contained in the contract an ultimate destination of the estate to the wife's heirs. This was not contractual; it could be altered by the wife at pleasure.[2] It was simply a "stipulation that, upon the wife's death without issue her estate should go to the persons entitled thereto by the law in force at the time of her death."[3] It was also to be noted that in *Buntine*[4] it might be contended that it was part of the contract that the husband should acquire no right whatever in his wife's estate, as the marriage-contract expressly excluded every possible right which under the then law he could have had—"*jus mariti*, and rights of courtesy and of administration." No such exclusion occurred in *Simons' Trustee*[1] or in this case. It was therefore submitted (*first*) that the decision of *Simons' Trustee*[1] ruled the present case, and (*second*) that that decision was based on sound principle, and ought to be followed.

The consulted Judges returned the following opinions:—

LORD PRESIDENT, LORD ADAM, LORD M'LAREN, and LORD KINNEAR—We are of opinion that the claim of the husband, under the Married Women's Property Act, 1881, sec. 6, to one-half of the funds settled by his late wife by their antenuptial contract of marriage is excluded by the terms of that contract. We do not think it doubtful that the right given by the statute to the surviving husband affects the whole moveable estate vested absolutely in the wife at the time of her death, if nothing has been done to exclude or discharge it. But it is in our judgment equally clear that the husband's interest may be excluded by conditions of a marriage-contract which are in effect inconsistent with it, although it may not have been renounced in express terms. We think this follows from the provisions of the 6th section that the husband's interest in his wife's estate is to be subject to the same rules of law "in relation to the exclusion, discharge, or satisfaction thereof," as the right of a widow in the moveable estate of her deceased husband, and of the 8th section, that the statute is not to affect contracts already made, which would of course contain no express discharge of a right not known to the law at the time when they were executed.

The question is, Which of these two rules ought to govern the present case? And the difficulty in this, as in previous cases, arises from the familiar practice of embodying in the same instrument the conditions of a marriage-

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[1] 18 R. 135.

[2] Ramsay v. Ramsay's Trustees, Nov. 24, 1871, 10 Macph. 120, 44 Scot. Jur. 77; Newlands v. Miller, July 14, 1882, 9 R. 1104; Laidlaw v. Newlands, Feb. 1, 1884, 11 R. 481; Montgomery's Trustees v. Montgomery, June 27, 1895, 22 R. 824.

[3] Buntine v. Buntine's Trustees, 21 R. 714, *per* Lord Kinnear, at p. 729.

[4] 21 R. 714.

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contract and also directions to trustees, which form no part of the contract between the spouses, but come into operation only when the purposes of the contract have failed. When, in contemplation of a marriage, funds are settled in trust for a variety of contingencies of which it is possible that none may happen, it is a common and convenient practice to direct the trustees what they are to do with the money, if none of the contingencies in reference to which the parties have contracted should take effect. But such directions, beyond the true objects of the contract, are not pactional, and therefore they are not obligatory on the true owner of the fund. If they are made in favour of third persons who are strangers to the marriage they are testamentary, and may be revoked at pleasure. If they are directions to hold for the settlor himself and his heirs or assignees, they are mere expressions of the legal consequence which follows from the failure of the purposes of the contract. We assent to the doctrine laid down by Lord President Inglis in *Ramsay* v. *Ramsay's Trustees*[1] and in *Simons* v. *Neilson*,[2] that if the purposes of a marriage-contract have failed or are satisfied, then it will follow that the estate which has been conveyed in order to secure the provisions of the contract becomes absolutely the property of the person who conveyed it. It follows, in our opinion, that funds which in this way have come to be absolutely vested in a husband or wife cannot be protected against the legal claims of the surviving spouse, by any mere direction to trustees to hold for the spouse to whom they originally belonged. It is of no consequence that such directions may be contained in the same instrument as the stipulations of a contract of marriage, if they are not themselves matter of contract. In such a case the husband's interest under the Act of 1881 cannot be held to be excluded by the marriage-contract because, *ex hypothesi*, the estate which is found to belong to the wife at her death is not affected by the contract at all, but has come to be her absolute property by the failure of all the contingencies on which she had contracted to dispose of it. This appears to us to be the effect of the decision in *Simons* v. *Neilson*.[2] It was held that the marriage provisions were burdens on the fee; that in the event which happened all of these had failed to take effect; and therefore that the trustees held for the wife, and for her alone, and that at her death the funds were *in bonis* of her, and subject to all the legal claims which affected her absolute property. In so far as it gives effect to the doctrine we have stated, we think this a sound decision. In so far as it proceeds on the interpretation of a particular marriage-contract, and determines as matter of construction that the wife's absolute right in her own funds was not derived from any bargain between the spouses, it cannot, in our judgment, be an authority for the construction of a different contract, and we do not therefore think it necessary or apposite to consider the case from that point of view. But while provisions of a marriage-contract which are not pactional but merely directory cannot operate to exclude the claims of either spouse on the moveable estate of the other, it is otherwise when they have bargained with one another for the disposal of the estate of either in a manner that is inconsistent with the legal claims.

The question, therefore, in the present case is, Whether the condition

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[1] 10 Macph. 120. [2] 18 R. 135.

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that, in the event which has happened, the trust-estate remaining in the hands of the trustees is to be paid to the heirs and executors of the deceased wife is matter of contract between the spouses, or whether it is a mere expression of the legal consequence which will follow from the failure of all the contractual purposes. This is not, in our opinion, a question to be determined by any fixed rule of law established by precedent, but a question of intention to be determined on the circumstances and construction of the marriage-contract. So treating it, we are of opinion that it is matter of contract. It is in form contractual, for by the general scheme and structure of the instrument all the provisions for the disposal of the funds settled by the wife are matter of stipulation between the spouses. It is stipulated that the income shall be paid to the wife during her life; that after her death it shall be paid to the husband; that in both cases the income shall be alimentary; and that on the death of the longest liver the capital shall be paid to the children of the marriage, if any be. All these are beyond question terms of the contract, and binding upon the spouses; and the remaining condition, that if there be no children the fund shall be paid to the executors of the wife, is a part of the same clause which provides for the interest of the children, and is in form and expression as clearly pactional as the other part of it. We see no reason why it is not to be considered pactional in substance as well as in form. It is not a provision for the benefit of strangers to the contract, but a stipulation in effect that if there be no children the wife shall have power to dispose of her own money by will; and she has, in fact, exercised that power by her *mortis causa* settlement. It was perfectly competent for the wife to stipulate, by an antenuptial contract, that she should have such power, and if she intended so to stipulate, she could hardly have adopted a better method for expressing the right she meant to secure than that which she has actually employed.

It is to be observed that the destination of the fund to the children, whom failing, to the wife's heirs and executors, would be quite sufficient to exclude the *jus mariti*, if it were not excluded in express terms. It has been decided in *Fotheringham* v. *Fotheringham*,[1] and we think rightly, that a discharge of the *jus mariti* will not of itself bar the husband's claim under the Married Women's Property Act. But when the question is, whether a provision in a marriage-contract is pactional or merely directory, it is very material that it would certainly operate, by way of contract, to bar the *jus mariti*. It is settled that when a wife by marriage-contract fixes the destination or appropriation of a particular sum in her own favour, or in terms which denote a fee in her own person, the contract must receive due effect to the exclusion of the *jus mariti*. In *Black* v. *Pearson*,[2] a wife conveyed her property by antenuptial contract to "herself and her husband and the longest liver of them in liferent and to the children of the marriage in fee, whom failing, to herself, her own heirs, executors, and assignees whomsoever." "Now," said Lord Mackenzie, "if the husband's *jus mariti* is to apply to these funds, every word of that conveyance is contradicted. There can be no liferent in him, no liferent, no fee in herself or her heirs or assignees, nor any fee in the children of the marriage. The fund goes evidently to the husband

[1] 16 R. 873.

[2] Feb. 9, 1841, 3 D. 504, 13 Scot. Jur. 233.

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exactly as if no such provision existed in the contract at all, in direct reversal of the conveyance of the contract. . . . It must vest in the husband and his heirs just as freely as his other property, and just as freely as if the contract respecting it had never been made at all. Now, for certain, that is quite contrary to the intention of the parties, and if it be allowed, the wife must be defrauded of that for which she stipulated, and in consideration of which she gave away herself and her fortune." This opinion appears to us to be just as directly applicable to the husband's claim under the statute as to his claim for *jus mariti*. The only difference is that in the one case the husband takes half of the wife's estate, and in the other he takes it all. But if a husband has agreed that his wife's estate shall belong to her own heirs and executors and assignees, it is just as contrary to his contract that he should carry off half of it for himself as that he should carry off the whole. Again, it is material that by a condition, which is undoubtedly pactional, a liferent of the whole settled estate is provided to the husband. For this is a condition which in the analogous case to which the statute refers us for the determination of questions of discharge or satisfaction, is held to exclude a widow's claim for *jus relictæ* from the moveable estate of her deceased husband. This is stated by Mr Erskine as a rule forthe construction of marriage-contracts.[1] It was so decided in *Riddel* v. *Dalton*,[2] and in several later cases; and the ground on which these decisions are rested, as it is stated by Lord Fraser, appears to us to be obvious and valid: For when a wife receives a liferent of the husband's whole estate "it necessarily follows from the acceptance of such a provision that she is not to carry off the fee of a part of it."[3] The same rule has been applied where a husband bequeathed a liferent to his wife by will, but without declaring that this provision was to be in full of her legal claims. The widow could not be deprived of her *jus relictæ* by will, but it was held that she was put to her election, because the will intended that she should not have her *jus relictæ* over and above the liferent—(*Bell* v. *Laurie*[4]). We do not, however, consider this as an absolute rule of law, to be followed irrespective of the other terms of the contract, but rather as a strong illustration of a general rule of construction, that a stipulation for a particular benefit excludes a claim for other benefits that are inconsistent with it, because repugnant claims cannot be enforced. This was held to be a consideration of weight in the case of *Buntine* v. *Buntine's Trustees*,[5] where the Lord President says: "The husband renounced his *jus mariti*, and (regarding the event which has happened of the wife's predecease without issue) agreed that the estate should be held for behoof of and at the absolute disposal of the wife and her heirs and assignees. On the other hand, the husband was to get, in the event which I have stated, the income of the estate paid over to him by the trustees during his life. These stipulations are clearly and directly reciprocal. In return for the husband giving up his *jus mariti* and engaging that the wife's estate shall be hers and her heirs', he gets a liferent of the whole." Accordingly it was held that the

[1] Erskine, iii. 3, 30.
[2] 1781, M. 6457.
[3] Fraser, Husband and Wife, ii. p. 1069.
[4] May 14, 1801, Hume, 486.
[5] 21 R. 714, at p. 719.

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husband's demand for half of the capital was contrary to the stipulations of the contract. We are of opinion that this was a right decision, and that it ought to be followed. The argument to the contrary seems to be that the stipulation that the balance of the trust-estate shall be paid to the wife's heirs and executors is a mere form of expression for providing that it shall belong absolutely to her, and that a provision to that effect, so far from importing anything inconsistent with the husband's claim, is really the basis of the claim, because the right given by the statute comes into operation only when the wife dies possessed of moveable estate. But that appears to be a repetition, in a new connection, of the old fallacy by which Lord Stair [1] tells us it was argued that the *jus mariti* could never be effectually renounced or excluded. We find no countenance for this fallacy in the cases of *Fotheringham* [2] and *Simons*.[3] If the settled estate remains the property of the settlor because there is no contract to dispose of it otherwise, it will be subject to all the claims which by the operation of law affect such property; but if one spouse has engaged by contract that the other shall have the absolute disposal of his or her estate in a certain event, it is irreconcilable with the contract, that the former should carry off half of the estate to the disappointment of the will of the other. Nor do we think it a valid answer to say that the legal right, which we hold to have been excluded by the marriage-contract, was not known to the law when the contract was made, both because antecedent as well as subsequent contracts are protected from the operation of the statute, and because the exclusion of the husband's claim is not effected by a renunciation of his legal rights in general terms, but by a positive stipulation in favour of the wife, which imports that no possible claim is to be brought forward by the husband to defeat the interest of her legatees. If a husband renounces his legal claims in general terms, he may very possibly be held to have intended only such claims as were known and competent to him under the existing law; but if he agrees by contract that a certain estate shall go to his wife's heirs and assignees, he has covenanted that he will not himself carry it away from them, on whatever ground he might otherwise have claimed it.

We desire to add that we should not be disposed to give either an affirmative or a negative answer to the first question of law, which we think is not properly framed for the determination of the rights in controversy. But the question is sufficiently raised in the statement, and we apprehend there will be no difficulty in pronouncing an interlocutor by which the husband's demand may be sustained or rejected.

Lord Kyllachy.—The question in this case is, Whether under the provisions of the Married Women's Property (Scotland) Act, 1881, the second party, who is the husband of a lady lately deceased, has right to claim as *jus relicti* one-half of the fee of his wife's moveable estate?

It is not apparently disputed that he has that right with respect to so much of the estate as is outside the scope of the marriage-contract. But the contention of the first parties is, that so far as regards the *settled funds* the claim is excluded by the terms of the marriage-contract. That contract was executed in 1877, prior to the passing of the Act, and having been so, it

[1] [See Stair, i. 4, 9.] [2] 16 R. 873. [3] 18 R. 135.

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does not of course contain any express exclusion of a right which at that time did not exist. But it provides the husband with a liferent of the whole settled funds, and it also provides in substance that on the wife's predecease without issue (the event which has happened) the whole estate —that is, the whole settled funds—shall be paid to the wife's "heirs, executors, and successors whomsoever."

What the first parties maintain is that in these circumstances the husband's claim is, on the just construction of the Statute of 1881, discharged or excluded.

It appears to me that for the present purpose the ruling enactment of the statute is that contained in the 6th section, which provides as follows:—"After the passing of this Act the husband of any woman who may die domiciled in Scotland shall take by operation of law the same share and interest in her moveable estate which is taken by a widow in her deceased husband's moveable estate according to the law and practice of Scotland, and subject always to the same rules of law in relation to the nature and amount of such share and interest, and the exclusion, discharge, or satisfaction thereof, as the case may be."

The question to be decided may therefore, I apprehend, be stated thus: Whether, according to the law and practice of Scotland, a wife's claim to *jus relictæ* would be excluded by a contract of marriage which was expressed, *mutatis mutandis*, in the same terms as the contract here, and which conferred on the wife the same rights with respect to her husband's estate as are conferred here on the husband with respect to the estate of the wife.

Now the law and practice of Scotland with regard to the discharge and exclusion of the wife's *jus relictæ* appear to me to be for the present purpose sufficiently settled by a series of authorities which, so far as I know, have not been questioned.

Erskine[1] puts the matter thus: "A provision by a husband to a widow of a liferent of all his goods and gear, moveable and immoveable, excludes the legal right which she would otherwise have had of the property of one-third or one-half of his moveables; for it is presumed that the liferent of the whole was granted in full satisfaction of her *jus relictæ*, and that the husband had no intention to give her both the property of that share to which she was entitled by law and the liferent of the rest."

As authority for this doctrine, Erskine cites the case of *Young*[2]—a case reported by Stair, and followed by a number of cases, which along with it form a section in the Dictionary under the head "How far conventional provisions imply a discharge of a wife's legal provisions." These cases range from the year 1664 to 1781, and they have been recognised as authoritative so lately as the case of *Leighton*,[3] and *Edward* v. *Cheyne*.[4]

If, therefore, the husband here had taken under the marriage-contract a liferent of the wife's *whole estate*, it could hardly, I think, be doubted that, applying the analogy which the statute prescribes, he would be thereby excluded from any claim on the head of *jus relicti*. There might under

[1] Ersk. iii. 3, 30.
[2] 1664, M. 6447.
[3] Leighton v. Russell, Dec. 1, 1852, 15 D. 126, 25 Scot. Jur. 63.
[4] March 12, 1888, 15 R. (H. L.) 33.

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some of the earlier cases have been a question as to whether the liferent *excluded* the legal right, or only put the husband to his *election;* but on principle it would seem to be clear that, in the case of a contract as distinguished from a testamentary settlement, the acceptance under the contract of a conventional liferent, if it excludes the legal right, excludes it absolutely. And this, I think, is recognised, and indeed affirmed, in the case of *Riddel* v. *Dalton*,[1] and also, I think, in the recent case of *Edward* v. *Cheyne*.[2]

I take it, therefore, that the only question really open is, Whether it is essential to the application of the rule that the liferent shall be universal in the full sense of the term, or whether it is enough that it covers the whole estate to which the question applies. And it appears to me, both upon principle and upon the true reading of the cases, that the latter is the correct view. The foundation of the rule as a canon of construction seems, if I rightly apprehend it, to be just this, that when a liferent of a subject is given and accepted, that, as a matter of reasonable construction, means a liferent *only*—a liferent as opposed to a fee; in other words, that, as regards the subject liferented, a right of fee is by implication excluded.

If the above view is well founded, it seems sufficient for the decision of the present case; and to be so without reference to the cases of *Fotheringham*,[3] *Simons' Trustee*,[4] and *Buntine's Trustees*,[5] the two former of which are said to be in conflict with the latter. In the case of *Fotheringham*[3] there was no provision for the husband at all, and therefore the present question could not arise. In the case of *Simons' Trustee*,[4] again, there was a liferent, and a liferent of the whole settled funds; but the husband not claiming the liferent, it appears to have been common ground that the liferent was out of the case. And although there is in one of the judgments a sentence which appears to treat the existence of the liferent as immaterial, I am disposed to think that anything said on that subject had reference not to the effect of the acceptance of a liferent as implying discharge or exclusion of the legal right, but to a different matter—viz., the recognised doctrine that a liferent is merely a burden on the fee, and is therefore quite consistent with a right of property in the fiar.

I therefore do not consider that, in the view which I have expressed, it is at all necessary to impugn either the decisions or the grounds of judgment in the cases either of *Fotheringham*[3] or *Simons' Trustee;*[4] and with respect to the other case—that of *Buntine's Trustees*[5]—all that need be said is that the Court there decided not in favour of, but against, the husband, and that although the decision went, it appears, upon another ground, nothing was said or indicated adverse to the ground of judgment which is now proposed.

Perhaps, however, I should add, as the question has been raised and argued, that but for the liferent here provided to the husband—provided to him, and accepted by him, in the contract of marriage—I should have held this case to be ruled by the decision in the case of *Simons' Trustee;*[4] and that if and so far as the case of *Buntine's Trustees*[5] is inconsistent with

[1] 1781, M. 6457. [2] 15 R. (H. L.) 33. [3] 16 R. 873.
[4] 18 R. 135. [5] 21 R. 714.

that case or the case of *Fotheringham*,[1] I should not be prepared to follow it. Every contract must of course be construed as a whole, and slight differences of scheme, or even of expression, may sometimes be important. But I do consider it to be sound general doctrine (1) that where a wife, being owner of her estate, puts it by marriage-contract under trust for certain purposes, the estate is still hers subject only to those purposes; and (2) that no words, which, when fairly read, are expressive simply of that result, can *per se* exclude rights or claims arising against the wife's estate—rights or claims not inconsistent with her right of property, and arising either by law or contract, and either to husband or children or other persons.

LORD KINCAIRNEY.—The question is as to the effect of a marriage-contract on a husband's *jus relicti*. A similar question has been decided in three previous cases—*Fotheringham*,[1] *Simons*,[2] and *Buntine*[3]; the claim for *jus relicti* being sustained in *Fotheringham*[1] and *Simons*,[2] but rejected in *Buntine*.[3] By the marriage-contract in this case, dated in 1877, Mrs Murray conveyed to trustees a sum of £450 for payment of the interest to her, and after her death to her husband, for division thereafter of the capital among the children, and failing issue, for payment "to her heirs and executors whomsoever." The *jus mariti* is not expressly excluded, although, no doubt, it is by implication.

Mrs Murray died in 1899 without issue, leaving, besides the £450, a sum of £190 unaffected by the marriage-contract. She left a settlement by which she bequeathes, by one purpose, the marriage-contract funds, and by another purpose, the residue of her estate, being I suppose, the £190.

Her husbands claims one-half of his wife's estate, including the £450, as *jus relicti*. This claim, if allowed, would encroach on the bequest by Mrs Murray of the £450, and is resisted by the legatees; and the chief question now in issue may be conveniently expressed thus, Are the legatees entitled to be paid the £450 in full without abatement on account of the *jus relicti*?

The question depends, of course, on sections 6 and 8 of the Married Women's Property Act, 1881. The effect of section 6 is to confer on a widower a *jus relicti* similar in all respects to a widow's *jus relictæ*. But the 8th section in effect provides that the *jus relicti* should not affect a marriage-contract. But it does not provide that there shall be no *jus relicti* when there is a marriage-contract.

This case differs from the previous cases in this important particular, that Mrs Murray has bequeathed the whole marriage-contract funds; and I think the case may be decided on that specialty, without conflict with any of these cases, and without the aid of doubtful legal presumptions.

Assuming Mr Murray's right to *jus relicti* under section 6, the question under section 8 is, whether that claim, if allowed, would affect any right depending on the marriage-contract. It might affect the marriage-contract in more ways than one; but it is quite certain that it would affect Mrs Murray's settlement, and reduce the bequest of the marriage-contract funds; and, if the settlement depends on the marriage-contract, that would be affecting

[1] 16 R. 873. [2] 18 R. 135. [3] 21 R. 714.

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the marriage-contract; and if that were so, the claim for *jus relicti* would necessarily be disallowed. That the settlement does depend on the marriage-contract appears from this, that, if the marriage-contract were for any reason reduced, the settlement would certainly fall along with it, because but for the contract Mrs Murray would have had nothing to bequeath. All her estate would have passed to her husband. The husband and wife in effect contracted that, notwithstanding the marriage, she should have the power of bequeathing her estate. She has exercised that power to the full, and there seems no reason why her legatees should not have the benefit of the contract and the settlement. If they should not receive their full legacies, that would be because the marriage-contract was denied full effect on account of the claim of *jus relicti*, which would be contrary to section 8. I am therefore of opinion that this question must be answered for the legatees and against the husband.

I do not doubt that the same result might be reached otherwise. It might be shewn that the claim of *jus relicti* is inconsistent with the marriage-contract in other respects, but there is no doubt about its inconsistency with the claim of the legatees; and this ground of judgment has the advantage, that it avoids all conflict with the previous cases.

The opinion has been expressed that the case may be decided on the 6th section without aid from the 8th, because of the provision that the right taken by a husband shall be subject to the same rules of law in relation to its nature and amount, and to its exclusion, discharge, or satisfaction, as a widow's *jus relictæ*. And it is said that because a widow's *jus relictæ* would be excluded, according to the authorities, by a provision in her favour in a marriage-contract of the whole liferent of a husband's estate, or of a definite part of it, the claim for *jus relicti* in this case must be excluded by the provision in favour of the husband of the whole liferent of the settled fund. I am impressed with this view, and express no dissent from it, although, if it involves a presumption of law that the husband intended to renounce his *jus relicti*, I am not wholly without doubt. I hesitate to assume that a man intended to renounce a right which he never had and never heard of. If it be said that the two claims for *jus relicti* and liferent are repugnant, I feel a doubt whether it would not have been possible to satisfy both of the husband's claims—that for *jus relicti* and that for liferent—without interfering with any right dependent on the marriage-contract, if Mrs Murray had not exercised her power of disposal.

Further, this view involves dissent from the opinion of the Lord President in the case of *Simons' Trustee*,[1] which I am not, as at present advised, prepared to disregard.

That being my view of the present case, I should not, had I been deciding it in the Outer-House, have been embarrassed by the previous cases, nor would I have found it necessary to attempt to reconcile them. But the terms of the remit to the whole Court seem to call for a reference to these decisions; and I think it important to begin with *Fotheringham*.[2] In that case nothing was given to the husband by the marriage-contract, the sole

[1] 18 R. 135. [2] 16 R. 873.

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object of which seems to have been to secure the fortune of the wife to herself, notwithstanding the marriage. The trust-conveyance was for behoof of the wife herself, whom failing, then for behoof "of her own representatives or other parties that may be hereafter named by her." The surviving husband's claim for *jus relicti* was sustained. This decision has not been challenged, and it appears to me to have been right; but it involves the decision that a claim for *jus relicti* is not affected by a conveyance in a marriage-contract of a wife's estate to trustees, nor by a destination of it to her representatives—a destination which seems to have been held to be wholly inoperative, as expressing only the rule of intestate succession. But I suggest that had Mrs Fotheringham exercised her power of nominating her successors, the judgment would have been the other way.

Simons'[1] case was more complicated. In it also there was a similar direction to the trustees (failing the primary purposes of the trust) to pay the estate to any person whom the wife might appoint, and failing such appointment, to her own heirs whomsoever. Mrs Simons did not exercise the power of appointment; and, in this case also, the claim for *jus relicti* was sustained. That case differed from *Fotheringham*[2] in this, that the contract provided a liferent of the whole estate to the husband, and he was entitled to claim that liferent at the date of his wife's death, when his right to claim *jus relicti* arose. But the provision of liferent was subject to forfeiture on a second marriage, and was, in fact, forfeited shortly after, and Mr Simons took no part of the liferent. But that does not seem to have been the ground of the opinion of the Lord President, because he expressly says, "I think Mr Simons would have been entitled to enjoy the liferent and to have made his present claim."[3] I do not know that there is any case in which a provision of liferent to a wife, subject to defeasance on a second marriage, has been held to exclude a claim of *jus relictæ*. This decision seems to involve the opinion that the destination in the marriage-contract to the wife was not contractual—agreeing in that with the case of *Fotheringham*[2]—and that the wife's heirs would have taken as in intestacy. Whether that was a right view or not would depend on the precise words of the contract. The case was certainly difficult, but it does not seem to me to affect any general question of law, and I am not prepared to express the opinion that the decision was erroneous. In this case also I suggest that the judgment might have been different had Mrs Simons exercised her power of disposal.

In *Buntine's*[4] case the judgment proceeded on the 8th section of the Act. The trustees were directed, on the failure of the primary purposes of the trust, to hold the wife's estate for her behoof, and at the absolute disposal of her "or her heirs or assignees." Here the claim for *jus relicti* was rejected. Possibly the judgment might have been rested on the provision of the liferent of the wife's estate to her husband. But it was not. I think the judgment involved that the ultimate destination was contractual, and I observe that Lord Adam expresses the opinion that Mrs Buntine's representatives would not take her estate *ab intestato*, but under the marriage-contract. I think that this was a question which depended on

[1] 18 R. 135. [2] 16 R. 873. [3] 18 R. at p. 137. [4] 21 R. 714.

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the precise words of the marriage-contract. The Court had before them the case of *Simons* [1] and also the case of *Fotheringham*,[2] and they express no disapproval of either. They found no inconsistency between sustaining the claim for *jus relicti* in *Simons'* [1] case and rejecting it in *Buntine's*.[3] In either case the judgment was upon the terms of the deeds, and did not determine any general question of law. The cases were certainly very like each other, and I am not sure that I could specify the exact difference. But both cases were delicate, and I am not prepared to say that there was not a distinction between the two deeds which may have justified the difference in result.

I understand that the only question on which the opinion of the whole Court is desired is, whether the husband is entitled to take from the legatees the one-half of the settled funds; the question, What is the just amount of the *jus relicti*? has not been argued.

LORD STORMONTH-DARLING.—I cannot distinguish the present case in any essential particular from *Buntine* v. *Buntine's Trustees*,[3] and, as I humbly think that the decision in that case was right, I am in favour of following it here.

In both cases there was an antenuptial marriage-contract dated before the passing of the Act of 1881. By both contracts the property of the wife was put under trust; by both the husband, in the event of his survivance, was to receive an alimentary liferent of the whole trust funds; by both the fee was to go to children, if any; and by both, failing issue, the trustees were to hold the fee for the heirs of the wife, whether by will or at law. There being no issue in either case, the claim of the surviving husband in this case is exactly the same as in the other, viz., to receive immediate payment of one-half of the capital of the wife's estate in name of *jus relicti*, and also to draw the liferent of the balance of the marriage-contract funds remaining in the hands of the trustees.

There are minor differences between the two cases which seem to me immaterial. In *Buntine's*[3] case the funds put in trust were the whole estate of the wife except legacies under £500 and revenue arising from estate separately settled on her; the *jus mariti* was expressly renounced over her whole estate; and she left no will. In this case the funds settled by the wife consisted of a definite sum of £450, forming (as it happened) the bulk of her property; the exclusion of the *jus mariti* (except as regards revenue) is to be inferred from the creation of the trust, which is just as effectual a mode of exclusion as express renunciation; and the wife has left a will disposing of the whole trust-funds. The *ratio decidendi* in *Buntine's*[3] case was that it would be inconsistent with the provisions of the marriage-contract to allow the husband to retain the liferent for which he had stipulated, and to carry off half of the capital besides. In following that case, therefore, we shall not be deciding anything contrary to such cases as *Fotheringham*,[2] where the husband got nothing under the contract at all.

It seems to me that the judgment in *Buntine's*[3] case may be justified by the terms of section 6 of the Act of 1881—the very section which creates *jus relicti*—as well as by section 8, on which the learned Judges mainly

[1] 18 R. 135. [2] 16 R. 873. [3] 21 R. 714.

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proceeded. For section 6 provides that *jus relicti* shall be "subject always to the same rules of law in relation to the nature and amount of such share and interest, and the exclusion, discharge, or satisfaction thereof," as in the case of *jus relictæ*. Now, I hold it settled by a train of decisions, of which *Young* v. *Buchanan*,[1] *Holmes* v. *Marshall*,[2] *Tod* v. *Wemyss*,[3] and *Riddel* v. *Dalton*[4] are samples, that *jus relictæ* is excluded by a marriage-contract under which the wife receives a total liferent of the husband's settled property. That is an exception to the general rule that discharge of the *jus relictæ* must be express, and it is founded on the principle that there may be implied discharge by a deed to which the wife is a party. It is true that in some of these cases a majority of the Judges held that the wife might have her election between the two rights, which cannot logically hold as between two rights, but only between a right and a gift. But the sounder opinion that there could be no election was never without its supporters; and at all events this addition to the finding cannot detract from the finding itself.

In later times, the case of *Edward* v. *Cheyne*[5] in the House of Lords is an illustration of the principle that discharge of the *jus relictæ* may be inferred from the terms of a deed to which the wife is a party, and also that, in such a case, there is no room for election. The deed was a testamentary disposition by the husband, and, apart from her own consent, the wife would have been put to her election between the liferent thereby provided to her and her *jus relictæ*. But she signed the deed in token of her consent to certain legacies made payable on the expiration of her liferent, and this was held to imply acceptance of the liferent as in full of her legal rights.

But in truth it is of very little consequence whether the implied exclusion of the *jus relicti* is laid on section 6 or section 8, for in either case the underlying principle is that a husband who has contracted for a certain benefit from his intended wife's estate cannot afterwards be allowed to make a claim which is inconsistent with his contract. Again I say that, if he contracts for no benefit, and merely renounces his *jus mariti*, it may be that the subsequent claim is not inconsistent with his contract. Anyhow, that is not the present case, and I deprecate our going beyond it. But I find it impossible to hold that the claim made here is consistent with the contract. From the necessity of the case, there could be no express discharge of a right which at the date of the contract was unknown. But the amount of the settled property was known; and the husband in effect stipulated that he should not touch a farthing of the capital, on condition that he received the whole of the income, for he could not both be proprietor of part and liferenter of the whole. It is suggested that the effect of the contract was only to make the wife's property her own, and thereby to raise the very condition of things to which *jus relicti* attaches. But *jus relicti* does not attach in all cases where there is separate estate. It never arises at all where the husband has contracted himself out of it; and to say that he can do so only by express discharge is to say that it can never be held to be "excluded" in the case of any husband marrying before the date of the Act.

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[1] 1664, M. 6447. [2] 1667, M. 6448. [3] 1770, M. 6451.
[4] 1781, M. 6457. [5] 15 R. (H. L.) 33.

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It seems to me that the contract which this husband made must be construed according to his intention at the time, and that it meant a great deal more than a mere consent that the wife's property should be separate estate in her person. By his acceptance of a total liferent he agreed that the capital should be left under trust till his death, and that it should then be divided either as his wife might direct by will or among her legal representatives. If he had not so agreed, it is possible that the marriage might never have taken place. He had, of course, his chance of becoming a beneficiary under any will which his wife might make, but it is, in my opinion, contrary to the contract that he should plead any right not derived from her, either in defeat of her will, or to the prejudice of her legal representatives, of whom he is not one.

If these views be sound they are sufficient for the decision of the case. I therefore think it unnecessary to deal with the case of *Simons' Trustee*,[1] which is specially referred to in the interlocutor of the consulting Division.

I doubt whether the questions of law appended to the special case are framed so as to raise the real question at issue, but I am for answering them in such a way as to declare that the second party has no right to claim *jus relicti* out of the marriage-contract funds.

Lord Low.—I concur with Lord Kyllachy, and shall only add a few sentences in regard to the case of *Buntine*,[2] in which I was Lord Ordinary.

The ground upon which the First Division decided that case was not argued before me, it being conceded that, so far as I was concerned, it must be regarded as settled by the judgment in *Simons' Trustee*[1] that the claim of the husband was not excluded by the fact that by the marriage-contract the trustees were directed to hold the estate of the wife—failing children and subject to the liferent given to the husband—for her behoof and at the absolute disposal of her and her heirs and assignees.

The only question, therefore, which I was asked to decide was, whether the husband could claim both the right conferred by the Act and the liferent of his wife's estate which had been given to him by the marriage-contract. I held that he could do so, on the ground that there was no room for the doctrine of implied intention, upon which is based the rule that a widow cannot claim both *jus relictæ* and a liferent of her husband's whole estate conferred upon her by marriage-contract. If the question of the husband's right fell to be determined upon the same principles as those which have been applied to the case of a wife, I still think that that view would be sound. Upon reconsidering the 6th section of the statute, however, I have come to be of opinion that the true meaning of that section is, that where a rule in regard to the exclusion, discharge, or satisfaction of *jus relictæ* has been established by the law and practice of Scotland, the same rule shall be held to be applicable to the case of a husband. I agree with Lord Kyllachy, that it must be regarded as the established rule that a widow cannot claim *jus relictæ* and also a liferent of her husband's estate. The application of that rule would have wholly excluded the claim of the husband in *Buntine's* case, and would exclude the claim of the husband in this case so far as the settled estate is concerned.

[1] 18 R. 135. [2] 21 R. 714.

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One consideration which has weighed strongly with me in coming to the conclusion that it is the rule which has been established in regard to a widow's claim, and not the principle upon which that rule is founded, which is to be applied to the claim of a husband, is, that if the principle and not the rule was applied, the result might depend upon whether the marriage was before or after the date of the Act. Suppose that there was a marriage-contract in the terms of that in *Buntine's*[1] case made in regard to the marriage prior to the Act, and a contract in precisely the same terms in regard to a marriage after the Act. In the former case there would be no room for the doctrine of implied intention in regard to a right which had not come into existence, and therefore the husband would not be barred from claiming both his statutory right and the conventional liferent; whereas in the latter case it would be presumed that the parties had contracted in view of the husband's right under the statute, and that therefore, in consideration of the liferent of his wife's whole estate, the intention was that he should forego his statutory right to a share of the fee of the estate. I do not think that the statute contemplated that there should be any such distinction between marriages before and after the Act.

LORD PEARSON.—I concur in the opinion of Lord Kyllachy.

At advising,—

LORD JUSTICE-CLERK.—When this case was before this Division it appeared to the Court that two previous decisions pronounced in the case of *Buntine's Trustees*,[1] and in the case of *Simons' Trustee*,[2] in which similar questions were raised to those in this case, were in conflict, and that it was advisable that this case should be considered by the whole Court. The direct point in the case is, whether a husband who under antenuptial contract receives as a widower the liferent of a specific sum brought into trust by his deceased wife, can also claim a right of *jus relicti* in respect of the provisions of the Act of 1881. The marriage and the relative marriage-contract were both of date prior to the passing of that Act. That Act was dealt with in both the cases I have referred to. I think that it cannot be doubted that by that Act the same legal rights were conferred upon the husband in the event of his survivance as had been the rights of a wife surviving her husband under the previously existing law. The question truly therefore is, whether such a legal right is enforceable in a case where by antenuptial marriage-contract the wife gives to her husband contractually a right to a liferent of estate belonging to her. Can he also have any right of fee in the subject of the mutual contract? That this question has in the law of Scotland in the case of a wife claiming *jus relictæ* been answered in the negative is undoubted. If a husband gave to his widow a liferent of his estate by provision in their marriage-contract, her right of *jus relictæ* ceased, it being held that the gift of a liferent was in full satisfaction, and that there was no ground for holding that she could claim the property of what would have fallen to her by law, and the liferent of the rest of the estate under the provision made by her spouse.

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[1] 21 R. 714. [2] 18 R. 135.

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There is in the case no question of election as between legal and conventional provisions, for in this case the gift and acceptance of the liferent were matter of contract which would exclude legal rights in the case of a widow. But by the Act in question (section 6) the *jus relicti* conferred upon the husband is subject to the rules of law applicable to the *jus relictæ* of a wife, and by section 8 the operation of contract between the spouses is saved. I therefore hold that as it is well-established that the contractual liferent of the husband's estate to a widow excludes a widow's claim at law, the same must apply to the case of a widower under the Act conferring the corresponding right to that of *jus relictæ* upon him. The sound view seems to be that the husband no more than the wife can make a claim upon a fund which is not consistent with what he has voluntarily contracted by mutual deed in regard to that fund. And that the claim in this case is not in accord with his contract seems to me to be clear. He agreed that he should be a liferenter of the sum in question, and thereby excluded himself from maintaining that he had a right to any part of the fee. The contract which he made must be read as at the time at which he made it, and as constituting an agreement from which he could not afterwards resile. The funds it was agreed should be trust funds till his death should set them free for the fiars who might be named by his wife, or succeed as representing her.

The case seems to me to be the same as that which occurred in *Buntine's Trustees*,[1] and to be ruled by it, and the only difficulty is created by the case of *Simons' Trustee*.[2] Some of the consulted Judges have indicated a view under which they hold that this case can be decided in accordance with *Buntine's*[1] case without derogating from the authority of the case of *Simons' Trustee*.[2] I confess that I am unable to see how these two cases can stand together. No doubt there was this difference upon the facts, that the husband had by a second marriage forfeited under the contract his right to the liferent. But the opinion of the Lord President seems to go beyond this ground, and to indicate that the husband might have claimed his *jus relicti* and also enjoyed his liferent. But whether the two cases can be reconciled or not, I agree with the consulted Judges that the decision in *Buntine's*[1] case was right, and that this case should be decided to a similar effect.

The questions as put in the case are not satisfactory, but the substantial deliverance should I think be, that the second party has no claim for *jus relicti* on the marriage-contract fund of £450 placed under trust by his wife.

LORD YOUNG.—I concur. I think the question in this case is a very clear one, and that it is ruled by the decision in *Buntine's Trustees*,[1] which was in my opinion rightly decided. I think it also right to state that in my opinion the case of *Simons' Trustee*[2] was not rightly decided.

LORD TRAYNER.—When this case was debated originally before this Division of the Court, I was of opinion that the cases of *Simons' Trustee*[2] and *Buntine's Trustees*,[1] upon which the parties respectively founded, were

[1] 21 R. 714. [2] 18 R. 135.

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not reconcilable. I remain of that opinion. I agree with Lord Stormonth-Darling in thinking that the case of *Buntine's Trustees*[1] was well decided, and ought here to be followed.

The ground on which I am prepared to repel the contention of the second party to this case can be stated very briefly. He claims a certain part of his late wife's estate in respect of the provisions in section 6 of the Married Women's Property Act, 1881. But section 8 of the same Act excludes the claim so made if it affects any contract made between spouses before or after the passing of the Act. Here the second party and his late wife entered into an antenuptial contract, by which it was provided that with regard to a certain fund (the fund of which the second party now claims one-half) the second party should, if he survived his wife, enjoy the liferent, while the fee, in the event of there being no issue of the marriage (as is the case) should go to the "heirs, executors, and successors whomsoever" of the wife. I regard the provision of the liferent to the second party as the only right conferred by paction on him, while he agreed in respect of the liferent so conferred to make no claim to the fee, which should go as his wife directed. To give the second party any part of the fee would affect the contract materially. It would upset the contract altogether so far as the fee of the fund in question is concerned. I am therefore of opinion that the second party is by his own contract excluded from any participation in the fee of that fund which he specially agreed should go to others.

LORD MONCREIFF.—In this case the second party, the surviving spouse, claims *jus relicti* out of the funds settled by his deceased wife in their antenuptial marriage-contract (dated 23d December 1871), and this he does in respect of the 6th section of the Married Women's Property (Scotland) Act, 1881.

I agree in the result of the opinions of the consulted Judges, though not in all the grounds on which they proceed.

In particular, I am still unable to find any solid distinction between the circumstances in the cases of *Simons' Trustee*[2] and *Buntine*,[1] and having to choose between the two decisions, I prefer the latter, and entirely agree in Lord President Robertson's opinion.

The question is simply this: The Act of 1881 confers on a wife certain rights in her estate which she did not previously possess, and to a corresponding extent curtails the husband's rights at common law. In compensation it confers upon a husband who survived his wife the right of *jus relicti* which he did not previously possess, and I assume that this applies to marriages contracted before the Act. But none of these statutory rights are given absolutely. They are all qualified by the 8th section of the Act, which provides—"This Act shall not affect any contracts made or to be made between married persons before or during marriage, or the law relating to such contracts." The only question, therefore, which we have to decide is, whether the application to this case of the 6th section of this Act, which confers on a surviving husband the right of *jus relicti*, would or would not affect, in the sense of interfering with, the provisions of the

[1] 21 R. 714. [2] 18 R. 135.

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I confess that upon that question I do not entertain any doubt. In my opinion all the provisions of the contract were pactional and reciprocal. It was intended not merely to operate *stante matrimonio*, but to regulate the disposal of the fund provided by Mrs Murray after her death should she predecease her husband. The meaning of the contract must be judged of as at the date of its execution, which was before the passing of the Act of 1881. Now, the good faith of the contract and its legal meaning and effect when it was entered into were, that instead of this fund passing by the assignation of marriage to the husband, he should be content to receive an alimentary liferent of it in the event of his surviving his wife; and that subject to his liferent the funds on his death (if there were no children of the marriage) should be treated as his wife's own property, and pass to her heirs, executors, or successors.

The Act of 1881 might have been so expressed as, notwithstanding such a contract, to give a surviving husband right to one-half of an estate in that position. But the Act specially guards against that by declaring that its provisions shall not affect such a contract or the law relating to such a contract.

It is said that the husband did not discharge his right to *jus relicti*, which indeed did not exist at the date of the contract. But, as I have said, the Act of 1881 does not give an absolute right of *jus relicti* to the surviving husband any more than it gives an absolute right of separate estate to the wife. Both statutory rights are qualified by the 8th section. If there had been no contract the wife's whole moveable estate, and not merely a contingent right to one-half of it, after her death would have passed to the husband. That was what he renounced by the contract, and on the faith of that renunciation the marriage took place.

Again, it is said that the destination to the wife's heirs, executors, and successors is testamentary. *Quoad* the wife perhaps, but not *quoad* the husband; the whole structure of the deed shews the contrary. The true meaning is, that the funds are to go to the wife's successors, voluntary or legal; and the words certainly cover disposal by *mortis causa* deed. The wife's understanding of her rights is shewn by the fact that she expressly disposed of them by will.

It might perhaps be sufficient for the decision of this case to hold that the husband's claim is excluded by his having agreed to accept a total liferent of his wife's money under the contract, on the analogy of the law relating to *jus relictæ*. That of itself is probably sufficient; but the case admits of being, and should be, decided on a broader ground.

I am therefore of opinion that the second party has right to no more than a life interest in the funds settled by his deceased wife in their marriage-contract.

THE COURT pronounced this interlocutor:—"In conformity with the opinions of the majority of the whole Judges of the Court, answer the first question of law therein stated by finding and declaring that the legal rights of the second party in the marriage-contract funds in question were restricted to a

liferent of said funds, and did not include any part of the fee thereof; and find it unnecessary to answer the second question therein stated: Find and declare accordingly, and decern."

FRANK M. H. YOUNG, S.S.C.—CLARK & MACDONALD, S.S.C.—Agents.

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Dundee and Arbroath Joint Railway Co. v. Carlin.

DUNDEE AND ARBROATH JOINT RAILWAY COMPANY, Appellants.—*Guthrie, K.C.—Glegg.*

MRS BRIDGET CARLIN, Respondent.—*Salvesen, K.C.—Gunn.*

Master and Servant—Workmen's Compensation Act, 1897 (60 *and* 61 *Vict. cap.* 37), *sec.* 4—"*Ancillary or incidental*" *to business of undertaker—Railway—Signal Cabin.*—A workman, when engaged in the employment of a builder in the erection of a stone and lime wall in a railway cutting, was run down and killed by a passing train. The wall, which the builder had contracted to build for the railway company, was intended to prevent earth on the bank of the cutting from falling down and obstructing the access to a signal-cabin belonging to the railway company. The workman's widow claimed compensation under the Workmen's Compensation Act, 1897, from the railway company, as the undertakers within the meaning of the Act.

Held (*diss.* Lord Young) that the work on which the deceased was engaged was not part of the business of the railway company, but was merely ancillary or incidental thereto, and that the railway company was not liable.

Burns v. *North British Railway Co.*, 2 F. 629, *not followed.*

Pearce v. *London and South-Western Railway Co.*, L. R. [1900], 2 Q. B. 100, *approved.*

2D DIVISION. Sheriff of Forfarshire.

MRS BRIDGET CARLIN, widow of James Carlin, labourer, Dundee, having claimed compensation under the Workmen's Compensation Act, 1897, from the Dundee and Arbroath Joint Railway Company, on account of the death of her husband, the claim was referred to the arbitration of the Sheriff-substitute at Dundee (Campbell Smith), who awarded compensation, and, at the request of the railway company, stated a case for appeal.

The case set forth:—"On the calling of the case on 24th October 1900, authority was granted by the Sheriff-substitute to serve a copy of the petition on Messrs D. P. How & Son, builders and joiners, Dundee, contractors for the construction of the station buildings and premises of the appellants at their new station at Stannergate, Dundee, and the said Robert Sheach junior, subcontractor under the said D. P. How & Son, for the mason work of the said buildings and premises, along with a notice of claim for indemnity. These parties did not enter appearance.

"Proof was led before the Sheriff-substitute on 5th December 1900, and by interlocutor of 18th January 1901 he found that on 22d June 1900, at the time of receiving his fatal injuries, the deceased James Carlin was working as a mason's labourer in the employment of Robert Sheach, builder, who had previously built the walls of the new Stannergate station, between Broughty Ferry and Dundee, and who was at the time employed by the defenders' company to build a stone and lime screen for the way to and around a signal-cabin which the defenders' company had built for themselves on the sloping side of the railway cutting, and furnished with appropriate signalling apparatus and connection with the rails and points, the purpose of said screen being to prevent the soil or 'muck' from the higher ground from blocking up or impeding the access to said signal-cabin; that

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on the night previous to the 22d there had been a fall of earth or other rubbish into this space which, when finished, the screen was intended to keep clean and unimpeded; that about 7 A.M. the deceased and his neighbour, who were carrying stones on a handbarrow, were directed by their foreman to remove the fallen earth or dust aforesaid; that they set the barrow on a tub by the side of the line, and were walking towards the said signal-cabin outside the line but close to the outside rail, when the deceased was struck in the back by the engine of the 7 o'clock passenger train from Dundee, carried a few feet by it and dropped by the side of the line a few seconds before he expired; that the work which the deceased was to do was necessary to the said signal-box being and continuing part of the working apparatus of a railway over which trains were running, and which involved dangers not distinguishable from the ordinary dangers of active railway service; that the full wage of the deceased was 23s. 4½d. a week, but that his average wage was 17s.; that the pursuer, as his widow, who was dependent upon him, was entitled to compensation to the extent of £150."

The question of law was,—"Whether the building contract between the appellants and Messrs D. P. How & Son, and the subcontract between that firm and Robert Sheach junior, were part of or process in the trade or business carried on by the appellants, or were merely ancillary or incidental thereto?" *

The undernoted authorities were referred to at the hearing.[1]

At advising,—

LORD JUSTICE-CLERK.—The deceased, for whose death compensation is claimed, was working at a stone and lime screen which a contractor, his employer, was putting up for a way to and around a signal-cabin which the defenders had built for the service of their line, the purpose being to prevent soil coming down a bank and blocking the access to the cabin. The death was caused by a passing train when the deceased was walking towards the cabin in the course of his master's work.

The question in the case is, whether the work which was being done was ancillary and incidental to the appellants' undertaking, and thus does not involve liability on their part to the workmen engaged under the Workmen's Compensation Act. I am of opinion that that question must be answered in the affirmative.

It has been held that a workman working for a contractor at a railway station could not obtain compensation from the railway company for an injury suffered while engaged on that work. That was decided in the case of *Pearce* v. *The London and South-Western Railway*.[2] I cannot distinguish

* Workmen's Compensation Act, 1897 (60 and 61 Vict. cap. 37), sec. 4.

[1] *By the Appellants.*—Pearce v. London and South-Western Railway Co., L. R. [1900], 2 Q. B. 100; Brennan v. Dublin United Tramways Co., Ir. R. [1901], 2 Q. B. 241; Fullick v. Evans & Co., 1901, 17 Times Law. Rep. 346. *By the Respondent.*—M'Gregor v. Dansken, Feb. 3, 1899, 1 F. 536; Devine v. Caledonian Railway Co., July 11, 1899, 1 F. 1105; Bee v. Ovens & Sons, Jan. 25, 1900, 2 F. 439; Burns v. North British Railway Co., Feb. 20, 1900, 2 F. 629; Cass v. Butler, L. R. [1900], 1 Q. B. 777; Cooper v. Davenport, 1900, 16 Times Law Rep. 266; Regulation of Railways Act, 1889 (52 and 53 Vict. cap. 57), sec. 1.

[2] L. R. [1900], 2 Q. B. 100.

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that case from the present. The ground being that the building of a station was ancillary or incidental to the business of the company, I think that the same rule must apply to a contract for building a retaining or sheltering wall to a signal-box. I am further confirmed in this view by the decision in the case of *Fullick* v. *Evans & Company*.[1] In that case the work which was being done was the building by a contractor of a signal-box for use by a railway company. In that case the contractor who undertook to build the signal-box was dealt with as the undertaker under the Act, and held liable in compensation for the accident. It does not appear to have occurred to anyone in that case that the railway company were the undertakers, and as such liable. The dispute was whether there was any liability, it being maintained that the work was not an engineering work under the definition clause, and that being decided in the affirmative, the contractor was found liable as the undertaker.

The case of *Burns*,[2] decided in the First Division, was founded on in support of the Sheriff's deliverance. In that case the work which was being done was the setting of signal wires and other signal appliances in connection with a signal-box. This work was being done by a contractor, but the Court held that it was not ancillary and incidental to the business of the railway company, and found the company liable. I am not clear that, if the work was preliminary to the line being put in working operation, the decision in that case was sound. But whether it is to be taken as sound or not, I think that this case is truly in the same category as that of *Pearce*,[3] and not in that of *Burns*.[2] The work being done on a station under a contractor does not involve liability against the company owning the station as undertakers. Neither does work done in a similar manner on an access to a signal-cabin.

I am of opinion that the question should be answered in affirmation of the second alternative.

LORD YOUNG.—The question here would have been easier, and the answer which I propose to give more satisfactory to myself, but for the decisions; but having regard to the decisions, and considering what weight we ought to give to them, I am of opinion that the Sheriff has taken the right view. I cannot regard a signal-cabin upon a railway, or any work regarding the erection of a signal-cabin, or relating to its existence, and the place where it may be put with safety to those who are using the railway—whether servants of the railway company or customers of the railway company—I cannot regard that as other than part of the business of a railway company.

A railway company is a business company. Railway companies are constituted by Act of Parliament, and special powers are given to them in the public interest, the privileges with the corresponding obligations being all in the railway statutes. Now, what is the purpose of this business company created by the statute? It is to make a railway. The powers are given to them for that purpose—to make a railway for the convenience of the public, and the public are by the statutes entitled to use that convenience which is prepared by the statutory company for them. They are entitled to use that convenience, just as people in the olden time were entitled to use the turn-

[1] 17 Times Law Rep. 346.
[2] 2 F. 629.
[3] L. R. [1900], 2 Q. B. 100.

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pike-roads, on the condition of paying their tolls to the public authority to whom is committed the duty of constructing and maintaining the road or line; anyone is entitled to put his own locomotives, carriages, or trucks upon the line, and to run them, paying the tolls to the railway company which the company is authorised by statute to levy. To provide a railway, to open it to the public, to be used by the public on these terms, and when made, to maintain it so that it may be used with safety, is one part of a railway company's trade or business. They have also the right to act themselves as carriers of goods or of passengers, and according to our experience they generally, although not always, do so; the chief part of their business is to act as carriers upon that public railway which they have created and are keeping up, not only for their own use as carriers but for the use of any others who may resort to it and pay the statutory tolls to the company who have made it and are keeping it up.

Now, I think the construction and maintenance of signal-boxes is very eminently part of a railway company's undertaking—of their business. I assume that those who have the management of the company's affairs erect and maintain only such signalling apparatus as they are of opinion is, if not essential, at least proper for the safe and convenient use of the line. That is the company's business. I think it is their trade to do that, for which they are paid by those who use the line by employing the railway company as carriers or by paying the tolls which the railway company are by statute entitled to exact. You may say that signalling apparatus is ancillary or incidental to the company's trade or business as carriers, just as everything connected with the maintenance of the line may be called ancillary or incidental to the business which they carry on as carriers. The locomotives, the trucks, and the passenger carriages are all ancillary to the carriage of the goods and the carriage of the passengers. You may say that signal-cabins are no part of that trade, and if, on account of any work connected with them the trains are stopped, and workmen are set to work to repair the damage, you may call this work of repair ancillary and incidental to the trade of the company, but not part of it. I cannot assent to that reasoning. I should be very unwilling to give my countenance to the proposition that this Act of Parliament has no application to the construction of the line or anything connected with the construction of the line, on the ground that all that is incidental or ancillary to the business of the railway company, but is no part of that business. I am not called upon to define the sense in which the framers of this statute used these words "ancillary or incidental to." I should have great difficulty in giving a definition to some other expressions in the Act as well as to this, but I can conceive things which would be no part of a railway company's trade or business although incidental thereto. Take refreshment rooms. That, I think, is no part of their business—is not what they are constituted for. Or a hotel for the convenience of passengers who are going by or arriving by their line. There may be room for saying that that is ancillary to their business, but is not part of it. But the construction and maintenance of signalling apparatus for the safe use of the line is, I think, if anything can be said to be, part of a railway company's business as distinguished from merely—and the statute uses the word "merely"—incidental or ancillary to that business.

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I have great respect for the learned Judges who have expressed views with which I cannot say my own are not in conflict, but with the opinion which I have expressed, I am not prepared to follow those decisions. Therefore, differing from your Lordship, I think that the view of the Sheriff-substitute is right, and that we should answer the question accordingly.

LORD TRAYNER.—I think the work in which the deceased was engaged at the time when he was killed was not any part of or process in the work or business carried on by the appellants, but was only incidental thereto, and that therefore the judgment of the Sheriff is wrong. My view is borne out by the authorities cited to us, which it is unnecessary to review. The case of *Pearce*[1] is *a fortiori* of the present. I offer no remark on the decision in the case of *Burns*[2] except this, that it can, I think, be distinguished from the present case, and does not form a precedent which I am here bound to apply.

LORD MONCREIFF.—This case raises a question of principle in the construction of the fourth section of the Act of 1897. That section is, in my opinion, confined to cases in which the undertaker delegates to a contractor the execution of work which forms a part of or process in the proper business or trade carried on by the undertaker, and does not apply to cases where the undertaker engages another tradesman or contractor to execute work which, however essential to the conduct of the trade or business, is not part of or a process in it, and is not in use to be performed by the undertaker himself or his own workmen.

The object of this remedial statute being to give a right to compensation to workmen who are obliged to work in or about any of the dangerous organisations of labour to which the Act applies, it would not have been surprising if the right to recover compensation from the undertaker without proof of fault on his part had been extended to workmen who are called in to execute works of repair or construction, and who are exposed to the same dangers as the servants of the undertaker. For instance, to the construction and carrying on of a factory it is essential that there should be buildings, machinery, and light; and accordingly the undertaker,—that is, the occupier of the factory,—requires from time to time the services of masons, carpenters, glaziers, gasfitters, engineers, and other workmen. These workmen may run just as great risks as the servants of the occupier of the factory. But the concluding paragraph of the 4th section, as I read it, expressly exempts the undertaker from any such claim, because the work which they are called in to execute, however essential and indispensable, is not part of or a process in the trade or business carried on in the factory.

In the present case I accept the Sheriff's finding that the erection of the stone screen was necessary to the proper use of the signal-box, and also that the work on which the deceased was engaged involved dangers as great as the ordinary dangers of active railway service; but, for the reasons which I have stated, I think he has arrived at a wrong conclusion in law.

I therefore agree in the view of the Judges in the English case of *Pearce*.[1]

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[1] L. R. [1900], 2 Q. B. 100. [2] 2 F. 629.

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I confess that I am unable to distinguish the circumstances of this case from those in the case of *Burns* v. *North British Railway Company*.[1] That case was decided before the case of *Pearce*,[2] and the Lord President disposes in a very few words of the question now before us, the other Judges adding nothing on that point. But when all is said, the decision is adverse to the appellants, unless it is held that the Court took the view that the erection of the signals was work usually performed by the railway company's own servants.

That, however, does not appear from the opinions, and if the ground of judgment was that all work in connection with the equipment or repair of a railway, including the station-buildings, signal-cabins, retaining-walls, and so forth, is part of the business carried on by the railway company, and not merely ancillary to it, I cannot agree.

If this claim were admitted, I do not see how a claim by a glazier or gasfitter called in to repair the signal-cabin could be excluded.

THE COURT pronounced the following interlocutor:—"Sustain the appeal: Answer the question of law . . . by declaring that the building contract between the appellants and Messrs D. P. How & Son, and the subcontract between that firm and Robert Sheach junior, were not part of or any process in the trade or business carried on by the appellants, but were merely ancillary or incidental thereto; recall the award of the arbitrator, and remit to him to dismiss the claim; and decern."

JAMES WATSON, S.S.C.—MACKAY & YOUNG, W.S.—Agents.

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May 31, 1901. Dundee Combination Parish Council v. Secretary for Scotland.

PARISH COUNCIL OF DUNDEE COMBINATION PARISH, Pursuers (Reclaimers).—*Ure, K.C.—Clyde.*

SECRETARY FOR SCOTLAND, Defender (Respondent).—*Sol.-Gen. Dickson —Younger.*

Local Government—Parish—Division of Parish—Creation of new Parish —Combination Parish—Secretary for Scotland—Order—Ultra vires—Local Government (Scotland) Act, 1889 (52 *and* 53 *Vict. cap.* 50), *secs.* 51 *and* 105—*Local Government (Scotland) Act*, 1894 (57 *and* 58 *Vict. cap.* 58), *secs.* 46 *and* 54.—*Held* (*aff.* judgment of Lord Kincairney) (1) that under the Local Government (Scotland) Acts, 1889 and 1894, the Secretary for Scotland has power to create new parishes by the division of existing parishes; and (2) that this power includes the creation of new parishes out of combination parishes constituted under section 16 of the Poor-Law (Scotland) Act, 1845.

Local Government—Parish—Division of Parish—Order—Procedure—Local Inquiry—Local Government (Scotland) Act, 1889 (52 *and* 53 *Vict. cap.* 50), *sec.* 51—*Local Government (Scotland) Act*, 1894 (57 *and* 58 *Vict. cap.* 58), *sec.* 46.—The Local Government (Scotland) Acts, 1889 and 1894, empowers the Secretary for Scotland to make orders altering the boundaries of parishes, and sec. 46 of the Act of 1894 enacts, *inter alia*, that "before making any such order the Secretary for Scotland shall consult with the authorities concerned, and upon the application of any one or more of such authorities shall cause a local inquiry . . . to be held, and shall cause the proposed order to be published in the *Edinburgh Gazette* . . . and shall consider all objections and representations respecting such order."

[1] 2 F. 629. [2] L. R. [1900], 2 Q. B. 100.

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In 1898 the County Council of Forfar presented an application to the Secretary for Scotland for an order altering the boundaries of a parish in the county. The parish council of the parish opposed the application. A local inquiry was held under section 46 of the Local Government (Scotland) Act, 1894, at which the parties interested were heard. In February 1899 the Secretary for Scotland intimated that he was not "at present" prepared to grant the application.

In December 1899 the County Council renewed their application, in support of which they brought under the notice of the Secretary for Scotland certain changes in the circumstances. The Secretary for Scotland then, without ordering any further local inquiry, but after considering a representation by the Parish Council, published a "proposed order" in the *Gazette*.

In an action by the Parish Council against the Secretary for Scotland, for declarator that the proposed order was illegal, in respect that the statutory procedure had not been followed in regard to it, and for interdict against the Secretary proceeding with the order, *held* (*aff.* judgment of Lord Kincairney) that the statutory procedure had been sufficiently complied with, and that the order was legal and regular.

2D DIVISION.

Lord Kincairney.

IN 1879 the Dundee Combination Parish was constituted under section 16 of the Poor-Law (Scotland) Act, 1845, by the union of the parishes of (1) Dundee, and (2) Liff and Benvie.

On 10th January 1898 the County Council of Forfarshire made a representation to the Secretary for Scotland for the issue by him of an order under the Local Government (Scotland) Acts,* detaching

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* The Local Government (Scotland) Act, 1889 (52 and 53 Vict. cap. 50), enacts:—

Sec. 51.—"On the representation of a county council or of a town-council the Secretary for Scotland may at any time after the expiry of the powers of the Boundary Commissioners by order provide for all or any of the following things:"—*inter alia*,

"(*e*) For dividing any parish in the county which by reason of its inconvenient extent, or by reason of its forming part of, or having within its boundaries, or lying partly within or partly without, a burgh or a police burgh, it seems expedient to divide, and for uniting all or any of such subdivisions of the parish with other parishes."

"Provided as follows:"—*inter alia*,

(iv.) This section shall be in addition to, and not in derogation of, any provisions in force at the passing of this Act in respect of the union, disjunction, or erection of parishes."

Sec. 105.—"In this Act, if not inconsistent with the context, the following terms have the meanings hereinafter repectively assigned to them; that is to say—" *inter alia*,

"The expression 'parish' means a parish *quoad civilia* for which a separate parochial board is or can be appointed, and where part of a parish is situated within and part of it without any county or other area, includes each such part."

The Local Government (Scotland) Act, 1894 (57 and 58 Vict. cap. 58), enacts:—

Sec. 1.—"This Act may be cited as the Local Government (Scotland) Act, 1894, and this Act and the Local Government (Scotland) Act, 1889 (hereinafter called the principal Act), shall, except as otherwise provided by this Act, be construed as one Act, and may be cited together as the Local Government (Scotland) Acts."

Sec. 46 (with the marginal note "Additional powers to alter parish areas").—"An order of the Secretary for Scotland, under section fifty-one of the principal Act, for altering the boundaries of any parish or for uniting several parishes or parts of parishes into one parish by the creation of a new

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from the Dundee Combination Parish the landward part of Liff and Benvie, and creating the said landward part a separate parish.

A local inquiry was held, under section 46 of the Local Government (Scotland) Act, 1894, by the Sheriff of the county (Johnston), at which the Parish Council of Dundee Combination Parish and the Lord Provost, Magistrates, and Town-Council of Dundee appeared, and maintained, *inter alia*, that the proposed order was illegal and *ultra vires* of the Secretary under the statute, inasmuch as the statute authorised detachment only as an incidental step towards effecting a new annexation or combination of parishes or parts of parishes.

On 18th February 1899 the Under Secretary for Scotland sent a letter to the Forfarshire County Council intimating the Secretary's decision. The letter stated that Sheriff Johnston's report had been the subject of the Secretary's careful consideration, and that the Secretary had come to the conclusion that the very exceptional circumstances of the locality would justify him on general grounds in disjoining Liff and Benvie landward area from the rest of the parish, "and if this were all that were necessary he would be prepared to order accordingly.

"But other considerations come into account when it is proposed to constitute the area in question into a parish by itself. The whole tendency of recent legislation and administration has been to avoid adding to the number, and consequently diminishing the *size of* administrative areas, and more particularly poor-law areas. Lord Balfour is aware that Liff and Benvie Landward is not smaller than some other Forfarshire parishes. But it is one thing to find small parishes in existence, and another to add to their number; and his Lordship is most unwilling, except for very strong reasons, to take action which would have this effect. . . .

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parish or otherwise, or annexing one or more of such parishes or parts of parishes to a larger parish, or for dividing any parish or for uniting any subdivision of a parish with any other parish, shall have effect for all purposes, whether county council, justice, sheriff, militia, parochial board, parish council, school board, local authority, or other, save as *hereinafter* provided. Before making any such order, the Secretary for Scotland shall consult with the authorities concerned, and, upon the application of any one or more of such authorities, shall cause a local inquiry in terms of the principal Act to be held, and shall cause the proposed order to be published in the *Edinburgh Gazette*, and in such other manner as to make the same known to all persons interested, and shall consider all objections and representations respecting such order, and may, after the expiry of not less than forty days from the date of the publication of the proposed order in the *Edinburgh Gazette*, finally make the order and cause the same to be forthwith published in the *Edinburgh Gazette*, and such order shall thereafter have effect as if enacted by Parliament unless or till revoked or modified by subsequent order in terms of this section. In addition to the provisions of the principal Act any such order may be made on the representation of a parochial board or parish council, or the commissioners of a police burgh, or a school board. . . ."

Sec. 54.—"Expressions used in this Act have the same meaning, if not inconsistent with the context, as expressions used in the principal Act: Provided that, if not inconsistent with the context" *inter alia*,

"The expression 'parish' means a parish *quoad civilia* which is at the passing of this Act or may hereafter be constituted a separate parish for the purposes of settlement and relief of the poor, and includes a combination of parishes within the meaning of section sixteen of the Poor-Law (Scotland) Act, 1845."

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"His Lordship is therefore not at present prepared to accede to that part of the prayer of the memorialists which would involve the creation of a new parish corresponding to the present landward Liff and Benvie. The case would be different if, along with the disjunction from Dundee, it were proposed to annex the landward area to a neighbouring parish. No such proposal is now before the Secretary for Scotland, and he must not, of course, be understood as suggesting that such annexation is otherwise than *prima facie* and on general grounds desirable. At present he cannot go further than say, for the information of your County Council, that on the production of a comprehensive and well-considered scheme, the matter will be reconsidered."

On 6th December 1899 the County Clerk of Forfarshire, on behalf of the County Council, wrote to the Under Secretary for Scotland a letter detailing certain negotiations which had been entered into by the County Council to effect an agreement for the amalgamation of the landward part of Liff and Benvie with the parish of Fowlis Easter, "which seemed to my County Council to be the only parish suitable for combination with Liff and Benvie Landward"; and stating that these negotiations proved to be fruitless owing to the opposition of the Parish Council of Fowlis Easter. "My County Council now, therefore, desire respectfully to renew its application to the Secretary for Scotland to remedy the anomaly complained of in its original application of 10th January 1898, by the separation of the Liff and Benvie Landward portion of Dundee Combination Parish from the rest of the parish, and its constitution into a separate parish." The letter concluded by setting forth reasons for granting the application, and stating certain changes of circumstances which had taken place since the date of the original application.

On 12th May 1900 the Under Secretary for Scotland wrote to the County Clerk of Forfarshire intimating that, in view of the considerations urged in the county clerk's letter of 6th December, "Lord Balfour is now satisfied that there are good grounds for giving favourable consideration to the application of your County Council, which he is advised is legally competent. His Lordship, therefore, will shortly cause to be inserted in the *Edinburgh Gazette* a 'Proposed Order' constituting the Landward Portion of Liff and Benvie a parish by itself."

Copies of this letter were sent to the authorities interested, including the Dundee Combination Parish Council.

At the request of the Dundee Combination Parish Council the publication of the proposed order in the *Gazette* was delayed to allow the Parish Council to represent against it, which they did.

Thereafter the Secretary for Scotland, having considered the representation of the Dundee Combination Parish Council, caused the proposed order to be published in the *Gazette*.*

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* The proposed order, which was dated 17th August, and appeared in the *Edinburgh Gazette* of 21st August 1900, was in the following terms:—

"Local Government (Scotland) Acts.

"*Alteration of Parish Areas.*

"Proposed Order No. XLVII.

"Dundee Combination Parish (New Parish of Liff and Benvie).

"Whereas it has been represented to me by the County Council of the county of Forfar that I should issue an Order, under section 51 of the Local Government (Scotland) Act, 1889, and section 46 of the Local Government (Scotland) Act, 1894, 'detaching from Dundee Combination Parish the

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No further local inquiry was asked for by the Dundee Combination Parish Council, or by any other authority or person, and none was held.

On 7th September 1900 the Dundee Combination Parish Council brought an action against the Secretary for Scotland, and also against the County Council of Forfarshire for their interest, concluding for declarator that the proposed Order was illegal and *ultra vires* of the defender, the Secretary for Scotland, and disconform to statute, and especially to the Local Government (Scotland) Act, 1889, section 51; and for interdict against the said defender making, issuing, submitting to Parliament, or otherwise proceeding with or following forth said proposed order in any manner of way.

The pursuers averred, *inter alia*;—(Cond. 8) "Said proposed Order is illegal and *ultra vires* of the defender. The Secretary for Scotland has no power under the statute to detach a portion of a parish and form such detached portion into a separate parish, except for the purpose of annexing it to another parish or part of a parish. Further, the Dundee Combination Parish is not a parish *quoad civilia*, and the parish of Liff and Benvie is not a parish for which a separate parochial board is or can be appointed, and neither of them therefore fall under the statute. Moreover, the procedure prescribed by the statute has not been followed in connection with said proposed Order. In particular, no local inquiry has been held."

The pursuers pleaded;—(1) The proposed Order being illegal, *ultra vires*, and disconform to statute, the pursuers are entitled to decree as concluded for. (2) The procedure relative to said Order not having been orderly carried out in terms of statute, decree of declarator and interdict should be pronounced, in terms of the conclusions of the summons.

The defender, the Secretary for Scotland, pleaded, *inter alia*;—(3) The proposed Order being legal and regular, and within the powers of the defender, the defender should be assoilzied.

There was no proof. The facts above narrated were not disputed.

On 2d January 1901 the Lord Ordinary (Kincairney) pronounced this interlocutor:—"Repels the pleas in law for the pursuers: Sustains the third plea in law for the defender: Assoilzies him from the conclusions of the action, and decerns: Finds the defender entitled to expenses." *

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landward part of the parish of Liff and Benvie, and creating the said landward part of the parish of Liff and Benvie into a separate parish, or such other or further Order as to the Secretary for Scotland shall seem necessary or expedient in order to provide a remedy in the circumstances:'

"And whereas, after consulting with the authorities concerned, and causing a local inquiry to be held, I am of opinion that it is expedient to give effect to the said representation:

"Now therefore, I, the Right Honourable Alexander Hugh, Lord Balfour of Burleigh, Her Majesty's Secretary for Scotland, do, in virtue of the powers conferred upon me by the Local Government (Scotland) Acts, order as follows:—

"1. The portion of the former parish of Liff, Benvie, and Invergowrie, now forming a landward part of Dundee Combination Parish, shall cease to be part of Dundee Combination Parish, and shall form a separate parish to be called the parish of Liff and Benvie."

The proposed order then set forth provisions for the purpose of settling the rights of authorities and persons affected by the change.

* "OPINION.— . . . The pursuers' first contention was that the

The pursuers reclaimed.
At advising,—

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LORD JUSTICE-CLERK.—In this case the question turns upon the reading to be put upon section 51 of the Local Government Act of 1889, taken along with section 46 of the Act of 1894 amending it. The reclaimers contend that the action taken by the Secretary for Scotland in dividing up the Combination Parish of Dundee into two divisions, and forming a new parish of the part taken off under the name of the parish of Liff and Benvie, was *ultra vires*—that he had no power to divide a parish, but only to take a part of a parish and attach it to some other parish. The contention is based on the words of the 51st clause, giving the Secretary for Scotland power for dividing "any parish in the county which by reason of its inconvenient extent, or by reason of its forming part of, or having within its boundaries, or lying partly within or partly without, a burgh or a police burgh, it seems expedient to divide, and for uniting all or any of such sub-

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Order was *ultra vires*, because the division of a parish was not authorised unless it were combined with the annexation of the detached portion to some other parish. They maintained that the policy of the Acts was to promote the union and not the division of parishes, and that their contention was to be preferred as being in accordance with that policy, but I think the presumption is rather the other way. It may be that the general operation of the statutes will be to increase the average extent of parishes and diminish their number, although there is nothing in the statutes which indicates that result. But their primary object was neither to increase nor diminish the extent of parishes, but to remedy the inconveniences arising from existing arrangements and boundaries, whether arising from the separation of parts of parishes or from their extent, whether less or greater than was suitable, and to substitute such other arrangements and boundaries as would suit the requirements of the various localities; and it would seem strange that if a parish were thought too large or too populous, so that it would be a clear advantage to divide it, a power to do so, conferred by the Legislature, could not be exercised merely because there happened to be no neighbouring parish to which it could be suitably annexed. It is to be remembered that the division of parishes was no novelty in the law, but had been provided for by various statutes, mostly of old date and relating to ecclesiastical matters, but one (7 and 8 Vict. cap. 44) so recent as 1844, the chief object of which was 'to facilitate the dividing and erecting of extensive or populous parishes and the erection of new parishes.' This Act, like the earlier Acts, regards chiefly, but not solely, ecclesiastical matters. So far as I know it is still in force, and is, I suppose, referred to at the close of the proviso to section 51 of the Act of 1889.

"These considerations, though not at all conclusive, are not, I think, wholly without bearing; but the real question is a question of construction of the statutes. The pursuers contended that it depends wholly on section 51 of the earlier Act, on which they contend the whole powers in regard to the division of parishes depend. They maintained that no additional powers of division of parishes were conferred by the Act of 1894. I do not think so, but think both Acts must be read together; but it may be convenient to consider the 51st section of the 1889 Act in the first place and by itself.

"Section 51 empowers the Secretary of State to provide for various matters, and, *inter alia*, for dividing 'any parish which by reason of its inconvenient extent, or by reason of its forming part of, or having within its

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divisions of the parish with other parishes." The reclaimers maintained that if the Secretary for Scotland does one thing he must do both, that "and" is to be taken as an imperative conjunction and not as copulative merely of two separate powers, of which he may exercise the first by itself, and only carry out the second if he sees fit in the special circumstances of the particular case to do so, he acting in the public interest.

Had the question depended entirely upon the 51st clause of the Act of 1889, I should have held that there was no ground for this contention of the pursuers. The words of the section are, I think, quite capable of being read in the sense in which they were applied by the defender, and the construction which the pursuers put on the clause is strained and unnatural. I concur with the Lord Ordinary in his remarks on this part of the case.

But if there were in fact any difficulty arising from the wording of the 51st clause of the 1889 Act, it would in my opinion be completely set aside by the 46th clause of the Act of 1894. By that clause it is enacted that "An order of the Secretary for Scotland under section 51 of the

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boundaries, or lying partly within and partly without, a burgh or police burgh, it may seem expedient to divide, and for uniting all or any of such subdivisions of the parish into other parishes.'

"The pursuers contended that this section, according to its sound construction, did not authorise division alone, but only division coupled with annexation; which they argued was indicated by the use of the word 'and,' and not 'or.' That may be a possible reading of the provision, but it seems to me that the more natural interpretation is to understand the words as authorising two things—division and annexation; not directing or requiring annexation, but only authorising it. Indeed, the words, strictly construed, barely admit of the pursuers' construction, for they do not speak of the union of all of the subdivisions effected, but of all or any of them, permitting and indeed expressing the view that there might be portions detached but not united.

"This question of mere construction may seem debateable. Still, I would have little difficulty in rejecting the pursuers' contention, if that were the whole of it. But the pursuers maintained, with considerable force, that the statute nowhere authorises the creation of a new parish any more than it authorises the creation of a new county, and that if it had been intended to authorise the creation of a new parish, provision would have been made for the conduct of its business and for the appointment and payment of the necessary officials, and it was argued that the section authorised only the division of a parish, not the erection of the divided part into a new parish. But as to that point the statute makes no distinction between one division and another. It does not speak of the detachment of one part from the rest, but only of division, which might conceivably be into equal parts, and it would be matter of easy inference to hold that each of these parts was to be a parish, and if once the statute is read as conferring power to create a new parish, the power to provide the necessary details must be implied, so far as it is not expressed in section 49.

"The 46th section of the Act of 1894 seems, however, to furnish what may be a more satisfactory answer. It is declared by the first section of that Act that it and the Act of 1889 shall, except as otherwise provided by the later Act, be construed as one Act. Hence the 51st section of the Act of 1889 and the 46th section of the Act of 1894 must be construed as sections of the same Act.

"Now the 46th section of the 1894 Act is expressed in a manner which is unusual as regards this matter, for although the marginal note is 'Additional powers to alter parish areas,' yet it does not profess to confer additional

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principal Act for altering the boundaries of any parish or for uniting several parishes or parts of parishes into one parish by the creation of a new parish or otherwise, or annexing one or more of such parishes or parts of parishes to a larger parish, or for dividing any parish, or for uniting any subdivision of a parish with any other parish, shall have effect for all purposes, whether county council, justice, sheriff, militia, parochial board, parish council, school board, local authority, or other, save as hereinafter provided."

Now, if this clause is to be read along with the provisions of the Act of 1889, it would be very difficult to say that the Secretary for Scotland, in carrying out his duties under section 51 of that Act, would not be entitled to do what is expressly stated as one of the things he can do in this 46th section of the later Act. But it is expressly enacted by section 1 of the Act of 1894 that "this Act, and the Local Government (Scotland) Act, 1889, shall, except as otherwise provided by this Act, be construed as one Act." Reading the two Acts as one, it seems to me to be impossible to maintain that the Secretary for Scotland has not the power in carrying out

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power to divide or create a parish, but proceeds on the assumption that that power has been conferred by the Act of 1889, and it takes the form of declaring that the Orders of the Secretary of State for the purposes mentioned shall be effectual. It expressly provides that an Order by the Secretary for Scotland for altering the boundaries of any parish, or for uniting several parishes, or parts of parishes, into one parish by the creation of a new parish or otherwise, shall have effect for all purposes. I do not think it necessary to quote the clause at length. It seems to me to meet the pursuers' chief objection as to the want of express power to create a new parish. It is true that the Provisional Order mentioned does not precisely correspond with the Provisional Order in this case, for that does not authorise the union of different parts of the combination parish (although it might have taken that form), but the erection into one new parish of one part of the combination parish, but I consider that, in fair interpretation, the words of the statute apply to it, and that it would be extravagant to hold otherwise.

"But the pursuers contend that the provision in section 46 proceeded on a misinterpretation of the previous section, and that therefore it should not receive effect. There are, however, several answers to this argument, of which the first is that the assumption in the section as to the meaning of section 51 of the Act of 1889 is not wrong but right, and further, that it must be accepted as right, as being a legislative interpretation of the Act of 1889, which the Court was bound to accept, for which position counsel for the defender quoted *The Attorney-General* v. *Clarkson*, L. R. [1900], 1 Q. B. 156, a decision which I would be disposed to follow. But the clearer ground seems to be that whether the assumption of section 46 as to the meaning of section 51 be right or wrong, and whether section 51 confers power to create a new parish or not, it is sufficient and conclusive that the statute declares that a Provisional Order creating a new parish shall receive effect. If once it be held that the provision of section 46, reasonably interpreted, covers this case, then there is no room for further argument, the statute is conclusive. For these reasons I am against the objection that the Provisional Order is *ultra vires*, because it proposes to divide a parish without uniting the portion detached to another parish.

"The pursuers further, in support of their first plea, objected that the combination parish was not a parish to which the statute applied, or with which the Secretary for Scotland had authority to deal. But the interpretation clause of the Act 1894 declares expressly that the expression parish 'includes a combination of parishes within the meaning of section 16 of the

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section 51 of the Act of 1889 to exercise the power which he is stated to have in section 46 of the Act of 1894, to divide a parish. Taking the Acts as one, his power to do what was done here is, I think, quite plain, if the parish in question which he proposed to divide was a parish to which these sections applied. But the reclaimers maintain that section 51 of the Act of 1889 does not apply to a combination parish. I am unable to see why it should not, but any difficulty about that matter is removed by the fact that the interpretation clause of the Act of 1894 declares that "parish" shall include a combination of parishes within the meaning of section 16 of the Poor-Law Act, and if the Acts are to be read as one Act this interpretation applies, unless there is something which in either Act precludes its application. There is nothing of that kind in the Act of 1889.

I do not think it necessary to notice the objection to the procedure, except to say that I concur in the observations of the Lord Ordinary. The reclaimers' case on that point has no real strength. There was no failure to hold inquiry, and no refusal of inquiry to any party. When the Secretary

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Poor-Law Act,' and I do not think that this express declaration can be got over by the other words of that interpretation clause. It is conclusive if it applies. The pursuers contended that it was only the interpretation clause of the Act of 1894, and not of the Act of 1889, and did not interpret the word parish in that Act. But as the two Acts are to be read as one Act, then this interpretation clause in the later Act must apply to the former Act also, unless such application of it involves some inconsistency or contradiction. But I do not find any inconsistency. The two interpretation clauses appear to me to be consistent.

"Section 105 of the earlier Act interprets the word parish as a 'parish *quoad civilia* for which a separate parochial board is or can be appointed.' These words appear to include the Dundee Combination Parish, if it be a parish *quoad civilia*. It was maintained that they do not, because the parish, as constituted by the 16th section of the Poor-Law Act, was only a parish *quoad* the poor-law. But it was not the less a parish *quoad civilia*, although not perhaps *quoad omnia civilia*, for the administration of the poor-law is not *inter sacra* but *inter civilia*. But . . . the Dundee Combination Parish Council is not now a body which does nothing but administer the poor-law. It performs all the duties of a parish council. Certainly the Dundee Combination Parish is now a parish *quoad civilia*. Further, section 21 of the Act of 1894 provides that every reference in any Act of Parliament to a parochial board shall be construed as referring to a parish council. It would seem, therefore, that the 105th section of the Act of 1889, so far as it interprets the word 'parish,' should be read as if the words were 'a parish *quoad civilia* to which a separate parish council is or can be appointed,' words which, of course, include the Dundee Combination Parish. Perhaps the words as so read may not have much meaning or effect, but they are, at all events, not inconsistent with the interpretation clause of 1894; and it is, in my opinion, sufficient that the Dundee Combination Parish is covered by that clause. I am, therefore, of opinion that this objection should also be repelled, and that the Provisional Order falls within the powers conferred by the statute on the Secretary for Scotland.

"The pursuers' second plea is that the procedure required by the statute was not followed. The averment in support of that plea is extremely meagre. It is not stated in what the defect in the procedure consisted, and I greatly doubt whether the averment is relevant. But it is not necessary to consider that matter closely, because I am of opinion that the objection has not been supported. It depends, to some extent, on the circumstances in which the order was published. The procedure is prescribed in

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for Scotland had held an inquiry, and had intimated that he was not then prepared to take action, the matter stood over, and when he was applied to later to reconsider the matter, it was for him to judge whether he had need for further inquiry. In this case he did not consider that he did require further information. He received representations from the reclaimers and considered them, but neither they nor any other party asked for further inquiry.

I would move your Lordships to adhere to the Lord Ordinary's interlocutor.

LORD YOUNG.—I agree with the Lord Ordinary and your Lordship that this action is altogether unfounded. I do not think it necessary to add anything to what has been said by your Lordship and by the Lord Ordinary. I do not think I have ever seen a more unfounded action.

LORD TRAYNER.—On reading the two Acts of 1889 and 1894 together, I am of opinion that what was done by the defender was within his competency. I am further of opinion that the procedure required by the cited Acts to be followed was duly observed. I therefore think the Lord Ordinary's interlocutor should be affirmed.

LORD MONCREIFF.—I am of the same opinion, and I am quite satisfied with the grounds of judgment of the Lord Ordinary. It think it would have been sufficient to found upon section 51 of the Act of 1889. Under that section the Secretary for Scotland has power to divide and erect into a

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section 46 of the Act of 1894, and differs somewhat from the procedure required in the former statute. Section 46 requires that the Secretary for Scotland shall consult with the authorities concerned, and on the application of one or more of such authorities shall cause a local inquiry to be made, and shall cause the order to be published, and shall hear objections and representations.

"Now, in 1898, an application for a provisional order, to the same effect as that which the Secretary of State has issued, was presented by the County Council of Forfar, and was opposed by the Dundee Combination Parish. A local inquiry, under section 46, was ordered, and was then conducted by Sheriff Johnston, and the parties interested were heard. The result of that inquiry was an intimation by official letter of 18th February 1899, that the Secretary for Scotland was not at that time prepared to accede to the petition.

"The County Council of Forfar have renewed their application, and have brought under the notice of the Secretary of State certain changes in the circumstances. The Secretary has not thought it necessary to order an additional local inquiry. It would, I think, have been out of the question to do so; and he was under no obligation to do so, for no one has suggested such a step, or asked for inquiry. That being so, I fail to see in what particular the statute has been violated. He has, it is true, not heard the Dundee Combination Parish again, but it must be assumed that he was fully informed on the whole matter before, and when an objection is taken to the procedure adopted by an official of the position of the Secretary for Scotland, I am of opinion that a failure to comply with the imperative directions of the statute must be made perfectly clear before an order by him can be set aside on that ground. I find nothing of that kind in this case, either in the record or the facts."

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separate parish, but the later Act puts that beyond doubt. As regards the procedure, I think that the Secretary for Scotland doubted at the first hearing whether it was the policy of the Act to create a new parish, and he gave the parties in whose favour the Lord Ordinary has decided an opportunity of saying whether they would have the parish annexed to some other parish. In that matter I think the reclaimers had no interest whatever, because their interest was to prevent division of the parish, and if part was taken off it did not matter to them whether it was erected into a new parish or annexed to another. When the Secretary for Scotland found that annexation was impracticable he reconsidered the matter to which the local inquiry was directed, and changed his mind. He thought that the objections on the ground of policy had been overcome and granted the original application. He was entitled to do that. Besides, before deciding finally he heard a representation on the subject.

THE COURT adhered.

MACPHERSON & MACKAY, S.S.C.—GEORGE INGLIS, S.S.C.—Agents.

No. 132.
June 1, 1901.
Henderson v. Menzies.

ALEXANDER HENDERSON AND OTHERS, Petitioners (Respondents).—*W. Berry.*
WILLIAM JOHN MENZIES AND ANOTHER (Henderson's Trustees), Respondents (Reclaimers).—*Macphail.*

Expenses—Reclaiming Note—Withdrawal of Reclaiming Note after printing by Respondent.—A reclaiming note was sent to the Summar Roll on 16th May 1901. On 1st June 1901 the reclaimer moved that the note be refused, with £2, 2s. of modified expenses. The respondent moved for full expenses on the ground that he had printed various documents in preparation for the discussion of the case. It appeared that before printing he had communicated with the reclaimer, that on 27th May 1901 there had been a meeting of parties, when a proposal for a joint print was discussed, and that the reclaimer had declined the proposal, but without indicating that there was any chance of the reclaiming note being withdrawn. The Court *allowed* £6, 6s. of expenses instead of the usual £2, 2s.

1st DIVISION. Lord Pearson.

ALEXANDER HENDERSON AND OTHERS presented a petition for the sequestration of the trust-estate falling under the marriage-contract of Mr Henderson and his wife, and for the appointment of a judicial factor. Answers were lodged for William John Menzies and another, the sole acting trustees under the marriage-contract.

On 4th April 1901 the Lord Ordinary (Pearson) pronounced an interlocutor sequestrating the trust-estate, and appointing a factor.

The trustees reclaimed, and on 16th May 1901 the reclaiming note was sent to the roll.

On 1st June 1901 the reclaimers moved the Court to refuse the reclaiming note, with £2, 2s. of modified expenses. They maintained that the action of the respondents in printing was premature.

The respondents moved for full expenses on the ground that they had printed various documents in preparation for the discussion of the case. They stated that before doing so their agents had—on 24th May—written to the reclaimers' agents intimating their desire to have certain documents printed, and suggesting a joint print. On 27th May the agents for the parties had a meeting, at which the proposal for a joint print was discussed, but declined by the reclaimers, who, how-

ever, had given no hint of their intention to withdraw the reclaiming note. Had they done so the whole expense of printing, viz., £5, 5s. to £6, 6s., would have been saved. In these circumstances the respondents maintained that they were entitled to full expenses.[1]

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The facts stated by the respondents were not disputed by the reclaimers.

LORD PRESIDENT.—We think that the circumstances here are such as to lead to somewhat more liberal treatment than in the ordinary case, because it cannot be said here, as it has been said in some other cases, that the respondent has been premature in printing. The respondent communicated with the other side, and they offered no discouragement to printing. We therefore think that the expense of printing the documents referred to should be allowed, but we consider that, instead of making a remit to the Auditor, an award of £6, 6s. instead of the customary £2, 2s. will meet the justice of the case.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

THE COURT refused the reclaiming note, and found the respondents entitled to £6, 6s. of expenses.

HAGART & BURN MURDOCH, W.S.—CADELL & WILSON, W.S.—Agents.

JOHN FARQUHAR, Pursuer (Reclaimer).—*A. J. Young*—*D. R. Melville.*
DONALD R. MURRAY, Defender (Respondent).—*Jameson, K.C.*—*M'Clure.*

No. 133.
June 4, 1901.
Farquhar v. Murray.

Reparation—Negligence—Medical Man—Issue.—In an action of damages by a patient against his medical attendant, the pursuer averred that on 14th April 1900 he called upon the defender and consulted him as to a scratched finger, that the defender prescribed a course of treatment, that the defender visited him on 16th April, when he directed the treatment to be continued till he called again, which he promised to do on an early day, that he did not call again for nine days, and that in consequence of the defender's neglect the pursuer's finger had to be amputated.

Held (*diss.* Lord Young, *rev.* judgment of Lord Kincairney) that the pursuer had set forth a relevant case for inquiry.

Form of issue *adjusted.*

THIS was an action of damages at the instance of John Farquhar, 13 Hillside Crescent, Edinburgh, against Donald R. Murray, M.B., C.M., 41 Albany Street, Leith.

2D DIVISION. Lord Kincairney.

The pursuer, who was a provision-merchant in Edinburgh, averred (Cond. 2) that on 14th April 1900 the pursuer called upon the defender, who was his regular medical attendant, to consult him as to a scratched finger. "The defender having examined the pursuer's finger, pronounced it to be affected with erysipelas, and wrote out a prescription for a medicine to be used internally, and an ointment to be applied externally. He instructed the pursuer to follow the prescription, and also carefully to poultice the finger with linseed and oatmeal, and undertook to call on Monday, the 16th inst. The defender accordingly called on that day about 7 P.M., and having again examined the finger, directed the pursuer to continue poulticing

[1] Little Orme's Head Limestone Co., Limited, v. Hendry & Co., Nov. 25, 1897, 25 R. 124; Gilchrist & Co. v. Smith, Jan. 9, 1901, *ante*, p. 329.

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it, and to use the medicines prescribed until he called again, which he promised to do without fail on an early day. The defender did not call next day as he had undertaken, and the pursuer waited on in daily expectation of a visit from him, relying upon the defender's promise to return, continuing all the time to carry out carefully the defender's instructions. The defender, however, never again visited the pursuer." (Cond. 3) "On or about 25th April 1900, the pursuer . . . asked his wife to write and request the defender to come immediately to see his finger. She accordingly wrote that day to the defender. The defender did not call that evening, but Dr Colin Mackenzie called next morning and stated that the defender was at present on holiday, and that he was looking after defender's practice while he was away from home. Dr Mackenzie further particularly stated, and it was the fact, that defender had not left any message or instructions whatever regarding pursuer's case, and that he knew nothing about it until he had got pursuer's wife's letter. The pursuer told Dr Mackenzie what the instructions to him were, and stated that he had carried these out faithfully. Dr Mackenzie examined the finger, and said it had been too long poulticed, and wrote out a prescription. The continuance of the treatment prescribed by the defender had, through his failure to perform his professional duty to the pursuer, been too protracted, had become prejudicial instead of remedial, and proved hurtful and injurious to the finger and health of the pursuer. Dr Mackenzie called again two days later, and continued to call every alternate day. . . . On the 10th of May he pronounced the state of the finger to be so serious that the pursuer might probably have to lose it; and he asked the pursuer to call and see the defender next morning, as he would then be home. The pursuer accordingly on 11th May called on the defender at his house. Dr Mackenzie was present on that occasion and examined the pursuer's finger along with the defender. It was then found that amputation would be necessary," and the pursuer's finger was subsequently amputated. (Cond. 4) "The defender carelessly and grossly neglected his duty to the pursuer as his patient by failing to visit him as he had promised to do after giving directions for the treatment of his finger. The defender further absented himself suddenly from home, without any communication to the pursuer of his intention to do so, and without making any arrangement for medical attendance on the pursuer during his absence. There was thus, on the part of the defender, a culpable want of attention and care, and a gross neglect of his professional duty." (Cond. 5) " . . . The loss of pursuer's finger, the permanent injury to his right hand and arm, and the suffering caused to him are the direct results of the defender's gross negligence and bad treatment or failure to give sufficient and proper attention and treatment as set forth. . . ."

The pursuer pleaded;—(1) The loss of the pursuer's finger having been caused by the fault and negligence of the defender and his failure to afford proper and sufficient professional treatment and attention, the defender is liable in reparation and damages as concluded for, with expenses. (2) The pursuer, having suffered loss, injury, and damage in the manner condescended upon through the defender's fault, is entitled to reparation as concluded for.

The defender pleaded, *inter alia*;—(1) The pursuer's statements being irrelevant, the action should be dismissed.

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'On 18th December 1900, the Lord Ordinary (Kincairney), having heard counsel on the adjustment of issues, dismissed the action as irrelevant.

The pursuer reclaimed, and argued;—A relevant case was stated. The ground of action was the failure of the defender to return as he promised, in consequence of which the too prolonged application of the treatment prescribed, which was to be followed until his return, caused harm. It was not a case of a patient continuing treatment on his own responsibility, which anybody could suppose would cause harm if continued, and it was not in the mouth of the defender to say that the pursuer was not entitled to assume from day to day that he would come back. Though not liable for a mistake of judgment, a professional man was liable for want of average skill, and for failure to take ordinary care to render that skill successful.[1] The responsibility of a medical man depended on either (1) *mala praxis*, which might be either want of skill, want of care, ignorance, or remissness,[2] or (2) on contract, in which a fair average amount of professional skill and care was implied.[3] This was a case of want of reasonable care.

Argued for the defender;—(1) There was no relevant case averred of breach of contract or of fault. On the pursuer's own statement the defender undertook to return next day; at least that was the interpretation which he appeared to put on "an early day." Next day, therefore, or at most "an early day," was the limit of the time during which the defender instructed the pursuer to continue poulticing, and if the defender did not return and the pursuer chose to go on poulticing without inquiring why his doctor did not return, or sending for another, he did so at his own risk. There was no case which decided that it was an actionable wrong for a doctor to go on holiday without letting his patients know that he was doing so, without informing them that he had appointed a *locum tenens*, and without informing his *locum tenens* of all his patients and their symptoms. The most that could be said was that this was a case of oversight, and in that case it was the pursuer's duty to protect himself by reminding the doctor or sending for another. (2) There was no relevant connection averred between the amputation of the finger and the alleged failure of the defender. It was not said that but for the poulticing the pursuer's finger would have got better; other causes might have produced the result. It was not to be inferred that it was caused by want of care on the part of the defender.[4]

At advising,—

LORD JUSTICE-CLERK.—The pursuer's averments are to the effect that the defender having been called in to prescribe for a diseased state of a finger, ordered him to poultice the finger, and to continue keeping it poulticed till

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[1] Purves v. Landell, March 10, 1845, 12 C. and F. 91 (Lord Brougham, p. 98, and Lord Campbell, pp. 102 and 103); Hart v. Frame & Co., June 18, 1839, Macl. and Rob. 595 (Lord Cottenham, p. 614); Jameson v. Simon, July 20, 1899, 1 F. 1211.

[2] Mann's Forensic Medicine (2d Ed.) 326; Beven on Negligence, ii. 1396.

[3] Rich v. Pierpont, 1862, 3 F. and F. 35 Erle, C. J., pp. 40 and 41; Sear v. Prentice, 1807, 8 East. 347; Lanphier v. Phipos, 1838, 8 C. and P. 475.

[4] Hancke v. Hooper, 1835, 7 C. and P. 81.

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he saw him again, he promising to call on the next day; that he did not call or send anyone else; and that after the pursuer had continued the treatment for about a week, and the doctor not calling, he directed his wife to write to the defender, and that next day a Dr Mackenzie called for him, presumably at the request of the defender. The effect of the pursuer's continuing the poulticing was that it became necessary to amputate the finger. The question is, whether the pursuer is entitled to have these averments sent to probation, his allegation against the defender being that by his failure and neglect to attend after ordering a certain treatment, he caused the injury to the pursuer of the loss of his finger. I am of opinion that the pursuer is in the position of having stated a relevant case for inquiry, and is entitled to an issue. The case is one in which it may turn out that the pursuer was himself to blame, and must be held by contributory negligence to have himself been responsible for the mischief that happened. But that is matter of evidence, and depends upon the facts when ascertained. I would therefore move your Lordships to recall the Lord Ordinary's interlocutor, and to grant an issue for the trial of the cause.

LORD YOUNG.—This action is certainly one of a particularly unusual character. It is an action of damages by a patient against a medical man. In my somewhat long experience I cannot remember having seen a similar case before. I understand the law to be this, that an action of damages may be maintained against a medical man, or indeed against any man acting for one in a professional capacity, for *crassa ignorantia* or *crassa negligentia*. But there must be either gross ignorance or gross negligence, and this action in order to be relevant must present a case of gross ignorance, gross want of professional knowledge, or gross carelessness. The question here is, is such a case presented?

The origin of the case was a small matter. About 9th April 1900 the pursuer scratched his finger on a nail. At first it caused him no pain. In a few days, however, it became sore, and the pursuer called upon the defender. The pursuer then states—"The defender having examined the pursuer's finger, pronounced it to be affected with erysipelas, and wrote out a prescription for a medicine to be used internally, and an ointment to be applied externally." If the prescription was such as to shew gross ignorance, that should have been averred; but the prescription is not produced, and no information is given on record as to its contents. I asked the counsel for the pursuer if he could give me any such information, and he said he could not. It is said the medicine was to be used internally. Is that a relevant statement of gross ignorance? It is further said that an ointment was to be used externally. That statement also discloses no gross ignorance on the part of the defender, and indeed we have no information as to what the ointment was. The condescendence goes on—"He instructed the pursuer to follow the prescription, and also carefully to poultice the finger with linseed and oatmeal, and undertook to call on Monday the 16th inst. The defender accordingly called on that day about 7 P.M., and having again examined the finger, directed the pursuer to continue poulticing it, and to use the medicines prescribed until he called again, which he promised to do without fail on an early day." The next sentence seems to

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infer that the defender promised to call not on an early day but next day. This shews the carelessness with which this record has been drawn. What did the pursuer do when he found that the defender did not fulfil his promise? Did he continue to poultice the finger? We have no information. On 25th April he got his wife to write to the defender, and next morning Dr Mackenzie called, and "stated that the defender was at present on holiday, and that he was looking after defender's practice while he was away from home. Dr Mackenzie further particularly stated, and it was the fact, that the defender had not left any message or instructions whatever regarding pursuer's case, and that he knew nothing about it until he got pursuer's wife's letter." Now, we have got to *negligentia*. Suppose the doctor had on account of illness, or because he wished to go away for some legitimate purpose, gone away and forgotten to mention to Dr Mackenzie about this patient with his scratched finger. Is that *crassa negligentia* to be the foundation of an action of damages? I cannot say that I think that otherwise than extravagant. The pursuer knew his doctor's address. His first meeting with him was at the doctor's own residence. When nine days had elapsed after the visit of 16th April he wrote through his wife to that residence. He got a prompt answer, for the defender's substitute, Dr Mackenzie, called next morning and told him that the defender was from home, and that he was looking after his practice while he was away. If the pursuer had written sooner he would have got the same answer. But he neither wrote nor called at the defender's house. On reading the case I was not surprised that the Lord Ordinary had dismissed the action without writing out the grounds on which his judgment proceeded. The Lord Ordinary is a Judge who, when he has any difficulty in deciding a case, always expresses his reason for coming to the decision, so that we may presume, as no note is appended to his interlocutor, that he considered this case a very clear one indeed. I entirely agree with him.

We were referred by the pursuer to the case of *Purves*,[1] which was decided in the House of Lords. That was an action against a law-agent, but in principle that action was much the same as the present. It was held in that case that not neglect, but gross neglect, not mistake, but gross mistake, must be averred in order to make the charges relevant, and all the Judges expressed themselves in distinct and strong language that facts must be averred from which the inference was inevitable that the defender had been guilty of either gross neglect or gross mistake.

On these grounds, which I assume are the grounds on which the Lord Ordinary has decided the case, I agree in the judgment arrived at by him.

LORD TRAYNER.—I am unable to say that the pursuer's averments are irrelevant. It is quite possible, and indeed probable, that the defender may be able to prevail in his defence, for if his statements are established, it would be difficult, I think, to hold that he had violated or neglected his professional duty towards the pursuer so as to incur liability for damages. But having regard merely to the pursuer's averments, I do not think that the case can be dismissed without inquiry.

[1] 1845, 12 C. and F. 91.

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LORD MONCREIFF.—I agree with the majority of your Lordships that on the pursuer's statements there is a case for inquiry. I do not doubt that in some circumstances a medical man may render himself liable in damages if through gross negligence or remissness he induces or permits a patient to continue under a course of treatment which, though beneficial at first, becomes injurious and dangerous if continued too long. If, for instance, a doctor prescribes medicine containing a small dose of poison, the action of which, though beneficial if taken with caution, requires to be watched, and, if necessary, stopped after a certain time, and tells the patient to continue to take it until his next visit, and then, without reasonable excuse, through carelessness fails to visit his patient, and serious consequences ensue, I think there is clearly a right of action against the medical man. In the case supposed the doctor has undertaken the case, and the patient is not expected to be qualified to know the effect of the drug or how long it can be taken with impunity.

The mode of treatment prescribed by the defender in the present case was not a poison but a poultice, and therefore at first sight perhaps the case appears more trifling. But the consequences, according to the pursuer, were serious enough, as a finger had to be amputated.

If at the trial the defender succeeds in proving either that the loss of the pursuer's finger was not due to poulticing, or that he, the defender, was unavoidably prevented through sudden illness from visiting the pursuer or sending directions as to his treatment, or that the pursuer was himself responsible for or contributed materially to his injuries, the defender will be entitled to a verdict.

The following amended issue was proposed by the pursuer:—"Whether the defender, in violation of his duty to the pursuer, negligently failed to give sufficient and proper attention and care to the pursuer as his patient, in consequence of which the pursuer's finger had to be amputated, to the loss, injury, and damage of the pursuer?"

Argued for the pursuer;—This was the proper issue for breach of professional duty.[1]

Argued for the defender;—If there was to be an issue, it should be on contract; and it was not averred that the defender contracted to go on attending the pursuer.[2] Further, what was averred, and what must be proved, was "gross" negligence, and this should be made patent on the face of the issue.

THE COURT pronounced the following interlocutor:—"Recall the said interlocutor reclaimed against: Repel the first plea in law for the defender: Approve of the issue as amended, and remit the case to the Lord Ordinary to proceed."

JAS. CAMPBELL IRONS, S.S.C.—BRUCE & STODDART, S.S.C.—Agents.

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[1] Barles v. Strathern, &c., Jan. 21, 1859, 21 D. 307.
[2] A B v. C D, Dec. 13, 1851, 14 D. 177.

THE CALEDONIAN INSURANCE COMPANY, Pursuers (Reclaimers).—*Ure, K.C.—Craigie.*
JOHN ROBERTSON AND OTHERS (Matheson's Trustees), Defenders (Respondents).—*Sol.-Gen. Dickson—C. D. Murray.*

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Superior and Vassal—Casualty—Construction of clause of relief—Obligation by an a me vel de me disponer in 1866 *to keep the fee full by the entry of heirs or to pay composition—Implied Entry—Supervenient Legislation—Conveyancing (Scotland) Act,* 1874 (37 *and* 38 *Vict. cap.* 94), *sec.* 4.—By disposition, dated in 1866, B, who held certain subjects in feu from A, disponed them to C, to be held *a me vel de me*, binding and obliging himself, his heirs, and successors, "to enter with the superiors . . . and if my heirs and successors shall not so enter, then I oblige myself, and my heirs and successors, to pay the whole composition exigible from the said" C "on receiving an entry direct from the over-superiors."

C recorded the disposition, and by the passing of the Conveyancing (Scotland) Act, 1874, became the entered vassal of A.

B died in 1877. A having demanded a casualty of composition from C, the latter brought an action of relief against the heirs of B, founding on the clause above quoted.

Held (*aff.* judgment of Lord Low) that the obligation undertaken by B to pay the composition was only exigible if there was a failure on the part of B or his heirs to enter, and that the implied entry of C having made it impossible for B or his heirs so to enter, there was no such failure, and that the obligation was not therefore prestable.

Superior and Vassal—Casualty—Construction of clause of relief—Effect of implied entry—Conveyancing (Scotland) Act, 1874 (37 *and* 38 *Vict. cap.* 94), *sec.* 4.—By disposition, dated and recorded in 1868, B disponed *a me vel de me* certain subjects to C, binding himself "to free and relieve the said" C "of all casualties both prior to the said term of entry and in all time coming thereafter." On the passing of the Conveyancing Act, 1874, C was impliedly entered with the superior. B died in 1877, and the superior having demanded a composition from C, the latter raised an action against the representatives of B claiming relief under the obligation expressed in the clause above quoted. The defenders maintained that the obligation could no longer be enforced to the extent of exacting a composition by reason of the change of law effected by the 1874 Act, but for which B's heir could and would have entered on payment of relief. *Held* (*per* Lord Low, Ordinary) and *acquiesced in* that the obligation being absolute in its terms, the defenders were bound to relieve C of the composition payable by him to the superior.

1ST DIVISION. Lord Low.

BY disposition dated 11th and 12th, and recorded 20th July 1866, Robert Matheson, architect, Edinburgh, disponed to the Caledonian Insurance Company (subject to feu-rights) certain subjects which had been feued by him to various persons.

The disposition contained the following clause:—

"To be holden the lands or subjects and others hereby disponed *a me vel de me* for payment to me" (that is, the said Robert Matheson) "and my heirs and successors of one penny Scots money in name of blench farm yearly, and doubling the same at the entry of heirs and singular successors; and declaring that the said Caledonian Insurance Company and its foresaids shall be freed and relieved by me and my heirs and successors now and in all time coming of and from payment of the whole feu-duties and casualties payable by me or my heirs to my superiors, as well as from all cess, teinds, minister's stipend, and other public and parochial burdens payable in respect of the said lands or subjects and others, and from all augmentations thereof, all

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such upper feu-duties and casualties and cess, teinds, and minister's stipend, and public and parochial burdens, and all augmentation thereof being payable by me or my foresaids now and in all time coming out of the remainder of the foresaid lands belonging to me not hereby disponed; and I do hereby burden and charge the said lands belonging to me, and not hereby disponed, with the payment of the said feu-duties and casualties, cess, teinds, minister's stipend, and of the said other public and parochial burdens, and of all augmentations thereof; and I constitute the said Caledonian Insurance Company my factors and commissioners and attorneys for the purpose of entering vassals, receiving resignations, pursuing actions of declarator of non-entry and of irritancy, and for all other purposes in reference to said subjects and others hereby disponed; and, farther, I bind and oblige myself, my heirs, and successors, at the expense of me, or my foresaids, to enter with the superiors and grant in favour of the said Caledonian Insurance Company such renewed factories and commissions as may be necessary to enable said company to enter vassals, receive resignations, pursue actions of declarator of non-entry and of irritancy, and for all other purposes in reference to said subjects and others before disponed; and if my heirs and successors shall not so enter and grant such factory and commission, then I bind and oblige myself and my heirs and successors to pay the whole composition exigible from the said Caledonian Insurance Company, or its foresaids, on receiving an entry direct from the over-superiors, and also the whole feu-duties and casualties which may thereafter become payable by it and them to said superiors."

By another disposition dated 11th and 12th, and recorded 14th December 1868, Mr Matheson disponed certain other subjects to the Caledonian Insurance Company, to be held *a me vel de me*, Mr Matheson binding himself as follows:—"And I bind myself to free and relieve the said Caledonian Insurance Company, and their foresaids of all feu-duties, casualties, and public burdens, imposed, and to be imposed, and all augmentations thereof, both prior to the said term of entry and in all time coming thereafter."

Mr Matheson died in 1877. Thereafter the Caledonian Insurance Company was called upon by the superiors of the subjects (the Governors of George Heriot's Hospital) to make payment of a year's subfeu-duties, in name of casualty, in respect of each of the subjects consequent upon Mr Matheson's death.

The Caledonian Insurance Company having intimated the claim to John Robertson and others, the trustees of Mr Matheson, and the trustees having declined to admit any liability to relieve the Insurance Company, the latter brought an action against the trustees for declarator that the trustees were bound to relieve the Insurance Company "of any casualty now payable to, or exigible by, or that may hereafter become payable to, or exigible by, the superiors (the Governors of George Heriot's Hospital) for and in respect of the lands hereinafter mentioned" (being the subjects conveyed by the two dispositions referred to).

The defenders denied liability, and explained that "the subjects described in the summons were held by the late Robert Matheson upon a title under which the entry of heirs is taxed at a nominal sum, being one-fifth of the annual feu-duty, whilst the entry of singular successors is untaxed. . . . Explained further that the defenders have all along been ready and willing to fulfil any obligation which

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may be prestable against them under the dispositions above referred to, and are ready, in terms of their obligations, if and when required to do so, to present the heir for entry with the said superiors, and to pay the taxed relief duty, which would then become payable in respect of said heir's entry."

On 26th October 1900 the Lord Ordinary (Low) pronounced this interlocutor:—"Finds (1) that the defenders are not bound to relieve the pursuers of the composition demanded from them by the Governors of George Heriot's Hospital as having become due upon the death of the deceased Robert Matheson, in respect of the subjects disponed to the pursuers by the said Robert Matheson, by disposition dated the 11th and 12th, and recorded in the Register of Sasines the 20th, days of July 1866; and (2) that the defenders are bound to relieve the pursuers of the composition demanded from them by the said Governors as having become due as aforesaid, in respect of the subjects disponed to the pursuers by the said Robert Matheson, by disposition dated 11th and 12th, and recorded in the Register of Sasines the 14th, days of December 1868."*

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* "OPINION.—The pursuers acquired the mid-superiority of certain subjects in Edinburgh from the deceased Robert Matheson, of West Coates, by dispositions, dated respectively in 1866 and 1868.

"Mr Matheson died in 1877, and the Governors of George Heriot's Hospital, who are the superiors of the subjects in both of the dispositions, have demanded from the pursuers payment of a composition of one year's subfeu-duties in respect of each of the subjects.

"The pursuers state that they are advised that the casualties are due, and the object of this action is to have it found that Mr Matheson's trustees are bound to relieve them of the casualties in terms of clauses of relief contained in the dispositions.

"The clause of relief in the disposition of 1866 is substantially different from that in the disposition of 1868, and it is therefore necessary to consider the clauses separately.

"In the former disposition Mr Matheson bound himself, his 'heirs and successors,' to relieve the pursuers, 'in all time coming, of and from payment of the whole feu-duties and casualties payable by me or my heirs to my superiors . . . And, further, I bind and oblige myself, my heirs and successors, at the expense of me or my foresaids, to enter with the superiors . . . and if my heirs and successors shall not so enter, then I oblige myself, and my heirs and successors, to pay the whole composition exigible from the said Caledonian Insurance Company or its foresaids on receiving an entry direct from the over-superiors.'

"I am of opinion that that clause does not entitle the pursuers to be relieved of the composition in question. Mr Matheson, in the first place, undertakes to relieve the pursuers only of casualties payable 'by me or my heirs.' These words do not include the composition payable upon the entry of a singular successor. Further, the latter casualty is dealt with at the end of the clause, where Mr Matheson undertakes that he and his heirs and successors shall enter with the superior, and that they will relieve the pursuers of any composition which they may be called upon to pay by reason of his heirs or successors failing to enter with the superior. I do not think that the pursuers can found upon that clause, because they are liable to pay composition in respect of the implied entry created by the Conveyancing Act, and not because Mr Matheson's heirs have failed to enter with the superior. The obligation to relieve of composition was undertaken in view of the law as it existed at the date of the disposition, under which Mr Matheson's heirs would have been entitled to enter with the superior, and thereby render it impossible for the superior to exact composition from the

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The Caledonian Insurance Company reclaimed against the interlocutor in so far as it dealt with the disposition of 1866, and argued;—The primary obligation undertaken by Mr Matheson was in effect to keep the disponees free from ever having to pay a composition. There were two modes open to the disponer at first of implementing that obligation, either to enter his heir or himself pay the composition exigible from his disponees for a direct entry. A clause like the one in question fell to be construed in favour of the disponees,[1] and any risk of a change of law was on the disponer. If supervenient legislation had rendered one of the alternative modes impossible that did not in any way affect the other.[2] If a man had agreed to do one of two things, and the performance of one of them was rendered impossible, he was not discharged from his liability to do the other.[3] The obligation to pay the composition was entirely unqualified, and irrespective altogether of what the cause of the failure to enter the heir might be, the penalty had to be exacted. The earlier clause in the deed declaring that the disponees were to be freed and relieved

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pursuers. The Conveyancing Act, however, put it out of the power of Mr Matheson's heirs to enter, and I am of opinion that the obligation to relieve of composition, in the event only of the heir failing to enter, cannot be enforced, when the composition has become due not through any failure on the heir's part, but because a supervening statute has changed the law.

"The clause in the disposition of 1868 is in the following terms:—'I bind myself to free and relieve the said Caledonian Insurance Company and their foresaids of all casualties . . . . both prior to the said term of entry and in all time coming thereafter.'

"The defenders contended, in the first place, that a composition was not, prior to the Conveyancing Act, a casualty of superiority. It seems to me that I must regard that point as having been settled adversely to the defenders by the judgment in *Farquharson* v. *Caledonian Railway Company*, 3 F. 141.

"The defenders further contended that the obligation could not be enforced by reason of the change in the law which was made by the Conveyancing Act. But for that Act Mr Matheson's heir could and would have entered with the superior, and a composition could not have been claimed from the pursuers.

"I have already expressed the opinion that that change in the law relieved the defenders of the obligation of relief contained in the disposition of 1866, but that is because the obligation was expressly based upon the existing state of the law. Mr Matheson bound his heir to enter with the superior, and it was only if the heir failed to enter that the pursuers were to be relieved of any composition which they might thereby be obliged to pay. The heir, in my opinion, could not be said to have failed to enter, when a subsequent statute put it out of his power to enter.

"In the disposition of 1868, however, the obligation to relieve of casualties is not conditional but absolute, and the question seems to me to be whether the change in the law operated by the Conveyancing Act so altered the incidence of the casualty that it would not be just and reasonable to regard it as falling within the purview of the contract.

"Now, I take it that when Mr Matheson died the position of matters

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[1] Dunbar's Trustees v. British Fisheries Society, Dec. 19, 1877, 5 R. 350, July 12, 1878, 5 R. (H. L.) 221.

[2] Dunbar v. Scott's Trustees, July 18, 1872, 10 Macph. 982, 44 Scot. Jur. 556.

[3] Addison on Contracts (9th ed.) p. 134; Barkworth v. Young, 1856, 26 L. J. Chanc. 153, at 163.

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by the disponer and his heirs in all time coming of the whole feu-duties and casualties payable by the disponer and his heirs was not limited in its application to relief-duty only. The casualties were said to be payable out of lands, and it would have been absurd to declare that relief-duty, which was merely nominal, should be payable out of lands. The reasoning of the Lord Ordinary in dealing with the other deed—that of 1868—and it was not challenged—was applicable to the present deed.

Argued for the defenders;—The parties to the deed had clearly contemplated the continued existence of a mid-superiority, and the situation which had arisen was outwith the scope of the clauses of relief. Neither party had it in view that the entry of Matheson's heir might become impossible. The question, therefore, was, which of two innocent parties was to suffer by the arbitrary interference of Parliament? The answer was that the loss must just lie where it fell. The obligation to pay the composition was only exigible from the disponer or his representatives in the event of a failure to enter the disponer's heir; but there could be no failure to do what the Legislature had made it impossible to do. The general rule that supervenient impossibility did not excuse from performance did not apply when subsequent legislation was the cause of the impossibility.[1]

LORD PRESIDENT.—The question is whether the defenders are bound to relieve the pursuers of a composition demanded from them by the Governors of George Heriot's Hospital as having become due upon the death of Robert Matheson in respect of subjects the mid-superiority of which was disponed by him to the pursuers by disposition dated the 11th and 12th, and recorded in the Register of Sasines the 20th days of July 1866.

Robert Matheson held parts of the lands of Coates under the Governors of George Heriot's Hospital as the superiors thereof, for payment of certain feu-duties, and by the disposition just mentioned he conveyed to the pur-

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would, if the Conveyancing Act had not been passed, have been this:—The superiors, the Governors of George Heriot's Hospital, would have been entitled to call upon the pursuers to enter with them as their vassals, and to pay a composition, and to enforce that demand by a declarator of non-entry. The pursuers, however, could have met that demand by putting forward Mr Matheson's heir. The superiors would have been bound to receive the heir, although—and I think that this is important—they could not have compelled him to enter. The result of the Conveyancing Act, therefore, was simply this, that the true vassal could no longer defeat the superior's claim to a composition by putting forward the heir in a bare mid-superiority. There has accordingly been no change in regard to the casualty, but the pursuers can no longer resort to a device which would formerly have been open to them, to avoid payment of the casualty. It seems to me that that is not a change in the law which entitles the defenders to refuse to implement an absolute and unconditional obligation to relieve the pursuers of all casualties. . . ."

[1] Anson, Law of Contract (9th ed.) 333; Bailey v. De Crespigny, 1869, L. R., 4 Q. B. 180; Brown v. Mayor of London, 1861, 9 C. B. (N. S.) 726; Mayor of Berwick v. Oswald, 1854, 3 Ellis and Blackburn, 653, Maule, J., at p. 665; Scott v. Howard, June 22, 1880, 7 R. 997, March 24, 1881, 8 R. (H. L.) 59; Lindsay v. Bett, July 13, 1898, 25 R. 1155; Scott v. Edmond, June 25, 1850, 12 D. 1077, 22 Scot. Jur. 473; Appleby v. Myers, 1867, L. R., 2 C. P. 651, following Taylor v. Caldwell, 1863, 32 L. J., Q. B. 164.

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suers, in consideration of the price of £6562, 10s. the subjects therein specified to be holden *a me vel de me* for payment to him, his heirs and successors, of one penny Scots money in name of blench farm yearly, doubling the same at the entry of heirs and singular successors. It was further declared in the disposition that the pursuers and their assignees should be freed and relieved by him and his heirs and successors, then and in all time coming, of and from payment of the whole feu-duties and casualties "payable by me or my heirs to my superiors," as well as from all cess, teinds, minister's stipend, and other public and parochial burdens payable in respect of the said subjects, and from all augmentations thereof, it being declared that all such upper feu-duties, casualties, cess, teinds, and minister's stipends and public and parochial burdens, and all augmentations thereof, should be payable by him and his foresaids, then and in all time coming, out of the remainder of the lands of Coates belonging to him not thereby disponed. He further bound and obliged himself and his heirs and successors to enter with the superiors, and if his heirs and successors should not so enter, he bound himself and his heirs and successors to pay the whole composition exigible from the pursuers on receiving an entry direct from the over-superiors, and also the whole feu-duties and casualties which might thereafter become payable by them to these superiors.

It is to be observed in the first place that the obligation undertaken by Mr Matheson is only to relieve the pursuers of casualties "payable by me or my heirs," words which do not include composition payable upon the entry of a singular successor, the latter casualty being afterwards dealt with in the undertaking by Mr Matheson that he and his heirs and successors shall enter with the superior and relieve the pursuers of any composition which they might be called upon to pay by reason of his heirs and successors failing so to enter.

Robert Matheson died in 1877, and the Governors of George Heriot's Hospital have demanded from the pursuers a composition of one year's subfeu-duties in respect of the said subjects.

As the law stood at the date of the disposition by Mr Matheson to the pursuers, lands fell into non-entry upon the death of the last entered vassal, and remained in that condition until a new vassal was entered, so as to fill the fee. Where lands had been sold and conveyed by the last entered vassal, it was competent for the heir of that vassal to come forward and claim an entry upon payment of relief-duty, thereby protecting the ancestor's disponee from the necessity of paying composition as the condition of obtaining an entry. So standing the law, the obligation upon Robert Matheson and his heirs to relieve the pursuers of the whole feu-duties payable by him or his heirs to his superiors bound him and his heirs to relieve them of the casualty of relief, but not of the casualty of composition which the Governors of Heriot's Hospital claim, and of which the pursuers now ask to be relieved by the defenders. Their first answer to this claim, therefore, seems to me to be a good one, viz., that Robert Matheson and his representatives are not bound, upon a sound construction of the first obligation of relief, to relieve the pursuers of the casualty which they are asked to pay to the Governors of Heriot's Hospital, viz., a composition.

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By the second obligation Robert Matheson bound himself and his heirs and successors to enter with the superior, and if his heirs and successors should not so enter, he bound himself and them to pay the whole composition exigible from the pursuers on their receiving an entry from the over-superiors. But the change in the law effected by the Conveyancing Act, 1874, entered the pursuers as vassals of the Governors of Heriot's Hospital, thus filling the fee, and rendering impossible of fulfilment the obligation that Mr Matheson's heirs and successors should enter. If, however, the leading obligation was thus rendered imprestable by subsequent legislation, it appears to me that the accessory obligation to relieve the pursuers of the composition which they are liable to pay to the over-superiors must also fall to the ground. The intention of the parties in the disposition of 1866 was, that the middle fee should be kept up, but it was in effect destroyed by the operation of the Conveyancing Act of 1874, and there was thus *rei interitus* as regards that fee.

I may add that the general rule is that such an obligation must be construed with reference to the law as it existed at the time when it was undertaken, and that it cannot be enforced, if fulfilment of it, or of any of the conditions attached to it, has been rendered impossible by subsequent legislation. In this connection I may refer to *Lindsay* v. *Bett*,[1] *Oswald* v. *Mayor of Berwick*,[2] *De Crespigny*,[3] *Brown* v. *Mayor of London*.[4]

For these reasons I am of opinion that the Lord Ordinary's interlocutor should be adhered to.

LORD ADAM concurred.

LORD M'LAREN.—I agree in all your Lordship's observations, and in the reasons for the judgment.

LORD KINNEAR.—I agree with your Lordship. There can, I think, be no question as to the rule which your Lordship has stated, that the rights of parties are to be interpreted with reference to the law in force at the time their contracts are made, and not with reference to some subsequent law of which the parties knew nothing when they were contracting. But it is hardly necessary in the present case to have recourse to any general rule, because as matter of construction it is certain that the stipulations which we have to consider were intended to regulate rights and liabilities existing at the time that the contract was made which have been altogether abolished by the Act of 1874. There is no possible law for the construction of this contract to which we can look except the law prior to the Act of 1874. The object of the stipulations was to keep up a barren mid-superiority for the protection of a purchaser, and the Act of 1874 says that that is a thing which shall no longer be done. The natural consequence would seem to be that specific regulations for the maintenance of a condition of things which the Act abolishes became inoperative, and that becomes all the more clear when, as your Lordship has pointed out, regard is had to the particular stipulations intended for that purpose in this deed. In the first

[1] 25 R. 1155.
[2] 4 L. R., Q. B. 180.
[3] 23 L. J., Q. B. 321.
[4] 9 C. B., N. S. 726.

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place the disponee binds himself and his heirs and successors to relieve the purchaser of all feu-duties and casualties "payable by me or my heirs to my superiors." It is perfectly obvious that the liabilities to which this obligation of relief relates are the liabilities of the existing investiture, the feu-duties and casualties payable by the disponer to his own superior, that is the liabilities arising from the terms of the charter constituting him and his heirs vassals of the superior in a certain estate; and it is equally clear that the heirs referred to in this clause are the heirs of the investiture. But then the investiture has come to an end. It has been entirely extinguished by the provisions of the Act of 1874 operating upon the conveyance. A new investiture has taken its place, and the disponer and his heirs have no concern whatever with any rights and liabilities of the new investiture, because they have no longer any interest in the subject. They are out of the feudal relation altogether, and have nothing whatever to do with the land. Therefore it seems to me to be perfectly clear that this stipulation has ceased to have any force or to have any legal meaning or effect with reference to the estate in question. Then a question of some difficulty is created by the second obligation, because there the disponer obliges himself and his heirs and successors to enter with the superior. Now, that has become a legal impossibility. So long as the disponer remained in life the fee was filled by him, and when he died, if the law had remained unaltered, it would have become vacant, and his heirs would have been obliged to enter with the superior. But then, before he died he had been completely divested and the disponees had been vested in his place by the Act of 1874, because the registration of their disposition entered them with the superior. Therefore there was no vacant fee at his death to which his heirs could possibly enter, and the fulfilment of the obligation which he had undertaken for them became impossible. Now I think with your Lordship that it is a well-established rule that where a condition of a contract is legal and possible at the time when the contract is made, but becomes impossible and illegal afterwards by the act of the Legislature, no action will lie for non-performance of the undertaking which the law as it now stands will not allow to be performed. The disponer had undertaken by a perfectly legal and practical obligation to enter with his superior so as to protect his disponee. The Act of Parliament says that shall not be done, and it appears to me to follow of necessity that the person who has undertaken the obligation cannot be treated as in breach of contract for failing to do what Parliament has made impossible. I think it is not only the performance of the obligation which the Legislature has made impossible, but the condition upon which it arises has been prevented from ever emerging, because the obligation is to enter whenever the fee becomes vacant, and no fee can now become vacant so long as a conveyance *a me* in favour of a living person stands recorded in the Register of Sasines; and therefore the condition upon which this disponer and his heirs could have been called upon to perform this obligation does not exist. The subject is gone. Well then, the question comes to be, whether the remaining obligation that if the disponer's heirs do not enter they shall pay the composition exigible from the disponees on receiving entry direct from the superior, can be enforced. I agree, for the reasons which your Lordship has given, that that cannot be

enforced against them, because it is an accessory obligation both in terms and in substance. It is an obligation accessory to the primary obligation to enter, and if the primary obligation has ceased, then this accessory obligation, which is merely machinery to enable the primary obligation to be enforced, necessarily falls with it. I think the reclaimer's counsel conceded that if during the interval between the date of the disposition and the passing of the Conveyancing Act the disponees themselves had gone to the superior and demanded confirmation of their infeftment, which would have had the effect of entering them directly with the superior, they could not have enforced this demand for relief from the composition. It was said that that would be because they could not complain of the necessary consequences of their own act, but that concession I think is fatal to the reclaimer's argument, because it is an exceedingly clear illustration of what I think is otherwise plain enough, that this obligation to relieve from the composition is not a separate and independent obligation at all, but is absolutely tied up with the primary obligation of the disponer to enter. If it had been a separate obligation it might not have mattered how the composition came to be exigible—whether on the demand of the disponee or by some other method,—because the obligation to pay composition might quite well stand as a separate and independent obligation. But the reason why it could not be enforced is that the condition on which it arises is that the disponers shall fail to enter, and they could not be said to have failed to enter if their entry was excluded by the act of the disponees themselves; but neither can they be said to have failed to enter if their entry is excluded by the act of the law. If the Legislature has already filled the fee, they cannot enter, and there is no failure on their part to fulfil their primary obligation to enter, and their accessory obligation to pay the composition for their disponees if they make such failure does not become prestable. The whole difficulty no doubt arises from the legislation by which Parliament has provided for the general relations of superiors and vassals without having its attention called to all the particular contracts by which in special cases the rights and liabilities of such persons might be regulated. If that results in any disadvantage to the disponees in the present case, I am afraid there is no principle in law or in equity by which we can relieve them from it. The disadvantage which is created by the operation of an Act of Parliament must lie where the Act of Parliament leaves it, and we have no power, and certainly there would be no justice in interfering if we had the power, to impose a liability on one of two contracting parties which Parliament has left to rest upon the other. Therefore, as far as regards the title of 1866, the Lord Ordinary's interlocutor is right and must be adhered to.

THE COURT adhered.

T. & R. B. RANKEN, W.S.—MORTON, SMART, & MACDONALD, W.S.—Agents.

No. 135. THE SCOTTISH PROVIDENT INSTITUTION, Appellants.—*Dundas, K.C.* —*Blackburn.*

June 4, 1901. Scottish Provident Institution v. Inland Revenue.

JOHN ALLAN (Surveyor of Taxes), Respondent.—*Jameson, K.C.*—*A. J. Young.*

Revenue—Income-Tax—Interest on Colonial Investments—Remittances not identified as capital—Income-Tax Act, 1842 (*5 and 6 Vict. cap.* 35), *sec.* 100, *Schedule D, Case* 4.—A Scottish mutual life assurance society was assessed for income-tax upon, *inter alia*, three sums of £25,000, £28,000, and £5000 remitted from Australia in 1898, on the ground that these sums were interest received in this country on investments in Australia. The Commissioners having sustained the assessments, the society obtained a case for appeal.

The case stated the following facts:—Between 1885 and 1890 the society remitted to their agent in Australia sums to be invested in specific loans agreed to by the society. After 1890 no further remittances were made from this country, but the whole interest on these loans, until 1893, was invested in Australia. Subsequently various sums were remitted to this country. At 31st December 1898 the amount of loans in Australia exceeded the total capital sent out from this country for investment. Loans repaid and interest paid in Australia were credited to a general bank account in Australia, and remittances to Great Britain were made from the same account. The whole revenue of the society in Australia was derived from interest on loans. This interest, whether brought home or not, was regularly included in the society's annual revenue accounts as part of its income.

On 1st February 1898 the society's Australian agent remitted the £25,000, with a letter stating that it was the amount of a loan repaid in 1891, and on 16th November 1898 he remitted the £28,000 as the amount of a loan repaid two days before. Both sums had been paid into the general bank account in Australia, and both remittances had been made from that account. The sum of £5000 was remitted directly by the borrower in Australia to the society's office in London as a repayment of capital.

Held (1) that as the two loans of £25,000 and £28,000 had been immixed with the society's other funds, consisting of capital and interest, the remittances could not be identified as the return of capital sent from this country; (2) that as the total amount invested in Australia exceeded the amount sent out, it was to be presumed that in the ordinary course of business the sums remitted were from revenue, and not the return of capital sent from this country, and that as the revenue consisted entirely of interest, the assessment on these two sums was valid; but (3) that the £5000 could not be regarded as interest, and was not liable to duty.

1st Division. Exchequer Cause.

THE SCOTTISH PROVIDENT INSTITUTION was assessed, for the year 1899-1900, under Case 4 of Schedule D of the Income-Tax Act, 1842,* upon a sum of £217,350, received in the year 1898, which

* The Income-Tax Act, 1842 (5 and 6 Vict. c. 35), enacts:—

Section 100—"And be it enacted that the duties hereby granted contained in the schedule marked D shall be assessed under the following rules . . . :—Rules for ascertaining the said last mentioned duties in the particular cases herein mentioned. . . .

Fourth case—The duty to be charged in respect of interest arising from securities . . . in the British plantations in America, or in any other of Her Majesty's dominions out of Great Britain and foreign securities, except such annuities, dividends, and shares as are directed to be charged under schedule C of this Act.

The duty to be charged in respect thereof shall be computed on a sum not less than the full amount of the sums (so far as the same can be computed) which have been or will be received in Great Britain in the current year, without any deduction or abatement."

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(for convenience) was taken as the year of assessment. The tax was charged upon this sum, in the view that it represented interest received in Great Britain from funds belonging to the Institution invested in Australia.

The assessment was sustained by the Commissioners, and the Institution obtained a case on appeal, the question at issue being whether the sum in question was interest upon the Australian investments or consisted of repayments of capital.

The following facts were set forth in the case:—

"The Scottish Provident Institution is a mutual life assurance society. It was established in the year 1837, and was incorporated in the year 1848 by its private Act, 11 and 12 Victoria, cap. 106. Its head office is in Edinburgh, and its ordinary management and administration are wholly vested in a board of directors established there. . . .

"The Scottish Provident Institution Act, 1884, empowered the directors to lend out the Institution's funds in various countries outwith the United Kingdom, and in 1885 they began to lend out sums of money in Australia, and have since invested large sums there. The Institution has representatives or attorneys in Melbourne charged with the management of the Australian investments. All proposed investments are submitted to the Institution's directors in Edinburgh, and made only if approved by them. Before 1885 the Institution had no funds in Australia, and it was consequently necessary to remit sums from this country for the purpose of meeting loans made there. All sums so remitted were against specific investments, and were so marked at the time. No sums were remitted from this country to Australia for investment after 1890. The interest accruing on the Australian investments prior to 1893, was not brought home, and the Institution's Melbourne representatives reinvested such interest in Australia as it fell due.

"The total amount sent out to Australia for investment in manner above mentioned up to 31st December 1898 was, .	£1,504,000
"The total amount of interest from funds there, after deducting all Australian expenses up to 31st December 1898, was, ...	1,034,707
"Total amount sent out, with accumulated interest to 31st December 1898, ...	£2,538,707
"Total remittances from Australia to 31st December 1898, ...	716,500
"Total funds remaining in Australia as at 31st December 1898, ...	£1,822,207

"The total amount remitted from Australia is made up as follows:—

During the years					
1893	1895	1896	1897	1898	Total
£32,000	£115,000	£101,000	£251,150	£217,350	=£716,500

"It is upon the said sum of £217,350 remitted during the year 1898 that the assessment the subject of appeal has been made.

"The following table shews certain sums remitted by the Institution to Australia against specific investments in manner previously mentioned, the dates of these remittances, the dates of repayment or

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part payment of said investments, and the dates and amounts of remittances from Australia during 1898 which go to make up said sum of £217,350, viz.:—

No.	Remittances for Investment.		Repayments of said Investments.		Remittances from Australia.	
	Date.	Amount.	Date.	Amount.	Date.	Amount.
	1886,		1891,		1898,	
1	May 21	£25,000	June 1	£25,000	Feby. 1	£25,000
2	Oct. 23	10,000	Oct. 14	10,000	Feby. 1	10,000
3	Aug. 5	25,000	Aug. 5	5,000	Feby. 1	9,000
			1896,			
			Novr. 5	4,000		
	1888,		1894,			
4	Jany. 19	100,000	July 25	25,991	April 13	35,000
			1895,			
			Jany. 21	39,859	May 17	20,850
					Sep. 7	10,000
	1886,		1898,			
5	Aug. 11	70,000	May 12	5,000	May 12	5,000
			1897,			
6	April 15	37,500	Aug. 6	37,500	Sep. 7	37,500
	1880,		1898,			
7	April 30	100,000	April 30	25,000	Sep. 7	7,500
					Nov. 2	17,500
	1890,		1898,			
8	Sep. 22	30,000	Mar. 24	6,000	Nov. 2	6,000
	1887,		1896,			
9	June 23	6,000	Decr. 24	6,000	Nov. 2	6,000
	1888,		1898,			
10	Nov. 14	28,000	Nov. 14	28,000	Nov. 16	28,000
						£217,350

"When the repayments mentioned above (with the exception of No. 5) were received, they were paid into the bank account kept by the Institution's Australian representatives, which account would at the time contain other sums of money, which other sums may or may not have included interest earned in Australia, and, as will be seen from the above table, very considerable periods in some cases elapsed between the dates when the repayments were received in Australia, and the remittances home made which the Institution claims represent those repayments. In the cases where there were such considerable periods, fresh investments had been made by drawing upon the said bank account, and had been repaid. It was an instruction from the Institution to their Melbourne representatives that remittances home should be against sums sent from this country, and accompanying all the said remittances home, except No. 5, the said representatives sent letters, of which the following excerpt from the letter accompanying remittance No. 1 may be taken as a sample:—'For your guidance in dealing with the Inland Revenue department, the above amount represents proceeds of the draft for £25,000 drawn by the attorneys of the Institution on 21st May 1886,' and each letter is headed with the name of the particular borrower for whom the

remittance from this country to the Institution's representatives or attorneys was originally sent. . . . With regard to No. 5 of the above table, the sum of £5000 in part repayment of the principal debt of £70,000 was cabled direct by the borrower's solicitor in Australia to the Institution in London, and never passed through the Institution's Australian representatives' hands.

"The whole of the Institution's income in Australia has been, and is, interest arising from its securities there. This interest, whether brought home or not, was regularly included in the Institution's annual revenue accounts as part of its income, and so far as received or accrued up to 31st December 1894, the date of the last septennial investigation, was duly taken into account in arriving at the surplus divisible among the members by way of bonus or otherwise. Interest received since 31st December 1894 will contribute to the surplus to be dealt with at the next investigation."

The Institution contended that the whole amount brought home in 1898 represented capital; that this was plain in the case of No. 10 in the above table, where the sum paid into the Australian account was two days afterwards remitted home; that the fact that it had been lodged for this time in the Australian account did not destroy its identity as capital, and that the same principle applied where sums paid into the account in repayment of capital by the borrower remained for longer periods in the Australian account. They contended generally, "that so long as they had any funds in Australia which had originally been sent out from this country, and which, owing to the repayment of the original loan, were available, they were entitled to treat all remittances to this country as the return of funds originally sent out, and not as remittances of income earned in Australia. . . . The result of the contention of the Crown, if affirmed, would be, that unless the Institution were to withdraw all their funds from Australia they could never bring home the capital sums sent out from this country without paying income-tax on them when received."

They further maintained, that in any event duty was not chargeable upon the £5000 which was remitted direct to the London office in part repayment of the loan of £70,000 (No. 5 of the table).

The Surveyor of Taxes contended that, as the sum still remaining in Australia in 1898 after the £217,350 was remitted exceeded the amount sent there for investment, the whole of these remittances fell to be treated as interest collected in that and preceding years, and were liable to income-tax under the Fourth Case of Schedule D when received in the United Kingdom.

The undernoted authorities were cited.[1]

At advising,—

LORD PRESIDENT.—The question is whether the sum of £217,350, received by the Scottish Provident Institution in the United Kingdom from Australia during the year ending 31st December 1898, and for convenience taken as the year of assessment, should, upon the statements in the case, be regarded as consisting of capital of loans repaid, or of interest assessable in terms of the

[1] *For the Appellants.*—Scottish Mortgage and Land Investment Company of New Mexico v. Inland Revenue, Nov. 19, 1886, 14 R. 98; Inland Revenue v. Scottish Provident Institution, Dec. 17, 1895, 23 R. 322; Colquhoun v. Brooks, 1889, 14 App. Cas. 493. *For the Surveyor of Taxes.*—Leeds Benefit Building Society v. Mallandaine, L. R. [1897], 2 Q. B. 402.

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Fourth Case of Schedule D of the Act of 5 and 6 Vict. c. 35. This would seem *prima facie* to be a question of fact rather than of law, but our judgment upon it is asked, I suppose, upon the view that the proper inferences to be drawn from admitted facts may involve legal considerations. (His Lordship here stated the facts, and proceeded)—

It appears that a sum of £5000 mentioned in the table, repaid by a borrower in Australia, and remitted to this country on 12th May 1898, was not paid to the representatives of the Institution in Australia, but was cabled direct by the borrower's solicitor in Australia to the Institution in London. I am of opinion that this sum cannot be regarded as consisting of interest assessable in terms of the Fourth Case of Schedule D of the Act 5 and 6 Vict. c. 35, and consequently that the decision of the Commissioners is erroneous in so far as it is concerned. It never was immixed with the funds of the Institution in Australia, but was sent to this country by the borrower as and for payment of his capital debt.

The other sums set out in the table, which, along with the £5000 just mentioned, make up the £217,350, appear to me to be in an essentially different position. The first of these sums may be taken as an example:—£25,000 was remitted from this country to Australia for investment on 21st May 1886, that sum was repaid by the borrower in Australia on 1st June 1891, and £25,000 was remitted to this country by the Institution's representatives in Australia on 1st February 1898. During the period of nearly seven years, throughout which the £25,000 remained in Australia, after it was repaid by the borrower, and before the remittance was made, it was, as I understand, immixed with the funds of the Institution in Australia, having been paid into its bank account there,—it is not stated in the case that the £25,000 remitted to this country on 1st February 1898 was in fact the £25,000 repaid by the borrower nearly seven years before, and it appears to me that the statements in the case do not require or warrant the inference that it was so. In so far as inference from the facts stated is admissible, the natural and proper inference from the known course of business seems to me to be that the money remitted was the interest accruing from funds invested in Australia. In some of the other cases the remittance was made shortly after the repayment in Australia by the borrower, the most favourable case for the Institution being that of the £28,000 which was remitted to Australia for investment on 14th November 1888, and repaid by the borrower there on 14th November 1898, while £28,000 was remitted to this country by the Institution's representatives there on 16th November 1898. Even that sum, however, was immixed with the funds of the Institution in Australia for two days, and no information is given in the case as to the state of the Institution's bank account in Australia, or as to the other operations upon it, at or about that time. In particular, it is not stated in the case that the £28,000 was in fact the amount of the loan repaid on 14th November 1898, and I am unable to find in the facts stated in the case any sufficient ground for drawing the inference that it was so.

With respect to the sums in the table other than the £5000 already mentioned, I am of opinion, upon the statements in the case, that the Commissioners were right in drawing the inference that they were, and in holding that they must be regarded as interest arising from securities in Australia

received in this country during the year of assessment, not as capital sums withdrawn from investment in Australia and returned to this country. The interest was not kept separate from the other funds of the Institution in Australia, and so invested there as to preserve its identity as interest, and, in the absence of evidence to the contrary, it appears to me that the drafts upon the bank account for the purpose of making new investments should be presumed to have been upon the capital of loans repaid, the interest in natural course being forwarded to this country. If, in terms of the agreement with a borrower in Australia, the interest on his loan had been remitted by him to the Institution in this country, it would not, in my judgment, have been doubtful that it (the interest) was assessable to income-tax here, and it does not appear to me to make any difference that, for the purposes of administration, the interest was paid to representatives of the Institution in Australia, by them lodged in bank there, and remittances, not proved to have been repayments of capital, made to this country. Further, I consider that money which was truly interest would not, for the purposes of the present question, cease to possess the character of interest by being invested by the Institution for a time on loan in Australia,—on the contrary, I think that if and when the money so invested was repaid, remitted to, and received in this country, it would be chargeable with income-tax here, as it was in fact interest of money invested in Australia.

The whole income of the Institution in Australia has consisted, and still consists, of interest arising from money invested there, and this interest, whether brought home or not, was, I understand, regularly and properly included in the annual revenue accounts of the Institution as part of its income, and so far as received or accrued up to 31st December 1894, the date of the last septennial investigation, was taken into account as the surplus to be divided amongst the members by way of bonus or otherwise, while the interest received since 31st December 1894 will form part of the surplus to be dealt with at the next investigation.

I am not leaving out of view the case of *The Inland Revenue* v. *The Scottish Provident Institution*,[1] in which it was held that where interest derived from colonial investments was not remitted to this country, but was retained and reinvested in Australia, the mere fact of its being entered in the Institution's accounts did not constitute constructive remittance to this country so as to render the interest chargeable with duty under Case 4, Schedule D, of the Income-Tax Act, 1842. When, however, the question is, whether particular remittances, the real origin and character of which as capital or interest are not definitely established, should be regarded as consisting of capital or of interest, the fact that the amounts were entered in the accounts of the Institution and treated as income in this country may be admissible evidence upon that question. It further appears to me that, under the circumstances, indefinite remittances to this country must be presumed to consist of interest, not of capital, so long as the amount of capital remitted to Australia for investment still remains invested there.

For these reasons I am of opinion that the decision of the Commissioners is right, except as to the £5000.

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[1] 23 R. 322.

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LORD ADAM.—I have had an opportunity of reading your Lordship's opinion, and I concur.

LORD M'LAREN.—I also concur. I wish to say that I do not think that the sum of £5000, referred to in the concluding part of your Lordship's opinion, creates any embarrassment or any difficulty in dealing with this case from the point of view of principle, because if a colonial debtor pays up his loan direct to the company in this country that has lent him the money, then the company is only liable to pay income-tax upon so much of the payment as consists of interest, but it pays nothing on the sum which he has remitted as capital. Now, in the present case, the sum remitted was only £5000 out of a larger debt amounting, I think, to £70,000, and that was admitted to be a payment in reduction of capital, and therefore it is not subject to duty. But where a capitalist company, as in the present case, has invested large sums for a period of fifteen years in a colony, and has an agent employed not only to receive interest, but also to receive the capital of the investment when paid up and to reinvest it, then if unappropriated remittances are made to this country, I think everyone would agree that they must be dealt with according to the ordinary course of business, and these remittances must be presumed to be paid in the first place to account of interest, and in the second place to account of principal or capital. I think that rule results from the fact that no prudent man of business will encroach upon his capital for investment when he has income uninvested lying at his disposal.

But then these sums were appropriated, and the terms of the appropriation are a little curious, because we have the following statement in the case, consisting of an extract from a letter which is taken as an example, and the extract is this,—"For your guidance in dealing with the Inland Revenue department, the above amount represents proceeds of the draft for £25,000, drawn by" so and so, the intention being to represent that this is capital, or the proceeds of payments to account of capital, and not to account of income. I cannot think that in a question between the Crown and the subject the liability to duty is to be determined by a representation of that kind made by arrangement between the creditor and his agent for the purpose of enabling him or his agent to appropriate a payment in such a manner as to avoid payment of duty, the appropriation being contrary to what one would expect in the ordinary course of business. There may be cases, special cases, like the one which we have dealt with specially, and which are determined by the facts of the particular transaction, but I think the sound principle is the one announced in your Lordship's opinion, that the quality of the fund remitted, in the absence of evidence to the contrary, must be determined according to the ordinary course of business in dealing with uninvested funds.

LORD KINNEAR.—I also have had an opportunity of reading your Lordship's opinion, and I concur in it.

THE COURT pronounced this interlocutor:—"Affirm the determination of the Commissioners except to the extent of the tax upon £5000 remitted direct by the borrower's solicitor in

Australia to the Institution in London in part repayment of a principal debt of £70,000: Order repayment of the tax upon this sum of £5000, with interest thereon at four per cent per annum from the date of payment until repaid, and decern: Find the Surveyor of Taxes entitled to expenses, which modify to two-thirds, and remit," &c.

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DUNDAS & WILSON, C.S.—PHILIP J. HAMILTON GRIERSON, Solicitor of Inland Revenue—Agents.

No. 136.
June 4, 1901.
Fraser v. Downie.

ROBERT FRASER (Burgh Prosecutor of Musselburgh), Petitioner (Respondent).—*F. T. Cooper.*
JOHN DOWNIE, Respondent (Appellant).—*Younger.*

Burgh—Dean of Guild—Civil or Criminal Jurisdiction—Penalty—Burgh Police Act, 1892 (55 *and* 56 *Vict. cap.* 55), *sec.* 487—*Summary Procedure Act*, 1864 (27 *and* 28 *Vict. cap.* 53), *sec.* 28.—In a petition to a Dean of Guild Court, that Court imposed a penalty of £5 on the respondent.

An appeal by the respondent to the Court of Session was objected to as incompetent, on the ground that the proceedings were criminal and not civil, in respect that by sec. 487 of the Police Act, 1892, the Magistrates of burghs were authorised to pronounce a sentence of imprisonment in default of payment of a pecuniary penalty, and that by sec. 28 of the Summary Procedure Act all proceedings by way of complaint were to be deemed to be of a criminal nature where the Magistrate was authorised to pronounce a sentence of imprisonment.

The Court *repelled* the objection, on the ground that sec. 487 of the Burgh Police Act, 1892, did not apply to a Dean of Guild Court.

Opinion per Lord Adam that sec. 28 of the Summary Procedure Act, 1864, was also inapplicable to a Dean of Guild Court.

Lang v. *Allan & Mann*, 7 Macph. 473, *commented on.*

1ST DIVISION.

IN a petition to the Dean of Guild Court, Musselburgh, by Robert Fraser, the Burgh Procurator, against Robert Downie, Musselburgh, the Court found the respondent liable in a penalty of £5, with expenses. The circumstances of the case are narrated by Lord Adam.

The respondent having appealed to the Court of Session, the petitioner, when the case was called in the Single Bills, objected to the competency of the appeal, on the ground that the proceedings were criminal and not civil, in respect that by sec. 487 of the Police Act, 1892, the magistrates of burghs were authorised to pronounce a sentence of imprisonment in default of payment of a pecuniary penalty, and that by sec. 28 of the Summary Procedure Act all proceedings by way of complaint were to be deemed to be of a criminal nature where the magistrate was authorised to pronounce a sentence of imprisonment.

The petitioner referred to the cases undernoted.[1]

The appellant referred to the case of *Somerville* v. *Macgregor*,[2] where a similar appeal was heard without objection, and contended that the sections of the statutes founded on had no application to the Dean of Guild Court.

The statutes are sufficiently quoted in the opinion of Lord Adam.

At advising,—

LORD ADAM.—In this case a petition was presented to the Dean of Guild

[1] Paton v. Linton, June 8, 1880, 4 Coup. 338; Lang v. Allan & Mann, Feb. 3, 1869, 7 Macph. 473, 41 Scot. Jur. 255.
[2] Nov. 7, 1889, 17 R. 46.

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Court of the burgh of Musselburgh by Robert Fraser, burgh prosecutor of the burgh, and as such Procurator of Court for the public interest, against the appellant, John Downie, craving the Court to find him liable in a penalty not exceeding £5 sterling for having failed to give notice as therein specified, or for having permitted certain houses to be occupied before a certificate applicable thereto had been obtained by him, with an additional penalty of 40s. for every day during which such occupation may have continued or should continue.

It appears that the appellant is the owner of certain houses in Musselburgh, and the petition is founded on the 180th section of the Burgh Police (Scotland) Act, 1892, which enacts that one month after any new house or building has been completed, or before such house or building, or any portion thereof, has been occupied, the owner shall give notice to the clerk of the commissioners that the house or building, or any part thereof, is ready for inspection before being occupied, and the said clerk shall thereupon transmit such notice to the surveyor of the burgh, who shall forthwith proceed to survey such house or building, and if he is satisfied that such house or building is fit for occupation, he shall grant a certificate to that effect; and that every owner who should fail to give such notice, or should permit such house or building to be occupied before a certificate applicable thereto had been obtained should be liable in a penalty not exceeding £5 sterling, with an additional penalty of 40s. for every day during which such occupation should continue.

It is averred that the appellant failed to give notice that certain houses of which he was owner were ready for inspection before being occupied, and also failed, before permitting the same to be occupied, to obtain a certificate under the hand of the burgh surveyor to the effect that he was satisfied that the houses were fit for occupation, and had continued to permit the same to be occupied, and had so incurred the penalties claimed.

A record was made up and closed and a proof led, upon considering which, upon 3d May 1901, the Dean of Guild Court pronounced an interlocutor by which the Court found that the appellant had contravened the 180th section of the said Act, as set forth in the petition, and fined him in the sum of £5 of penalty, and found him liable in expenses.

It is against this judgment that the appellant has appealed. The respondent, however, maintains that the appeal is incompetent in the Court of Session, and ought to have been brought before the Justiciary Court.

It is difficult to conceive a Court which deals with matters more exclusively civil than a Dean of Guild Court, and there is nothing whatever of a criminal nature in the present proceedings. But the respondent rests his contention on the combined effect of section 487 of the Police Act, and section 28 of the Summary Procedure Act, 1864.

Section 487 of the Police Act enacts that the magistrate may sentence any person found liable in a pecuniary penalty to imprisonment until the same is paid, but that in no case should the period of imprisonment exceed the respective periods thereinafter specified. The respondent maintains that under this section the Dean of Guild Court might competently have sentenced the appellant to imprisonment.

He then refers to the enacting part of the 28th section of the Summary

Procedure Act, which provides that "in all proceedings by way of complaint instituted in Scotland, in virtue of any such statutes as are hereinbefore mentioned, the jurisdiction shall be deemed and taken to be of a criminal nature, where, in pursuance of a conviction or judgment, upon such complaint, or as part of such conviction or judgment, the Court shall be required or shall be authorised to pronounce sentence of imprisonment against the respondent, . . . and in all other proceedings instituted by way of complaint under the authority of any Act of Parliament the jurisdiction shall be held to be civil."

It is accordingly argued that as, in this case, the Court was authorised to sentence, and might, if it had chosen, have sentenced the appellant to imprisonment, the case falls under the 28th section of the Summary Procedure Act, although no such sentence was in fact pronounced.

It does not appear to me that the power conferred upon "the magistrate" by the 487th section of the Police Act of sentencing the appellant to imprisonment extends to a Dean of Guild Court. By section 3 the Act is divided into parts. The section in question is one of a bundle of sections which form Part VI., and which is titled "Jurisdiction and Recovery of Penalties." The part commences with section 454, and confers the jurisdiction and powers set forth in the Act, on "the magistrates of police of a burgh under this Act or any one or more of such magistrates, except where otherwise provided in this Act, including stipendiary magistrates and Sheriffs acting in the Police Court." The power contained in section 487 is one of the powers so conferred, and I do not see how we can hold that it applies to the Dean of Guild Court, or how that Court is to be brought under the category of "the magistrates of police of a burgh," or any of the magistrates or justices specified in the Act.

If that be so, then the objections to the competency of the appeal must fail.

But I think further, that even were it otherwise the 28th section of the Summary Procedure Act would have no application to the case. That section proceeds upon the preamble that "whereas much inconvenience has resulted from the uncertainty which exists as to the nature of the jurisdiction conferred by various Acts of Parliament authorising convictions for offences, and the recovery of penalties, and the enforcement of orders by imprisonment, upon summary complaint before Sheriffs, Justices, and Magistrates in Scotland, and it is expedient to define the cases in which such jurisdiction shall be held to be of a criminal nature."

The Act therefore concerns itself with jurisdiction in cases of summary conviction before Sheriffs, justices, and magistrates in Scotland.

Magistrate in the Act means "any magistrate of any burgh of Scotland having jurisdiction."

It certainly appears to me that the conviction under the petition to the Dean of Guild Court in this case is not a summary conviction before any Sheriff, justice, or magistrate in Scotland.

Coming then to the enacting part of the clause, we find that, in accordance with the preamble, it enacts that in all proceedings by way of complaint, the jurisdiction shall be deemed to be of a criminal nature where in pursuance of a conviction or judgment, upon such complaint, or as part of

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such conviction or judgment, the Court shall be required or shall be authorised to pronounce sentence of imprisonment against the respondent. And turning to the interpretation clause (sec. 2) to see what "Court" here means, we find that it means a "Sheriff Court or Burgh Court or any Court of Justices of the Peace for any county or city in Scotland, . . . any Police Court having jurisdiction, or any Sheriff, magistrate of any burgh, or Justice or Justices of the Peace for any county or city in Scotland exercising jurisdiction . . . in any matter which may lawfully be brought before him or them in the manner provided by this Act."

It appears to me that a Dean of Guild Court falls within none of the definitions or descriptions of a Court here specified. The one to which it has most analogy is, perhaps, a "Burgh Court." But although it is a Court held in a burgh, it is certainly not "the Burgh Court," a Court before which all sorts of crimes and offences of a limited kind may be brought.

In my opinion the Summary Procedure Act has no application to a Dean of Guild Court.

With regard to the case *Lang* v. *Allan*,[1] that was a petition under the Glasgow Police Act, 1866. It was presented to the Dean of Guild, and craved that the respondents should be found liable, in respect of a certain guild offence, in certain penalties, and failing payment within fourteen days, warrant was craved to imprison the respondents for any period not exceeding twenty days. The Dean of Guild found that the respondents had incurred the penalties specified in the petition, and granted warrant of imprisonment failing payment within fourteen days. It was held in an advocation that the Summary Procedure Act applied to the case, and that the advocation was not competent in the Court of Session.

The Lord Justice-Clerk (Patton) is the only Judge who indicates the grounds on which the Summary Procedure Act was held to apply to the case. He says,—"The Lord Dean of Guild is clearly 'a magistrate of a burgh exercising jurisdiction,' and the offence libelled was according to the terms of the Summary Procedure Act a criminal offence," by which he means, no doubt, an offence a conviction for which gave jurisdiction to the Justiciary Court. That may or may not be so, but I fail to see how a Dean of Guild Court, as in this case, can be held to be a magistrate of a burgh exercising jurisdiction.

It appears from the interlocutor appealed against that the Court in this case consisted of four persons, two of whom happened to be magistrates of the burgh, and two were not. I do not see how a judgment pronounced by a Court so constituted can be considered as the judgment of a magistrate exercising jurisdiction in the burgh. I therefore think that the case of *Lang* v. *Allan*[1] is no authority against repelling the objections to the competency of the appeal, which I propose your Lordships should do.

The Lord President and Lord Kinnear concurred.

Lord M'Laren was absent.

The case was sent to the roll.

Buik & Henderson, W.S.—Beveridge, Sutherland, & Smith, S.S.C.—Agents.

[1] 7 Macph. 473.

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June 5, 1901.

Hawick Police Commissioners v. Watson & Sons.

THE COMMISSIONERS OF POLICE OF THE BURGH OF HAWICK, First Parties.—*Guthrie, K.C.—Dewar.*
WILLIAM WATSON & SONS, Second Parties.—*Wilson, K.C.—W. Thomson.*

Police—Burgh—Water Supply—Assessment—Manufactories—Burgh Police (Scotland) Act, 1892 (55 *and* 56 *Vict. cap.* 55), *secs.* 21 *and* 347—*Public Health (Scotland) Act*, 1897 (60 *and* 61 *Vict. cap.* 38), *secs.* 134 *and* 136.—The Burgh Police (Scotland) Act, 1892, sec. 347, provides that "where the Commissioners shall have supplied, or resolved to supply, the burgh with water in terms of this Act, the annual value of all . . . manufactories within the burgh shall, as regards the burgh general assessment, so far as is applicable to water, . . . be held to be one-fourth of the annual value thereof entered in the Valuation-roll."

A Local Authority acting under the Public Health (Scotland) Act, 1867, introduced a water supply into a burgh in 1882.

By virtue of section 21 of the Burgh Police Act, 1892, the whole powers and obligations of the Local Authority were transferred to the Police Commissioners of the burgh, who thereafter continued and administered the water supply.

Held that the water was supplied by the Commissioners "in terms of this Act" in the sense of section 347 of the Act of 1892, and that consequently for the purposes of assessment, so far as applicable to such water supply, the annual value of manufactories within the burgh was to be held to be one-fourth of the annual value thereof entered in the Valuation-roll.

Opinion per Lord Moncreiff, that even if the water supply could be regarded as established under the Public Health (Scotland) Act, 1897, the assessment would fall to be made upon one-fourth, and not upon the whole annual value of the subjects.

THIS was a special case, the parties thereto of the first part being the present Police Commissioners of the burgh of Hawick, and, of the second part, William Watson & Sons, the owners and occupiers of a manufactory in Hawick. 2D DIVISION.

In 1882 an additional water supply was introduced into Hawick by the Local Authority under the Public Health (Scotland) Act, 1867 (30 and 31 Vict. cap. 101).

By section 21 of the Burgh Police (Scotland) Act, 1892, the powers and duties of the Local Authority were transferred to the Police Commissioners of the burgh, and thereafter the water supply was continued and regulated by them.

After the passing of the Public Health (Scotland) Act, 1897,* the

* Public Health (Scotland) Act, 1897 (60 and 61 Vict. cap. 38),—

Section 134.—"In any burgh, or where any special water supply district has been formed under this Act or any of the Acts hereby repealed, the expense incurred by the Local Authority for water supply within the same, or for the purposes thereof, and the sums necessary for payment of any money borrowed therefor, either before or after the passing of this Act, together with the interest thereof, shall be paid out of a special water assessment, which the Local Authority shall raise and levy on and within such burgh or special district, in the same manner and with the same remedies and modes of recovery as are hereinafter provided for the Public Health General Assessment."

Section 136 sets forth that the Public Health General Assessments shall be assessed, levied, and recovered in like manner and under like powers as the General Improvement Rate under the Burgh Police (Scotland) Act, 1892.

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Commissioners, who had previously under the Public Health Act, 1871, assessed manufactories at one-fourth of their value, assessed the second parties for water-rates on the full annual value of their manufactory. The second parties having objected on the ground that under section 347 of the Burgh Police (Scotland) Act, 1892,* the assessment should be limited to one-fourth of the annual value, this special case was presented. The case bore:—"The first parties maintain that the second parties are assessable on the full value of their premises as appearing in the Valuation-roll, in respect (1) that the restriction by the 1871 Act to one-fourth is repealed by the 1897 Act; (2) that the water provisions of the 1892 Act do not apply; and (3) that in any case the abatement to factories under section 347 of the 1892 Act is limited to water supplies brought in under that Act, or at all events is limited to the burgh general assessment, and does not extend to the general improvement rate, which is specially stated

* Burgh Police (Scotland) Act, 1892 (55 and 56 Vict. cap. 55),—

Section 21.—"Wherever the boundaries of any burgh have been determined in terms of this Act, the whole powers and duties (including the rights to levy assessments) exercisable by any Local Authority acting under the Public Health (Scotland) Act, 1867, and Acts amending the same, within the district or the districts comprehended within such burgh shall cease and determine, and the same shall be transferred to and vested in the Commissioners under this Act, and all drainage, water, and other works executed in such district or districts by such Local Authority in the performance of its powers and duties under the said Acts shall be taken over by the Commissioners under this Act, who shall be liable for the whole debts and obligations of such Local Authority applicable to such district or districts."

Section 347.—" . . . And where the Commissioners shall have supplied, or resolved to supply, the burgh with water, in terms of this Act, the annual value of all quarries and manufactories within the burgh shall, as regards the Burgh General Assessment, so far as is applicable to water, subject to the exception hereinafter provided, be held to be one-fourth of the annual value thereof entered in the Valuation-roll. . . ."

Section 359.—"Whenever the Commissioners in any burgh shall resolve, in manner hereinbefore provided for, to make provision for the general improvement of the burgh, it shall be lawful for them to charge, in equal proportions, all owners and occupiers of lands or premises within such burgh, with reference to the said Valuation-roll, and to all the provisions of this Act applicable to the Burgh General Assessment, which shall apply to the Improvement Assessment as if they were here repeated, with a special assessment not exceeding threepence in the pound of the gross rent or yearly value of such lands or premises, over and above any other assessment or rate to which such persons may be liable under this Act; and such special assessment shall, for the purposes of this Act, be called 'the General Improvement Rate,' and shall be leviable either from the owner or occupier of such lands or premises, in equal proportions, or in whole from the occupiers thereof, but in the latter case the occupier shall be entitled, on payment thereof, to deduct from his rent the proportion payable by the owner; and such assessment, so far as the occupier is concerned, shall be recoverable in the same manner as the Burgh General Assessment is authorised to be recovered."

Section 340 authorises the assessment called "the Burgh General Assessment."

Section 267 provides that "for shops the water-rate, or portion of the Burgh General Assessment applicable to water, shall be chargeable only on one-fourth of the rental of the premises unless in special circumstances the Commissioners see cause to charge the ordinary rates."

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to be on the gross rental." On the other hand, the second parties maintained that they were only assessable on one-fourth of said value, in terms of section 347 of the Burgh Police Act, 1892, and also of sections 134 and 136 of the Public Health Act, 1897.

The questions for the opinion and judgment of the Court were—"(1) Ought the owners and occupiers of manufactories within the said burgh to be assessed for water rates only on one-fourth of the value of such manufactories as the same appears in the Valuation-roll? or (2) On the full value?"

Argued for first parties;—The water supply here was not introduced under the Act of 1892, and consequently was not supplied by the Commissioners in terms of that Act, and section 347 thereof accordingly did not apply. The restriction to one-fourth in the Act of 1871 was repealed by the Act of 1897, and they were therefore entitled to assess on the full value.

The argument for the second parties was on the lines of the opinions of Lord Trayner and Lord Moncreiff.

At advising,—

LORD TRAYNER.—I think the question before us can be decided on a consideration of the terms of the 347th section of the Act of 1892, and without reference to the other Acts of Parliament to which attention was called in the course of the debate.

The water supply in question was introduced into the burgh of Hawick by the Local Authority under the Public Health Act, but the whole powers and obligations vested in and incumbent upon that Local Authority are now, as we are informed, transferred to the Police Commissioners of the burgh under and by virtue of the 21st section of the Act of 1892. That being so, the water supply in question is now being, and since 1892 has been, supplied by the Commissioners. Now, the section I first referred to (section 347) provides that manufactories, such as the second parties have, when assessed in respect of such water supply, shall be assessed therefor on "one-fourth of the annual value" of the subjects appearing in the Valuation-roll. It appears therefore to me that this section affords the answer to the question put to us. The same result may probably be reached on the other statutory provisions referred to in the discussion, but in my view it is not necessary to inquire into or decide that. I am therefore for answering the first question in the affirmative, and the second in the negative.

LORD MONCREIFF.—I am of the same opinion. I would add that even if this could be regarded as a water supply established under the Public Health Act, 1897, I should also be of opinion that the assessment fell to be made upon one-fourth, and not upon the whole annual value of the subjects. It is plain, on reading clauses 134 and 136 of the Public Health Act, 1897, that they are to be taken in connection with clauses 347 and 359 of the Burgh Police Act, 1892. The special water assessment authorised by the Public Health Act, 1897, is to be raised and levied in the same manner as the Public Health General Assessment; and the Public Health General Assessment is to be levied as a separate assessment, and to be assessed, levied, and recovered in like manner with the General Improvement Rate under the Burgh Police Act, 1892, and under like powers. On going back to that Act we find that the General Improvement Rate is to be levied as a

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separate assessment upon owners and occupiers, but with reference to all the provisions of the Act applicable to the Burgh General Assessment. Turning, therefore, to section 347 of the Act, we find that one of the conditions applicable to the Burgh Assessment is that for that assessment the annual value of manufactories, &c., shall be held to be one-fourth of the annual value appearing in the Valuation-roll. It is plain, therefore, that if the assessment were to be regarded as laid under the Public Health Act, 1897, it should be only upon one-fourth of the annual value.

I am of opinion that the first question should be answered in the affirmative.

The LORD JUSTICE-CLERK concurred.

LORD YOUNG was absent.

THE COURT answered the first question in the affirmative, and the second in the negative.

W. & J. L. OFFICER, W.S.—STEEDMAN & RAMAGE, W.S.—Agents.

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June 7, 1901. Marchetti v. Marchetti.

FRANK MARCHETTI, Petitioner.—*Dewar.*

MRS MARIA MAGRI or MARCHETTI, Respondent.—*A. J. Young.*

Parent and Child—Husband and Wife—Abduction of child by mother—Petition by father to recover custody of child—Procedure—Denial of status of marriage.—In a petition at the instance of a father to recover the custody of his son, nine years of age, from the mother, the petitioner averred that the mother had suddenly left the United States of America, where the parties were resident, taking the child with her, that she had posted letters to the petitioner stating that by the time the letters were received she and her child would be dead, that the petitioner had succeeded in tracing the mother and child to a town in Scotland, that the mother had an ungovernable temper, and that the petitioner had reason to believe that there was danger of her destroying the child unless it was instantly removed from her custody.

The Court ordered intimation and service of the petition, and at the same time, in terms thereof, granted warrant to messengers-at-arms and other officers of the law to take into their custody the person of the child and deliver him to his father, and authorised and required all Judges Ordinary in Scotland, and their procurators-fiscal, to grant their aid in the execution of the warrant, and recommended all magistrates elsewhere to give their aid and concurrence in carrying the same into effect.

In her answers to the petition the mother stated (1) that the petitioner was her uncle, and that her marriage was invalid by the law of Italy, where the parties were domiciled at the time of the marriage; (2) that she had no intention of injuring the child; and (3) that the petitioner had been cruel to the child, and that it was necessary for its welfare that it should remain in her custody; and contended (1) that the petitioner had no right to the custody of the child, and (2) that it was expedient that she should retain the custody.

The Court *refused* to deal with the question of *status*, and having ascertained as the result of an examination of the child by one of the members of the Court that it was under no apprehension of ill-treatment by either of its parents, and regarded both with affection, *found* the father entitled to the custody.

1ST DIVISION. THIS was a petition at the instance of Frank Marchetti, merchant, Pawtucket, United States of America, against his wife Mrs Maria Magri or Marchetti, for the custody of his child Thomas, who was nine years of age.

The petitioner averred that he was married to the child's mother,

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Maria Magri or Marchetti, in 1891, and that Thomas was the only child of the marriage; that his wife and child lived with him at Pawtucket until September 1900, when his wife, who had gone for a short holiday to Newport, a seaside resort about thirty miles from Pawtucket, "suddenly left the hotel there in which she was residing, after having posted letters to the petitioner, the proprietor of the said hotel, and a number of friends, stating that she had resolved to drown herself and the said child, and that by the time the said letters were received, she and her said child would be dead."

The petitioner further stated that he had traced the mother and child to Broxburn, where they were residing with Mr F. Ghiloni, ice-cream vendor, a relative of the mother. "The respondent is a person of immoral character, and of violent and ungovernable temper, and incapable of taking charge of a child. The petitioner believes that it was her intention to destroy herself and the said child when she last threatened to do so, and he has reason to believe that there is danger of the threat being carried out unless the said child is instantly removed from her custody."

Counsel for the petitioner, in moving for an order for intimation, service, and answers, further moved the Court, in terms of a crave in the petition, "to grant warrant to messengers-at-arms and other officers of the law to take into their custody the person of the said child wherever he may be found, and deliver him into the custody of the petitioner; and to authorise and require all Judges Ordinary in Scotland and their procurators-fiscal, to grant their aid in the execution of such warrant, and to recommend to all Magistrates elsewhere to give their aid and concurrence in carrying such warrant into effect; and further, to prohibit and interdict the said Maria Marchetti, or anyone acting on her behalf, and all others, from withdrawing, or attempting to withdraw, the said child, Thomas Marchetti, from the jurisdiction of your Lordships' Court."[1]

LORD PRESIDENT.—Great caution is required in dealing with an application of this kind, but I think that in the very special circumstances of the case we should grant an order that the child should be delivered to the petitioner, or to someone having his authority, until the case can be considered after answers are lodged. In some of its *prima facie* aspects the case is an extraordinary one. It is alleged that the respondent disappeared after posting letters to the petitioner and other persons, stating that by the time the letters were received she and the child would be dead. She left America, where she had been resident with her husband, and it is stated that she is now residing at the house of an ice-cream vendor at Broxburn. A person of her temperament might disappear again, or do violence to the child, upon hearing that this petition had been presented. When the petition is considered with answers, if the respondent lodges any, she may be able to get the order for custody altered. Meanwhile, however, it appears to me that we should grant the order asked.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

THE COURT ordered intimation and service and answers within six days, and granted warrant, &c. (in terms of the prayer of the petition).

[1] Hutchison v. Hutchison, Dec. 13, 1890, 18 R. 237.

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Thereafter answers were lodged by Maria Magri or Marchetti, who claimed that she was entitled to retain the custody of the child on the ground (1) that it was illegitimate, and (2) that the father by his cruelty and immorality was unfitted to have the custody.

As regards the first ground, she averred that she and the petitioner were Italians, and were married in Italy before going to live in America, that she was the petitioner's niece, and that by the law of Italy the marriage was void, as within the prohibited degrees.

As regards the second ground, she averred that she had left the petitioner and taken the child with her in consequence of the petitioner's violence, which was such as to endanger her own and her child's health. She also averred that on two specified occasions he had encouraged his elder daughter by a former marriage, a girl of fourteen, to strike and illtreat her child, and as regards the petitioner himself, she averred that he was a man of immoral character, and that "his conduct to the child was cruel and relentless. Blows and threats were a daily experience, and the child lived in extreme terror of the petitioner. The respondent, finding that he persisted in his cruelty, and that her child was rapidly losing health through the torture he had to bear, resolved to leave the petitioner and take her child with her. This she did, as above admitted, in September 1900. She had no friends in America from whom she could get advice or assistance, and she did not inform the petitioner of her intention to go away, as she knew he would not be scrupulous about the means he took to prevent her."

After hearing counsel in the Summar Roll, the Court indicated that they would not consider the question of *status;* that one of their number would see and question the child to ascertain his attitude and feelings towards his parents. The child was accordingly seen by the Lord President, who reported, as the result of the interview, that the child entertained feelings of affection for both his parents, and was in no fear of illtreatment from either. Thereafter, on 7th June, the parties having failed to come to an arrangement, the Court, following the course adopted in *Hutchison* v. *Hutchison*,[1] pronounced the following interlocutor:—

> "THE LORDS having resumed consideration of the petition, with the answers thereto, and heard counsel for the parties, in respect that the custody of the child Thomas Marchetti has been recovered by the petitioner, find it unnecessary to pronounce any further order, dismiss the petition, and decern," &c.

CORNILLON, CRAIG, & THOMAS, S.S.C.—ROBERTSON & WALLACE, S.S.C.—Agents.

No. 139.

June 8, 1901. Leonard v. Baird & Co.

MRS URSE JAKAMAWICUS OR LEONARD, Respondent.—*Salvesen, K.C.* —*Moncrieff.*

WILLIAM BAIRD & COMPANY, LIMITED, Appellants.—*Campbell, K.C.* —*Hunter.*

Master and Servant—Workmen's Compensation Act, 1897 (60 *and* 61 *Vict. cap.* 37), *sec.* 1 *and First Schedule* (1) (*a*) (i.)—*Compensation where no wages earned—Amount of compensation.*—A miner was killed after he had

[1] Dec. 13, 1890, 18 R. 237.

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descended to work in the pit in which he was employed, but before he had actually commenced to work, and before he had earned anything.

Held that his widow was entitled to compensation under the Workmen's Compensation Act, 1897, and, the average weekly earnings of the deceased being *nil*, that she was entitled to the alternative sum of £150 under the First Schedule of the Act.

2D DIVISION. Sheriff of Lanarkshire.

IN an arbitration under the Workmen's Compensation Act, 1897, at the instance of Mrs Urse Jakamawicus or Leonard, widow of Lenawarc Jakamawicus or Leonard, against William Baird & Company, Limited, Bothwell Park Colliery, Bellshill, the Sheriff-substitute at Lanark (Davidson) awarded compensation, and at the request of the company stated the following case:—

"The following facts were admitted or proved:—That the deceased was employed by the appellants on 20th November 1900, and descended their pit to dig coal on the following day; that before commencing work on said last-mentioned date his lamp went out, and he took it and a lighted one, borrowed from a fellow-workman, to the lamp-station; that while returning he was crushed by a rake of hutches, and subsequently died from his injuries; that he had earned no wages, and was entitled to none from the appellants.

"I found that the average weekly wage of deceased was *nil*, and that his widow, the respondent, was entitled to the alternative sum of £150 under the first schedule of the said Act.

"The question of law for the determination of the Court is—Whether the applicant is entitled to compensation under the first schedule of section 1, subsection (*a*) (i.) of said Act, the accident which caused the death having befallen deceased after he had descended appellants' pit to work, but before he had actually commenced work and before he had earned anything?" *

Argued for the appellants;—Unless wages had been earned no compensation was due under the Act. It was a case not provided for by the Act. *Lysons'* case [1] was not an authority to the contrary, for it merely decided that where some wages had been earned a liberal construction should be given to the Act.

Argued for the respondent;—There was here a completed contract of service, and consequently employment in the sense of the Act. The effect of *Lysons'* case [1] was that where there was employment, however short, and irrespective of earnings, there was a right to compensation. The respondent was therefore entitled under the schedule either to a sum calculated on the average weekly earnings or to £150, whichever was the greater sum, and as the former was *nil*, the latter

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* The Workmen's Compensation Act, 1897 (60 and 61 Vict. cap. 37), enacts,—Schedule I. "(1) The amount of compensation under this Act shall be—(*a*) where death results from the injury—(i.) if the workman leaves any dependants wholly dependent upon his earnings at the time of his death, a sum equal to his earnings in the employment of the same employer during the three years next preceding the injury, or the sum of £150, whichever of those sums is the larger, but not exceeding in any case £300, provided that the amount of any weekly payments made under this Act shall be deducted from such sum, and if the period of the workman's employment by the said employer has been less than the said three years, then the amount of his earnings during the said three years shall be deemed to be 156 times his average weekly earnings during the period of his actual employment under the said employer. . . ."

[1] Lysons v. Andrew Knowles & Sons, Limited, L. R. [1901], A. C. 79.

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was the right sum to award. It was not necessary that the employment should have lasted for three years to give right to the £150.[1]

At advising,—

LORD JUSTICE-CLERK.—This case raises a difficult question, particularly in view of what has been decided in previous cases in regard to compensation under the Workmen's Compensation Act.

The deceased had entered the employment, but was killed as he was proceeding to work, but before he had done anything which gave him a claim for any sum of wages. Under the Act, in the case of a death, an alternative is given by which if on a computation of wages for the period prescribed less is brought out than £150, nevertheless decree may be given for that sum. The question is whether that ratio can be applied in a case where, although the workman had entered on the employment, no right to any earnings had arisen before the death. I confess that but for the view that has been taken in the highest Court of review, that the schedule of the Act only provides a mode of ascertaining damages, and does not exclude damages where the circumstances prevent its application, thus practically indicating that where the schedule will not apply compensation may be ascertained notwithstanding, I should have felt great difficulty in agreeing with the Sheriff's finding. But I take it that the decisions of the House of Lords amount to an instruction that a sound interpretation of the Act involves the right to compensation where there has been employment and accident in the employment. Accepting that, as I feel bound to do, I find that means are given by the statute for fixing £150 in the case of a death, where applying the rules as to computation of earnings would not bring out so large a sum. Here, dealing with earnings, no sum can be brought out at all, and I think that the Sheriff was justified, looking to the decisions I have referred to, in fixing the sum according to the alternative given in the Act.

LORD TRAYNER.—The appellants' contention here is this—that compensation under the Act can only be claimed by an injured workman who has earned wages in the employer's service, or by the representative of a deceased workman who had earned wages; that in this case the deceased had not earned anything in the service of the appellants, and that therefore the respondent's claim was excluded by, or at all events not provided for, in the Act. I think the construction put upon the Act in the case of *Lysons*[2] excludes the appellants' contention. The respondent's husband met his death in a mine belonging to the appellants and in the course of his employment. His case therefore fell within the leading provision of the Act, and that leading provision is not derogated from (according to the construction approved by the House of Lords) by the fact that the precise terms of the schedule which prescribes the mode in which the award of compensation is to be determined cannot be exactly applied to the particular circumstances of the case. I think, on the authority of the case referred to, the appeal should be dismissed.

[1] Forrester & Co. v. M'Callum, March 12, 1901, 3 F. 650.
[2] L. R. [1901], A. C. 79.

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LORD MONCREIFF.—It logically follows from the judgment of the House of Lords in the case of *Lysons*,[1] and our own judgment to-day in the case of *Nelson*,[2] that the respondent's husband having been killed while in the employment of the appellants, and in consequence of an accident arising out of his employment, the respondent as his widow is entitled to the alternative sum of £150, although he died before he had time to earn any wages. This is an extreme case, but the grounds of judgment on which the House of Lords proceeded, in my opinion, cover it. The right to compensation does not depend upon the length of service, but on the fact that the workman was injured while in the employment of the undertaker through an accident arising out of the employment.

LORD YOUNG was absent.

THE COURT pronounced this interlocutor:—"Find in answer to the question of law therein stated that the respondent is entitled to compensation under the First Schedule, section 1, subsection (*a*) (i.) of the Workmen's Compensation Act, 1897: Therefore dismiss the appeal, and affirm the award of the arbitrator, and decern."

W. & J. BURNESS, W.S.—SIMPSON & MARWICK, W.S.—Agents.

No. 140.
June 8, 1901.
Nelson v. Kerr & Mitchell.

WILLIAM NELSON, Claimant (Respondent).—*Salvesen, K.C.—M'Clure.*
KERR & MITCHELL, Appellants.—*Campbell, K.C.—Hunter.*

Master and Servant—Workmen's Compensation Act, 1897 (60 *and* 61 *Vict. c.* 37), *sec.* 1 (1), *Schedule I.* (1) (*b*)—"*Average weekly earnings*"—*Employment for more than one week, but wages earned during one week only.*—Where a workman in the course of his employment had earned 16s. 2d. in the first week, and in the second week had worked for two hours but earned nothing, and was then injured, *held* that 16s. 2d. represented his average weekly earnings in the sense of Schedule I. of the Workmen's Compensation Act, 1897.

Master and Servant—Workmen's Compensation Act, 1897 (60 *and* 61 *Vict. c.* 37), *sec.* 1 (1) *and Schedule I.* (1) (*b*)—"*Average weekly earnings*"—*Workman employing unpaid assistant.*—A miner who was paid according to his output employed his son as an assistant in his work, but paid him nothing for his services. The usual wage for such assistance was 2s. 9d. per day. The miner having been injured in the course of his employment, and having claimed compensation under the Workmen's Compensation Act, 1897, *held* that in estimating his average weekly earnings nothing fell to be deducted in respect of the gratuitous assistance given by the son.

2D DIVISION. Sheriff of Lanarkshire.

THIS was a stated case arising out of an arbitration under the Workmen's Compensation Act, 1897, in the Sheriff Court at Hamilton, in which the Sheriff-substitute (Davidson) awarded compensation to William Nelson, miner, Wishaw, from his employers, Kerr & Mitchell, coalmasters, Glenclelland Colliery, Clelland, on whose crave the case was stated as follows:—

"On the 15th day of May 1900 he entered appellants' employment, and worked on that and the following day. On the 18th day of May he worked in a different section of the pit, preparing a working place, but put out no work. On the 21st day of May he worked in a third place, and while holing coal there was injured after having worked two hours only. He earned no wages on the 21st, which was a

[1] L. R. [1901], A. C. 79. [2] *Infra.*

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Monday, and the amount earned by him for his work in the preceding week was 16s. 2d. He employed a boy, his son, who assisted him in his work, but he paid the boy nothing. The boy only assisted him as a drawer, and on the 18th and 21st May, when the respondent had no output, he had no work to do. The usual wage for a boy so assisting a miner is 2s. 9d. per day.

"I found that the average weekly earnings of the respondent while in appellants' employment were 16s. 2d., and I awarded him compensation at the rate of 8s. 1d. per week."

The questions of law for the determination of the Court were:—"1. Should a deduction be made in respect of the work done by respondent's son from the total amount earned by the respondent? 2. Should the average weekly wage of the respondent be taken as 16s. 2d. or 8s. 1d.?"*

Argued for the appellants;—(1) Part of the respondent's output, and consequently of the money return, was due to the work of the son, and a reduction fell to be made from the whole amount earned in respect of what was earned by the son. (2) The respondent had worked in more than one week, and his average weekly earnings were to be arrived at by dividing the wages earned by the number of weeks worked in—in this case two.[1] *Lysons'* case[2] did not deal with the case of a workman employed for more than one week.

Argued for the respondent;—(1) Nothing was paid for the son's services, and therefore nothing fell to be deducted therefor. (2) Average weekly earnings could be calculated from one week's earnings,[1] and here there was only one week's earnings to estimate by.

At advising,—

LORD JUSTICE-CLERK.—Two points arise for decision in this case. The first is whether, in computing the earnings of the injured party, there is to be deducted from these earnings a proportion of the amount, in respect that he had the assistance in his work of a boy, his son. The fact is that the son, who acted as his father's drawer, was not paid any money for doing so by his father. In that state of matters I see no ground for holding that any deduction should be made. The pursuer received all the wages earned by his work, and did not have any outlay for assistance, and that seems to

* The Workmen's Compensation Act, 1897 (60 and 61 Vict. cap. 37), sec. 1, enacts,—"(1) If in any employment to which this Act applies personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the First Schedule to this Act." The First Schedule, *inter alia*, provides,—"(1) The amount of compensation under this Act shall be . . . (*b*) Where total or partial incapacity for work results from the injury, a weekly payment during the incapacity after the second week not exceeding fifty per cent of his average weekly earnings during the previous twelve months, if he has been so long employed, but if not, then for any less period during which he has been in the employment of the same employer, such weekly payment not to exceed one pound."

[1] Cadzow Coal Company, Limited, v. Gaffney, Nov. 6, 1900, *ante*, p. 72; Russell v. M'Cluskey, July 20, 1900, 2 F. 1312 (Lord M'Laren, p. 1317); Small v. M'Cormick & Ewing, June 6, 1900, 1 F. 883; Keast v. Barrow Hematite Steel Co., 1899, 15 T. L. R. 141.

[2] Lysons v. Andrew Knowles & Sons, Limited, L. R. [1901], A. C. 79.

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me to be a sufficient ground for holding that in this arbitration no deduction should be made from the earnings in considering the compensation.

The second question is whether the computation of his wages is to be taken at 16s. 2d., being the amount of the earnings he made during the week before the accident, or whether, as he worked in two weeks, but had not at the time of the accident earned anything in the second week, the wages are to be counted on an average of the two weeks, and therefore fixed at 8s. 1d. Considering that it has been decided in the House of Lords that where there has only been employment in one week, compensation may be assessed by considering the earnings of that week only, although the schedule declares that it is average weekly earnings by which computation is to be made, I think it may be fairly taken to follow that if there were no earnings except in one week that amount must be taken as the basis of assessment, and is not to be cut down by the fact that the workman was in the employment in a small part of another week, during which he did not earn any sum, as his work had not proceeded so far in that week as to give rise to a claim for wages.

I would propose to answer the first question in the negative, and to affirm the first alternative of the second question.

LORD TRAYNER.—The important fact in this case is, that the respondent had earned wages for only one week. My view (previously expressed), in accordance with the views expressed by some of the learned Judges in England, was, that in such a case no compensation could be claimed under the Workmen's Compensation Act, because it could not be ascertained what were the workmen's "average" weekly earnings. That being the only standard according to the statute by which compensation was to be estimated, I could not supply any other, and if the statutory standard could not be applied, then the compensation could not be ascertained, and consequently there could be no award. But the opinions delivered in the case of *Lysons*[1] in the House of Lords are adverse to the view I hold, and in deference to those opinions I can no longer act upon that view. I am accordingly of opinion, on the authority of *Lysons'*[1] case, that the amount earned by the respondent in one week must be taken as his average weekly earnings, and his compensation determined on that footing. I think no deduction should be made from the respondent's earnings on the ground that he had some assistance from his son. No sum was in fact paid to the son for his assistance, and there was therefore no deduction from the week's earnings on that account.

LORD MONCREIFF.—As the case is presented I do not think that much difficulty exists. The first question of law may be left out of view altogether; it is not arguable, and should be answered in the negative. The second question is—"Should the average weekly wage of the respondent be taken at 16s. 2d. or 8s. 1d.?" The meaning of that question is, are we to hold that the respondent earned wages for two weeks or for one? If for two weeks we must, I assume, reach the average weekly earnings by dividing what he earned in the two weeks by 2. But although he went to his

[1] L. R. [1901], App. Ca. 79.

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work on the Monday of the second week he was injured by a fall from the roof before he had earned any wages, he being paid by output. The appellants' argument is, that as the respondent was in the employment of the appellants for more than one week the sum which he earned during the first week must be divided by the number of weeks—that is, by 2.

The argument before the Sheriff, and the Sheriff's judgment, have evidently proceeded in view of the judgment of the House of Lords in the case of *Lysons*,[1] which was pronounced on 14th December 1900. But for that decision the respondent would probably not have obtained a judgment, as under some of the previous decisions, and in particular the decision in the case of *Lysons*[1] in the Court of Appeal, it had been decided that in order to entitle a workman to compensation under the Act he must have been in the service of the employer and earning wages for at least two weeks, so that an average of his weekly earnings could be taken.

The views of the learned Judges in the Court of Appeal are very clearly stated by Lord Justice Smith and Lord Justice Collins. The former says, p. 785, "Is not this Court then necessarily driven to say that in order to come within the Act a man must have been in his employment for at least two weeks at the date of the accident. Unless we say that, I cannot see how an average of the weekly earnings can be taken"; and Lord Justice Collins says, p. 786, "It seems to me, therefore, that the schedule contemplates the existence of the relation of master and servant for not less than two weeks between the injured man and his employer."

In *Lysons'* case[1] the workman only worked for two days—on Tuesday and on Thursday of the same week. The County Court Judge took the earnings for those two days as his average weekly earnings; but the Court of Appeal differed from him, and allowed the appeal although Lord Justice Romer doubted.

On the case going to the House of Lords their Lordships, consisting of the Lord Chancellor, Lord Macnaghten, Lord Shand, Lord Davey, Lord Brampton, Lord Robertson, and Lord Lindley, unanimously reversed the order of the Court of Appeal; and they took occasion to lay down certain broad principles as to the construction of the statute, and the weight to be attached to the schedule. I think we are bound to give effect to the views thus enunciated. As I read them they come to this: The statute confers a right of compensation upon every workman who sustains personal injury in an employment to which the Act applies, by accident arising out of and in the course of the employment, however long or however short a time he may have been in the employment, and whether wages have been received or not. The view of Lord Justice Collins in the Court of Appeal was, that the statute contemplated employment of considerable duration. He says,—"It seems to me that, when it was dealing with the assessment of the amount of compensation, the Legislature in taking in case of death a maximum of three years' earnings as a basis of the assessment was evidently contemplating the existence for a considerable time of the relation of master and servant." The House of Lords negatived that view, and I think rightly. While some of the expressions in the schedule give colour

[1] L. R. [1901], App. Ca. 79.

so it, it is conceded that if a workman was injured after being in the same employment for two weeks his representatives would be entitled to just as much remuneration in the event of his death as if he had been in the employment for three years. Further, the employer in the sense of the Act is not necessarily the workman's own employer in whose service the workman may have been for three years. He is the undertaker with whom the workman may have been sent to work for a very short time. See section 4.

The real difficulty arises on the construction of the words in the first section of the statute, "compensation in accordance with the first schedule to this Act." The view taken by the House of Lords was, that the schedule is really ancillary to the leading provisions of the Act, and does not control it. Lord Halsbury says, p. 87,—"It seems to me that the Legislature in using the phrase that you must take the average of the earnings for the week did not in the least mean to limit and cut down the right of the disabled labourer to have his compensation, so that if you had a difficulty in the arithmetic he was not to get it at all; but it provided an artificial means of finding out what that quantum was to be, and that was no doubt by the use of the word 'average.'" In short, their view was that where the schedule in terms applies, it should receive effect, but where it is inapplicable and it is impossible to arrive at a weekly average by taking the earnings of two or more weeks, the Arbitration Court is free to ascertain in some other way the amount of compensation to be awarded. There are certain conditions in the schedule which no doubt must receive effect in any case, such as the maximum to be awarded, and the provision that weekly payments are not to be made until after incapacity for two weeks from the date of the injury. But the schedule does not prescribe any particular way in which the arbitrator is to arrive at the amount of compensation, where he has not the earnings of two or more weeks to guide him.

Applying the principle laid down by the House of Lords to the present case, we find that the only earnings were those of the week ending 19th May 1900, amounting to 16s. 2d. Nothing was earned in the next week although the man went to his work. I do not think that we should be giving effect to the judgment of the House of Lords if we divided the wages earned in the first week by two. We have only the earnings of one week, and we are entitled to regard these as the average weekly earnings of this workman. A more difficult question would have arisen if he had earned wages on the Monday and been injured on the Tuesday. I should like to reserve my opinion as to whether in such a case the earnings of one day could be regarded as the week's earnings, his earnings being interrupted by injuries sustained in the service of the employer. But it is enough for the present case that nothing was earned on the Monday.

I am therefore of opinion that the Sheriff-substitute's judgment was right.

Lord Young was absent.

The Court answered the first question in the negative, and in answer to the second question, found that the average weekly wage of the respondent fell to be taken as 16s. 2d., and dismissed the appeal.

W. & J. Burness, W.S.—Simpson & Marwick, W.S.—Agents.

No. 141.

June 8, 1901. Smellie v. Gallon.

JESSIE DOUGAL MARTIN SMELLIE, Petitioner (Appellant).—*Salvesen, K.C.—Kemp.*
JAMES GALLON, Respondent.—*Guy.*

Police—Burgh—Building Regulations—Taking down insecure part of building in order to restore to original condition—Turnpike Roads (Scotland) Act, 1831 (*1 and 2 Will. IV. c.* 43), *sec.* 91—*Burgh Police (Scotland) Act*, 1892 (*55 and 56 Vict. c.* 55), *sec.* 158.—Section 91 of the Turnpike Roads (Scotland) Act, 1831, enacts,—"No houses, walls, or other buildings above 7 feet high shall be erected without the consent of the trustees previously obtained in writing . . . within the distance of 25 feet from the centre of any turnpike-road."

Section 158 of the Burgh Police (Scotland) Act, 1892, enacts,—"When any house or building has been taken down in whole or in part in order to be altered, or is to be rebuilt, the commissioners may require the same to be set backwards to or toward the line of the street or the line of the adjoining houses or buildings, or such other line as may be fixed by the commissioners, in such manner as the commissioners may direct for the improvement of such street: Provided always that the commissioners shall make full compensation to the owner . . ."

Held that neither of these provisions was applicable to the case of taking down part of an existing tenement, which had been injured by the operations of an adjoining proprietor, in order to restore it to its original condition.

2D DIVISION. Dean of Guild Court of Queensferry.

MISS JESSIE DOUGAL MARTIN SMELLIE presented a petition to the Dean of Guild Court of the burgh of Queensferry, in which she craved the Court "to grant warrant to the petitioner to take down the west gable wall and the adjoining portion of the south front wall of the tenement belonging to the petitioner situated on the north side of the High Street of Queensferry, and in place thereof to re-erect a new gable wall and adjoining portion of the front wall of the tenement, and to make the internal and other alterations and buildings necessary, all conform to the plan herewith produced, and also to grant warrant to the petitioner to occupy such portions of the public road or street adjoining for laying down and enclosing the necessary materials for said building as shall seem reasonable."

She averred;—(Cond. 1) "The petitioner is proprietrix of certain subjects, consisting of dwelling-house and yard with stabling behind, situated on the north side of the High Street of South Queensferry. . . ." (Cond. 2) "During certain operations in the beginning of the year 1899 on the adjoining property belonging to the respondent Mitchell in connection with the erection of a new hotel, the west gable wall of the property now belonging to the petitioner was wrongfully interfered with and partially taken down without the knowledge or consent or authority of the petitioner or her authors, and a portion of the front wall immediately adjoining said west gable became cracked. . . . The petitioner is anxious to restore the said subjects to their former condition, all as shewn on the plan produced, and it is necessary that the petitioner should obtain warrant for that purpose. . . ."

James Gallon, Master of Works for the burgh of Queensferry, lodged answers. (Ans. 2) ". . . Not known and not admitted." Explained "that the petitioner proposes to take down the buildings at present on the subjects, or part thereof, in order to be altered or rebuilt. Explained further that the subjects upon which the buildings are proposed to be erected are bounded by and abut on the High Street of

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the burgh of Queensferry. The said High Street is a road or highway to which the provisions of section 91 of the Statute 1 and 2 Will. IV. c. 43,* and section 123 of the Act 41 and 42 Vict. c. 51,† apply. The buildings proposed to be erected are 17 feet high, and are within 8½ feet or thereby of the centre of the said street. The petitioner has not obtained the consent of the Local Authority of the burgh to the erection of the said buildings, but, on the contrary, the said Local Authority object to and disapprove thereof. Further, the line of the proposed buildings abutting on the said street is not upon the line of the street or the line of the adjoining houses or buildings, and upon 30th November the Commissioners of the burgh, having previously, under section 158 of the Burgh Police (Scotland) Act, 1892,* passed a resolution to that effect, served upon the petitioner a requisition in the following terms:—'The Commissioners of the burgh of Queensferry, acting under and in terms of the Burgh Police (Scotland) Act, 1892, particularly by section 158, have resolved that the house or building abutting on the north side of the High Street of the burgh belonging to you, the gable of which has been taken down, and which you propose to rebuild in whole or in part, must on being so rebuilt be set backwards to the line of the street there, which is a straight line drawn between a point on the street line or front or south face of the house or building immediately on the west to a point on the street line or front or south face of the house or building immediately on the east of your said property, and the Commissioners require your new building to be set back accordingly.' The execution of said intimation and requisition to the petitioner is herewith produced. The building proposed by the petitioner is a building to which the said statutes apply."

The respondent pleaded, *inter alia;—Additional*—(2) The proposed buildings being in contravention of the General Turnpike Act and the Roads and Bridges Act mentioned in the answers, and the petitioner not having obtained the consent of the Local Authority thereto, the petition should be dismissed with expenses. (3) The Commissioners of the burgh having resolved under section 158 of the Burgh Police (Scotland) Act, 1892, and having served a requisition upon the petitioner, all as mentioned in the answers, the petition should be dismissed with expenses.

The petitioner pleaded, *inter alia;*—(3) The Acts of Parliament founded on by the respondents are inapplicable.

Probation was renounced by both parties by lodging the following minute:—"Beyond the productions made which are admitted as probative, and the facts known to the Court and ascertained on inspection and measurement of the subjects in dispute, the parties renounce probation."

Thereafter, on 25th March 1901, the Dean of Guild pronounced an interlocutor, which, after finding that the west gable wall of the tenement belonging to the petitioner, situated on the north side of the High Street of Queensferry, had already been taken down in order to be altered, and that the same was taken down in the summer of the year 1899, with the consent or on the instructions of the petitioner, sustained the second and third additional pleas in law

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* Quoted in rubric.

† This section of this Act (the Roads and Bridges (Scotland) Act, 1878), incorporates section 91 of 1 and 2 Will. IV. c. 43.

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for the respondent, refused the warrant craved, and dismissed the petition.

The petitioner appealed to the Court of Session, and argued;—There was no proof (probation having been renounced), and nothing on record to justify the Dean of Guild's finding that the building had been taken down with consent of the petitioner to be altered. The petitioner's statement on record must be accepted that it was taken down in order to be restored to its original condition. The General Turnpike Act of 1831, sec. 91, did not apply to the re-erection of buildings on previously occupied sites.[1] The Burgh Police Act of 1892, sec. 158, applied only to buildings taken down in whole or in part to be altered or rebuilt. Here no alteration was contemplated, and no rebuilding beyond what was necessary for restoration.

Argued for the respondents;—By the minute renouncing probation the Dean of Guild Court was entitled to use its own knowledge of the facts, and the finding complained of was in accordance with that knowledge. The proposed building was within 25 feet of the centre of the turnpike, and therefore required the written consent of the Local Authority to its erection.[2] Further, the prayer of the petition included "alterations," and the provisions of section 158 of the Burgh Police Act, 1892, therefore applied.

At advising,—

Lord Justice-Clerk.—In this case the procedure in the Dean of Guild Court has been in some respects irregular. The Court, by the interlocutor and note, plainly dealt with facts which were not in any competent way before it, and made assumptions which the only facts admitted did not justify. The case of the appellant is, that a building belonging to her had, by the improper proceedings of a neighbour, had a side gable practically brought down, and as a consequence the stability of part of the front affected, and accordingly she applied to the Dean of Guild for authority to take down the broken gable, and the adjoining portion of the south front which had been injured, and replace these portions of the building.

The Master of Works resisted the granting of a warrant by the Court, maintaining that as the petitioner proposed to take down her building or part thereof, the Commissioners of the burgh were entitled, under section 91 of 1 and 2 Will. IV. c. 43, and the Burgh Police Act of 1892, section 158, to prevent the work, and to insist that the building should be put back from its original line to the new line of the street under the rules laid down in these statutes. He denies the statement of the proprietor as to how the part of the building came to be taken down. This contention the Dean of Guild Court gave effect to, sustaining the second and third additional pleas for the Master of Works.

I am of opinion that in the circumstances neither of these pleas ought to have been sustained. The petitioner was not proposing to take down her building in the sense of the Act. She was only proposing to repair an injury done to part of the building by the action of others. The Master of Works does not aver that the petitioner took down the gable for any other

[1] Macdonald v. Commissioners of Fort-William, March 19, 1895, 22 R. 551; Whyte v. Bruce, March 20, 1900, 2 F. 823.

[2] Whyte v. Glass, Dec. 20, 1900, *supra*, p. 291.

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son than that which she avers. He only says of it—Not known, and not mitted. It was for him to raise that question. Further, the building s not to be removed and another substituted for it, nor was any part of to be made different from what it was before. No doubt a part had to taken down, just as a part might require to be taken down if a building is struck by lightning, or injured by a flood caused by a thunderstorm, or rtially destroyed by a fire. But where a part of a building has suffered injury it is not the less a work of mere repair, because, in order to make at a tradesman calls "a good job," some of the existing structure must be moved and replaced. If what the petitioner avers is true,—and there was thing admitted by her, and nothing averred by the contradictor, or disosed in what was competently before the Court, entitling the Court to hold e contrary,—then the decision of the Dean of Guild Court could not be stified, and the sustaining of the second additional plea would be wrong—at is just the state of the matter. But the Court had nothing competently before it to the contrary, and therefore I feel bound to hold that the stsining of this plea was wrong.

The same follows in regard to the third additional plea. The resolution f the Commissioners could not justify the decision of the Dean of Guild Court unless the circumstances were such as to give it validity. Now, the 58th section of the Burgh Police Act relates to two cases—(1) where a building has been taken down in whole or in part in order to be altered, and (2) or is to be rebuilt. The second alternative is not in this case. The house is not to be rebuilt. Therefore the plea must be based on the first alternative. A part of the house has admittedly been taken down. But is it so taken down in order to be altered? Of that there is no trace in the case. The petitioner states that the part taken down because of the injury is to be put up again as it was before, and this is not denied. I therefore think that there was no ground for sustaining this plea.

I would move your Lordships to recall the interlocutor, to repel the second and third additional pleas for the respondent Gallon, and to remit to the Dean of Guild Court.

Lord Trayner.—The Dean of Guild has sustained the second and third of the respondent's additional pleas in law, and dismissed the petition. In doing so, I think he has overlooked the character of the petition presented to him. The petitioner is not asking a lining for a new erection; she is asking authority to take down a part of an existing tenement which has been injured by the operations of an adjoining proprietor, and to restore it to its former condition. To such a state of circumstances neither the provisions of the General Turnpike Act of William IV. nor the provisions of the Burgh Police Act of 1892, on which the respondent's pleas are founded, have, in my opinion, any application. The provisions of the former Act have reference to buildings which it is proposed to erect on a site then unoccupied, which is not the case here. The Burgh Police Act (section 158) refers to buildings taken down in whole or in part to be altered or rebuilt, and enables the Commissioners to require that the altered or rebuilt premises shall be erected in a line with the line of the street or of the adjoining buildings. But this presupposes, I think, that that part of the tenement

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taken down is a part which affects the line of the street, and the removal of which affords reasonable opportunity for altering or rectifying the line, or making a new line. For example, if the whole front wall of a house was taken down with a view to some alteration in the character of the house, the clause might apply. The Commissioners might require the new front wall to be set back. But if a part—say at the top of the front wall—was taken down to be restored—it might be merely a chimney-stalk—which had no immediate connection with the line of the street, it would be unreasonable to insist that in these circumstances the proprietor should be called on to take down his building with a view to alter or improve the line of the street. That is really the kind of case we have here. The upper part of the petitioner's gable has been partly destroyed by the neighbour's operations, which have also cracked the front wall. Nothing is proposed to be done in the way of alteration of her building, nor any rebuilding beyond what is necessary as a proper work of restoration.

The Dean of Guild finds as matter of fact that the present condition of the petitioner's property is the result of operations executed with her consent or on her instruction. Even if that were so, it would not alter my view of the case, but I find it difficult to see how the Dean of Guild can issue such a finding, as no such thing is averred by the respondent, and is directly contrary to the averments made by the petitioner. I think the appeal should be sustained, and the pleas for the respondent to which I have referred repelled. The case will then go back to the Dean of Guild as proposed by your Lordship, to be proceeded with.

LORD MONCREIFF.—I am of the same opinion, and for the reasons which your Lordships have fully stated.

The Dean of Guild's judgment proceeds on a finding in fact that this house has been taken down in whole or in part in order to be altered. If that were so, the case would appear to fall under the terms of section 158 of the Burgh Police (Scotland) Act, 1892. But I find no ground on record for that finding in fact, and there has been no proof. On the contrary, it appears plain that what your Lordships have pointed out happened, namely, that part of the front wall was damaged by reason of operations on a neighbouring property, and that the wall was taken down in order to be put up again. I do not think that that is a case to which section 158 applies.

LORD YOUNG was absent.

THE COURT sustained the appeal, recalled the interlocutor appealed against, repelled the second and third additional pleas in law for the respondent, and remitted to the Dean of Guild to proceed.

WHIGHAM & MACLEOD, S.S.C.—W. & J. L. OFFICER, W.S.—Agents.

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June 11, 1901. Barr's Trustees v. Ardrossan Castle Curling Club.

JAMES BARR AND OTHERS (John Barr's Trustees), Pursuers and Real Raisers.

THE ARDROSSAN CASTLE CURLING CLUB, Defender (Respondent).—*Kennedy—Wilton.*

WILLIAM M'CONNELL (James Barr's Curator Bonis) AND OTHERS, Defenders (Reclaimers).—*A. S. D. Thomson—Younger.*

Succession—Legacy—Ademption—Stock—Shares—Uncertainty of subject of bequest—Falsa demonstratio.—By his trust-disposition and settlement, dated in 1878, a testator directed his trustees "to transfer" to the A. C. Curling Club "two five per cent guaranteed shares of £100 each of the Glasgow and South-Western Railway Company." No part of the capital of the railway company consisted of guaranteed shares of £100 each, but the testator held £460 ordinary stock, £310 preference consolidated stock, and £70 perpetual guaranteed stock, interest at the rate of five per cent being payable on the two latter stocks.

The testator died in 1884.

Between the date of his will and his death the testator borrowed money on the security of his estates and executed an *inter vivos* trust-disposition and assignation, under which his whole estates, including the railway stocks above mentioned, were realised, the surplus, after payment of his debts, being handed over in 1896 to his testamentary trustees. Thereafter, in a competition between his residuary legatees and the curling club, the former maintained (1) that the bequest to the club was a specific legacy, and had been adeemed by the *inter vivos* disposition; or otherwise (2) that the bequest was void from uncertainty, the subject of it not being susceptible of identification with any of the stocks of the railway company.

Held (1) that the bequest was not a specific legacy, but a legacy of such sum as might be required at the date of the testator's death to purchase the stock described in the will; and (2) that the expression "guaranteed" as used by the testator meant other than ordinary, and included preference stock, and that the bequest was not therefore void from uncertainty.

1ST DIVISION Lord Low.

BY his trust-disposition and settlement, dated 4th September 1878, Mr John Barr, contractor, Ardrossan, conveyed his whole estate to trustees. The sixth purpose of the deed was as follows:—"I direct my trustees at the first term of Whitsunday or Martinmas after my death, to pay or transfer, free of legacy-duty and charges, the legacies following, namely, to pay to . . . a legacy of £500 sterling; to pay to . . . a legacy of £100 sterling; and to transfer to the president, vice-president, and treasurer for the time being of the Ardrossan Castle Curling Club two five per cent guaranteed shares of £100 each of the Glasgow and South-Western Railway Company, to be held by them, . . ." in trust, for the purpose of applying the income thereof, to the extent of £1, 5s. yearly, in purchasing a medal to be competed for annually, and of applying the balance of the income in the purchase of coals for the poor.

By the last purpose the testator appointed certain persons to be his residuary legatees.

At 4th September 1878 the testator was proprietor of £460 ordinary stock, £310 preference consolidated stock, and £70 perpetual guaranteed stock in the capital of the Glasgow and South-Western Railway Company. He held no part of the share capital thereof.

Mr Barr was a holder of stock in the City of Glasgow Bank, which failed in 1878. His means and estate, although sufficient to meet the calls upon him, would have had to be unfavourably realised if realised at that time; accordingly, he borrowed certain sums of money to

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enable him to pay the calls, and granted a trust-disposition and assignation of his whole estate, heritable and moveable, for the security of the lenders of those sums, and the cautioners or guarantors for him of the money borrowed, and to secure the balance, if any, of the calls. This trust-disposition and assignation was dated 9th July 1880.

The trustees under the *inter vivos* disposition of 1880 duly entered into possession of and realised the estates conveyed to them, including, *inter alia*, the above-mentioned stocks of the Glasgow and South-Western Railway Company.

Mr Barr died in 1884.

In 1896, after the purposes of the disposition of 1880 had been satisfied, the balance of the estate was transferred to Mr Barr's testamentary trustees.

Questions having arisen as to the parties entitled under Mr Barr's settlement to the estate, his trustees raised this action of multiplepoinding.

One of the questions was with reference to the bequest, under the sixth purpose, to the Ardrossan Curling Club.

A claim was lodged by the Club, who stated,—(Cond. 3) "By the terms of the said legacy the testator intended that a fund yielding £10 per annum should be placed in the hands of the claimants for administration by them as trustees for the purposes of the legacy, and he referred to guaranteed shares *per incuriam* for stock of the Glasgow and South-Western Railway as a suitable investment, to be transferred, or procured and transferred by his trustees to the claimants accordingly for the satisfaction and security of his said bequest." (Cond. 4) "At 4th September 1878, being the date of the testator's settlement, the capital of the Glasgow and South-Western Railway Company, yielding £5 per centum per annum, consisted of guaranteed consolidated stock, preference consolidated stock, perpetual guaranteed stock, perpetual guaranteed stock No. 2, Castle-Douglas preference stock, and £20 5 per cent preference shares. The company issued no part of its capital in shares of £100 each, but it had certain preference shares of £20 each bearing interest at the rate of £5 per centum per annum. The said stocks were converted in 1881 by the company under their Parliamentary powers into guaranteed four per cent preference stock, each £100 of the original three stocks being entitled to £125 of the new stock, so as to yield £5 per centum per annum as prior to the conversion. The said £10 preference shares were also converted into stock upon the same basis."

Claims were also lodged by William M'Connell and others (representing the residuary legatees), who stated that the testator neither in 1880, at the date of the *inter vivos* disposition, nor at the date of his death, was possessed of any five per cent guaranteed shares of the Glasgow and South-Western Railway Company.

The Curling Club claimed (1) the sum of £338, 2s. 6d., or such other sum as would purchase such an amount of stock in the Glasgow and South-Western Railway Company as would yield £10 per annum for transfer to them in trust for the purposes specified in the testator's settlement; and (2) such a sum as represented £10 yearly for the period from Whitsunday 1884 to the execution of the said transfer, to be applied by the claimants in accordance with the provisions of the said legacy.

The residuary legatees pleaded;—The specific legacy of two shares of £100 each of guaranteed stock of the Glasgow and South-Western

Railway Company, not having been in the testator's possession at the time of his death, are adeemed. No. 142.

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On 20th July 1900 the Lord Ordinary (Low) pronounced an interlocutor whereby he found, *inter alia*, "that the legacy to the Ardrossan Castle Curling Club was not a special legacy, but a legacy of such sum as might be required to purchase, as at the date of the testator's death, £250 guaranteed four per cent preference stock of the Glasgow and South-Western Railway Company," and ranked and preferred the Curling Club to the sum of £271, 12s., with interest on £268, 16s. at 3 per cent from 15th May 1884, until payment.*

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* "OPINION.— . . . The only other question which was argued related to the legacy to the Ardrossan Castle Curling Club. It is in these terms—'I direct my trustees to transfer to the president, vice-president, and treasurer for the time being of the Ardrossan Castle Curling Club two 5 per cent guaranteed shares of £100 each of the Glasgow and South-Western Railway Company, to be held by them' in trust for certain purposes.

"At the date of the settlement the truster held £460 ordinary stock, £310 preference consolidated stock, and £70 perpetual guaranteed stock of the Glasgow and South-Western Railway Company. The preference consolidated stock and the guaranteed stock yielded interest at the rate of 5 per cent. The company issued no part of its capital in shares of £100 each.

"I do not think that the legacy was a special legacy, and therefore it was not adeemed by the granting of the *inter vivos* trust. The question, however, is whether it is not void from uncertainty?

"I think that the intention of the truster was that his trustees should transfer to the Curling Club a part of the railway stock held by him. I come to that conclusion (1) because the direction to the trustees is simply to 'transfer,' and (2) because the truster in fact held stock in the Glasgow and South-Western Railway Company.

"In the next place it seems to me that the description 'guaranteed shares' may fairly be read as meaning (or, at all events, as including) preference consolidated stock. Suppose that the bequest had been of '£200 five per cent guaranteed shares,' and that the truster had held the stock which he did hold with the exception of the £70 guaranteed stock. In that case I think that it would not have been difficult to conclude that the word 'guaranteed' was used in contradistinction to 'ordinary' stock, and that the truster intended his trustees to transfer £200 of the £310 preference stock which he held. I am disposed to take the same view, although the truster did hold guaranteed stock, because I think that he intended his trustees to transfer to the legatees a portion of some particular parcel of stock which he then held, and if so there was nothing which would at all fit the bequest (ordinary stock being out of the case) except the £310 preference stock.

"The chief difficulty which I feel arises from the description 'two shares of £100 each,' because such a thing as a share of £100 did not exist. If, however, I am right in thinking that the subject intended to be transferred was part of the £310 preference stock which the truster held, I do not think that it is an unduly strained construction to hold that he was dealing with the £310 preference stock as composed of parcels or shares of £100 each, two of which he desired to be transferred to the legatees.

"I think that this is a case of an incorrect description of the subject of the legacy, where, however, that subject can be sufficiently ascertained from the settlement and the circumstances existing at the time when it was made.

"The truster intended to give to the legatees part of certain stock which he held in the railway company: what that stock was is defined to this extent that it was five per cent stock, and was not ordinary stock: the truster held stock of that description of sufficient amount to allow of the

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The residuary legatees reclaimed, and argued;—The legacy in question was a specific legacy,[1] and had been adeemed.[2] The use of the word "transfer" clearly implied that the testator meant to deal with something in his possession. The bequest was void from uncertainty. Admittedly the description of the subject of the bequest was erroneous, for no part of the capital of the railway company was in the form of £100 shares. On the other hand, the capital embraced several varieties of guaranteed stocks, and there was no sufficient identification of the particular stock meant by the testator. Taking it that the legacy was general, there was no means of knowing what its value was.[3]

Argued for the respondents;—The legacy was not specific. It was not a bequest of "my" shares, or of shares "belonging to" the testator.[4] The direction to "transfer" simply meant to "acquire and transfer." It did not make a legacy specific that the testator had in fact something answering to the description of the subject of the bequest in his possession at the time.[5] The testator's object apparently was to leave the curling club such a sum as would produce a certain annual return. "Shares" covered "stock."[6] The bequest was not void from uncertainty. The reasoning of the Lord Ordinary had not been answered by the reclaimers.

At advising,—

LORD PRESIDENT.—(After narrating the facts)—Upon these facts two questions of law have been raised—(1) Whether the legacy of the shares of the Glasgow and South-Western Railway Company in favour of the Ardrossan Castle Curling Club was adeemed by the trust-disposition and assignation of 9th July 1880? and (2) whether, assuming that legacy not to have been adeemed, it is void from uncertainty?

It was maintained by the reclaimer that the legacy is specific, and that consequently it was adeemed by the conveyance of Mr Barr's estate contained in the trust-disposition and assignation of 9th July 1880. A specific legacy is thus defined by Lord M'Laren:[7] "A specific legacy is a gift of a specified subject, which may be either corporeal or incorporeal: a definition which includes sums of money invested on specific securities." I am of opinion that the legacy in question does not satisfy this definition, and that it is not a specific, but a general, or perhaps more correctly, a demonstrative

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legacy being given out of it: and the amount given was two shares of £100 each out of a holding of, in round numbers, £300.

"Therefore, although the question is one of difficulty, I am of opinion that the claimants, the president and treasurer of the curling club, are entitled to the amount which at the date of the truster's death (or it may be six months thereafter) would have been required to purchase £200 preference consolidated stock, or an equivalent amount of the stock into which the preference consolidated stock was by that time converted."

[1] Bell's Prin. sect. 1874; Ersk. Inst. iii. 9, 11.

[2] Anderson v. Thomson, July 17, 1877, 4 R. 1101; Mitchell's Trustees v. Fergus, July 3, 1889, 16 R. 902, Lord Justice-Clerk, 905.

[3] Dresser v. Gray, 1887, L. R., 36 Ch. Div. 205.

[4] Theobald on Wills (5th ed.), p. 125, and cases there cited.

[5] Macdonald v. Irvine, 1876, L. R., 8 Ch. D. 101; Dewar v. Kirk-Session of Torryburn, March 23, 1864, 2 Macph. 910, 36 Scot. Jur. 456.

[6] Morrice v. Aylmer, 1874, L. R., 10 Ch. Ap. 148, overruling Oakes v. Oakes, 1852, 9 Hare, 666.

[7] M'Laren on Wills and Succession, p. 575, 3d ed.

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legacy. The case might have been different if Mr Barr had given the direction with respect to two of "my" five per cent guaranteed shares of £100 each of the Glasgow and South-Western Railway Company, or had used other language unequivocally limiting the direction to particular shares which he possessed at its date. While, however, I agree with the Lord Ordinary in thinking that Mr Barr probably intended the direction to apply to shares which he then possessed, he did not limit it to such shares. His trustees could have fulfilled the direction to transfer the shares to the officials of the curling club as well by purchasing shares of the specified character and value in the market and making them over to the officials as by conveying shares which Mr Barr possessed at his death. The mere fact of a testator having had shares answering the description in a legacy at the time when he made it does not, in my judgment, render the legacy specific. In the case of *M'Donald* v. *Irvine*,[1] it was held that a legacy of "500 Egyptian nine per cent bonds" was not specific, though the testator had such bonds at the time when he made the bequest; and in the case of *Dresser* v. *Gray*,[2] it was decided that a bequest of "fifty shares in the York Union Banking Company," in which the testator held seventy shares of the nominal value of £100 each at the date of the will, was not specific but general, it being in effect a bequest of such a sum as at the date of the testator's death should be the value of fifty shares of £100 each in the unlimited company, although in that case the bequest failed, because owing to events of which the testator was aware it had become impossible to determine that value. Although, therefore, I agree with the Lord Ordinary in thinking that Mr Barr intended that the legacy should be satisfied out of stock which he possessed, I consider that the legacy was not adeemed by the trust-deed of 9th July 1880, because by its terms the bequest was not limited to such stock. I may add that a bequest of railway "shares" will carry railway "stock," unless there is some valid reason for placing the more restricted construction upon it,—*Morriee* v. *Aylmer*[3] overruling *Oakes* v. *Oakes*.[4]

The case is further complicated by the facts that the stocks above mentioned were in 1881 converted by the Glasgow and South-Western Railway Company, under Parliamentary powers, into guaranteed four per cent preference stock, each £100 of the original three stocks giving right to £125 of the new stock, so as to yield five per cent per annum as prior to the conversion, and that the £10 preference shares were converted into stock upon the same basis. I consider, however, that the conversion did not operate ademption.

The question remains whether the legacy is void from uncertainty. It is true that no part of the stock of the Glasgow and South-Western Railway Company consisted of "five per cent guaranteed shares of £100 each," and indeed that the company issued no part of its capital in shares of £100 each. But the question is one of intention, and I agree with the Lord Ordinary in thinking that the description "guaranteed shares" may fairly be held to mean, or at all events to include, preference consolidated stock. It seems to me reasonable to hold, as the Lord Ordinary has done, that the

[1] L. R., 8 Chanc. Div 101.
[2] L. R., 36 Chanc. Div. 205.
[3] L. R., 10 Chanc. App. 148.
[4] 9 Hare, 666.

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term "guaranteed" was used in contradistinction to "ordinary" stock, and that Mr Barr intended that his trustees should either transfer to the club £200 of the £310 preference stock which he held, or that if he should possess no such stock at the time of his death, his trustees should acquire and transfer £200 of that preference stock. It appears to me that in such a case the construction which will result in the legacy receiving effect should be preferred to the construction which would lead to its failing.

For these reasons I am of opinion that the Lord Ordinary's interlocutor should be adhered to.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

THE COURT adhered.

F. J. MARTIN, W.S.—WEBSTER, WILL, & Co., S.S.C.—A. M. GREGORSON, W.S.—ALEXANDER BOWIE, Solicitor—KIRK MACKIE & ELLIOT, S.S.C.—Agents.

No. 143.

June 11, 1901. Fraser v. Great North of Scotland Railway Co.

JOHN FRASER, Applicant (Respondent).—*J. Dove Wilson.*
THE GREAT NORTH OF SCOTLAND RAILWAY COMPANY, Appellants.—*Salvesen, K.C.—Ferguson.*

Master and Servant—Workmen's Compensation Act, 1897 (60 *and* 61 *Vict. cap.* 37), *sec.* 2—*Claim for Compensation—Application to arbiter without previous claim.*—The Workmen's Compensation Act, 1897, sec. 2, enacts that "proceedings for the recovery under the Act of compensation for an injury shall not be maintainable unless . . . the claim for compensation with respect to such accident has been made within six months from the occurrence of the accident."

Held that an application to the Sheriff as arbiter under the Act to fix the compensation is itself "a claim for compensation" within the meaning of the above section, and if brought within six months of the accident does not require to be preceded by any other form of claim.

Opinion *reserved*, whether a letter received by the employers within the six months intimating that a claim was to be made under the Act, but not stating the amount claimed, was a sufficient "claim for compensation" under the section.

Master and Servant—Workmen's Compensation Act, 1897 (60 *and* 61 *Vict. c.* 37)—*Schedule i. sec.* 2—*Wage-earning capacity—Offer by employer to continue wages previously earned.*—Employers in whose service a workman, earning wages at the rate of 16s. a week, had sustained injuries resulting in the loss of an arm, offered to retain him in the same employment at the same wages.

This offer was declined by the workman. The Sheriff as arbitrator in an application to fix the compensation payable under the Workmen's Compensation Act, 1897, found that the loss of his arm diminished the applicant's capacity to earn wages in the employment in question and awarded compensation at the rate of 6s. a week.

In an appeal, *held* that the refusal of the workman to accept the offer of employment did not exclude his right to compensation, if otherwise well founded, and award *sustained*.

1ST DIVISION. Sheriff of Aberdeen.

IN an application under the Workmen's Compensation Act, 1897, by John Fraser, engine-cleaner, Kincardine O'Neil, against the North of Scotland Railway Company, the Sheriff-substitute at Aberdeen (Robertson) awarded compensation. In a case stated at the instance of the railway company the following facts were held as proved:—

"That the respondent John Fraser is eighteen years of age, and was in the employment of the appellants as an engine-cleaner on 2d

May last, when he met with an accident in the course of his employment, as a result of which his right arm was amputated above the elbow. No. 143. June 11, 1901. Fraser v. Great North of Scotland Railway Co.

"That the respondent was at the time of the accident employed in or about a railway in the sense of the Workmen's Compensation Act, 1897.

"The respondent had been ten months in said employment, and his average weekly wage during that period was 16s.

"That the present application was brought on 31st October 1900, and no previous written notice or claim had been given or made to the defenders, except a letter from respondent's agent to the appellants' solicitor sent on 30th October 1900, in the following terms, viz.:—

"'Dear Sir,—I have been consulted by John Fraser, engine-cleaner, lately in your company's service, as to his claim for compensation in respect of the loss of his arm on 2d May last. As it will be six months on Thursday first from the date of the accident, there will be no time to negotiate, and I must therefore raise action under the Workmen's Compensation Act. This, however, will be done merely to conserve my client's legal position, and I trust will not stand in the way of a friendly settlement.

"'Please let me know by noon to-morrow if you will accept service.'

"That the application was raised on 31st October 1900, and that the appellants' solicitor accepted service thereof on same date.

"That the appellants were aware of the accident and had, up to the time of the raising of this application, paid the respondent his full wages, and that they suffered no prejudice from the fact of no notice being sent of the accident.

"That thereafter appellants offered to take the respondent at his former wages to work at the same employment as he had at the time of the accident, adding that 'if anything more suitable turns up hereafter, it could be given to him. I am writing without prejudice to my company's pleas, should we have to thrash the matter out in Court.'

"That respondent declined said offer, in respect (1) that the appellants declined to guarantee its permanency; and (2) that he was satisfied that he was not equal to the work with one arm.

"That respondent, while he could clean portions of an engine with one arm, is not able to do the whole work of an engine-cleaner.

"That apart from the fact that he was injured in the appellants' service, the respondent would not be entitled to and could not get full wages as an engine-cleaner.

"That in the service of the appellants an engine-cleaner has in ordinary course the chance of being promoted to be in the first place a fireman, and finally an engine-driver; and that the respondent is not now eligible for either of these posts.

"That his wage-earning capacity was diminished."

Upon the foregoing facts the Sheriff held:—"(1) That the application was competently brought. (2) That the respondent was entitled to compensation under the Act, and I awarded him 6s. a week from and after 30th October 1900, and I found him entitled to expenses."

The questions of law for the opinion of the Court of Session were:—"(1) Whether the present proceedings cannot be maintained, in respect that the claim for compensation with respect to the accident was not duly made, and no question had arisen for settlement by

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arbitration in terms of the Act? (2) Whether in the circumstances, having regard to the fact that the appellants offer and are willing to continue the respondent in their employment at a wage equal to his average weekly earnings during the twelve months previous to the occurrence of the accident, and that the respondent has declined said offer, the respondent is entitled to decree for the sum of 6s. per week awarded to him?"*

Argued for the appellants;—First question.—The Act required that proceedings for recovery of compensation should follow upon a "claim" for compensation. The "proceedings" were in section 2 treated as distinct from the "claim." The employer was entitled to have an opportunity of inquiring into and considering the claim before he was brought into Court.[1] Unless contentious proceedings were preceded by a claim, they were premature, and ought to be dismissed, so that nothing remained to establish a claim. Second question.—The Act by schedule 1, sec. 2, enacts that the compensation was to be fixed by comparing the wages which the workman was able to earn before and after the accident. The criterion was not necessarily ability to earn in the open market; actual offers of employment open to the workman must also be taken into account. The Sheriff had gone wrong in holding that the workman was not bound to take the work offered in the absence of proof that he was unfit to do what he was asked to do. Otherwise it would be open to a workman who preferred idleness to refuse work and to insist on getting what was practically a pension. It was not open to a workman to take this course and to refuse a *bona fide* offer of work for which it was not proved that he was unfit. If the workman had accepted the work he would have sustained no immediate loss, and accordingly the case should in any event have been treated on this footing, and a nominal sum awarded, or a declaratory finding made as to wage-earning capacity, leaving it to the workman to apply to the arbiter again if it should turn out that a loss of wages had *de facto* resulted from his injuries.[2]

Argued for the respondent;—First question.—The application to the Sheriff, even if invalid as a step in the proceedings for the recovery of compensation by reason of there being no previous "claim," was in any event valid as such a claim. It contained all the particulars requisite for the appellants to know, and it could not be rejected as a claim merely because it was in the form of a Sheriff Court petition. If this view was sound, then there had been a "claim" within six months, and the first question must be answered in the respondent's favour. There was nothing in the case of *Powell*

* The Workmen's Compensation Act, 1897 (60 and 61 Vict. c. 37), enacts:—Section 2 (quoted in rubric). Schedule 1, section 2—"In fixing the amount of the weekly payment regard shall be had to the difference between the amount of the average weekly earnings of the workman before the accident, and the average amount which he is able to earn after the accident."

[1] Powell v. Main Colliery Company, Limited, L. R. [1900], A. C. 366, *per* the Lord Chancellor; Bennett v. Wordie & Company, May 16, 1899, 1 F. 855.

[2] Freeland v. Macfarlane, Lang, & Co., March 20, 1900, 2 F. 832; Irons v. Davis & Timmins, Limited, L. R. [1899], 2 Q. B. 330; Chandler v. Smith, L. R. [1899], 2 Q. B. 506; Pomphrey v. Southwark Press, L. R. [1901], 1 K. B. 86.

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v. *Main Colliery Company*[1] adverse to this view; in fact the implication was that the raising of an action in the form required by the statute was in itself a claim in the sense of section 2. Having served its purpose as a claim there was no reason why the application to the Sheriff should not be afterwards used as the basis of the proceedings for recovery of compensation when the claim was disputed. Second question.—The Sheriff had held that the respondent was in consequence of the loss of his arm not able to do the whole work or earn the full wages of an engine-cleaner. The appellants' offer was thus in part an offer of charity, and could it be said that a workman was obliged to accept of charity in place of the compensation to which he was legally entitled? There was nothing in the Act to compel a workman to accept of an offer of work from his former employer even if made *bona fide*, and yet the appellants' argument necessarily involved the affirmance of this proposition.

At advising,—

LORD PRESIDENT.—Two questions of law are submitted for our adjudication in this case, the first being, "Whether the present proceedings cannot be maintained, in respect that the claim for compensation with respect to the accident was not duly made, and no question had arisen for settlement by arbitration in terms of the Act?" The decision of that question must depend mainly upon the terms of section 2 of the Workmen's Compensation Act of 1897, as applied to the facts of the case. That section requires two things as conditions-precedent to a proceeding for recovering compensation under the Act—first, that notice of the accident shall have been given as soon as practicable. That requirement, it is admitted, may be dispensed with, and no point is made upon it here. The second condition is that a claim for compensation in respect of such accident shall be made within six months from the occurrence of the accident causing the injury, or in case of death within six months of the death, and it is maintained by the appellants that nothing which was done by the applicant in this case constituted a claim for compensation in the sense of the section. The Act does not require, in terms at all events, that the amount of compensation shall be stated in the claim, but merely that a claim for compensation with respect to the accident shall have been made. We have here, on the second last day of the six months, the letter of 30th October 1900, written by the respondent's solicitor to the railway company, and it begins—"I have been consulted by John Fraser, engine-cleaner, lately in your company's service, as to his claim for compensation in respect of the loss of his arm." So that the letter clearly relates to a claim for compensation, and we know from other statements in the case that negotiations were going on between the respondent and the appellants as to that claim. But the appellants maintained that a claim for compensation must contain a specification of the sum claimed; that it is not enough to say, "I claim compensation." I do not think it necessary to express any opinion upon this point, because even if the letter of 30th October was held insufficient to satisfy the statutory requirement of a claim, the application which was brought on 31st October, within the six months, is sufficient to do so.

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That application in its prayer asks the Sheriff to fix and determine the amount of compensation, and thereafter craves decree for payment to the respondent of the sum of 8s. weekly, or such other weekly sum as the Court in the course of the proceedings may fix and determine. So that, within the period of six months the appellants had a letter intimating a claim for compensation, and a formal application specifying the amount claimed. Now, it seems to me, without discussing the precise requisites of a claim, that the application by itself, or the two documents together, satisfy the requirement of section 2 in regard to that matter.

The second point is of a different kind, and it certainly raises a question of very general importance, as it involves the contention on the part of the appellants, that if they choose to offer to continue to employ an injured workman at a wage equal to his average weekly earnings during the twelve months previous to the accident, he is not entitled to decline the offer, and that if he does decline it, he must go without compensation. Now I must say that is a somewhat startling doctrine, for which I find no warrant whatever in the Act. The first schedule of the Act, subsection 2, which declares the mode of ascertaining compensation, runs thus—"In fixing the amount of weekly payment, regard shall be had to the difference between the amount of the average weekly earnings of the workman before the accident and the average amount which he is able to earn after the accident, and to any payment, not being wages, which he may receive in respect of his injury, during the period of his incapacity." The first observation which occurs on the appellants' proposal is, that it is not an offer of compensation, measured by the difference between the earning capacity of the respondent before the accident and his earning capacity after the accident. That his earning capacity has been largely diminished is plain from the Sheriff's statement, that "the respondent, while he could clean portions of an engine with one arm, is not able to do the whole work of an engine-cleaner," and then he goes on to say that the respondent would not now be fit to be first a fireman and afterwards a driver, a course of promotion usually open to engine-cleaners. There is nothing in the statute which would require that a workman who has lost his right arm shall remain in the service and endeavour to clean parts of engines with his left hand. It is common knowledge that when a man has sustained a serious injury in connection with dangerous mechanism, he is apt to be scared and timorous about having anything to do with that mechanism again; and I think that this should not be left out of view when it is said that the respondent's refusal of the terms offered by the appellants is capricious. The offer is not made in perpetuity, or for any definite period, and even if it had been, the respondent would not have been bound to accept it in lieu of the compensation provided by the Act. It therefore appears to me that upon the second point, as well as upon the first, the Sheriff-substitute's judgment is right.

Lord Adam.—The first question here is, "Whether the present proceedings cannot be maintained, in respect that the claim for compensation with respect to the accident was not duly made, and no question had arisen for settlement by arbitration in terms of the Act?" Now, we have this proceeding before the Sheriff, in which this award was pronounced, and it is

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sufficiently clear that if the claim for compensation refers to the action, it is within the proper time. But it is contended that that is not what is meant by "claim for compensation," because, besides the claim in the action Mr Ferguson contends, there must be another claim preceding the raising of the action. That contention was founded upon the 2d section of the Act. Now, that section requires, apparently, a notice which shall contain certain things which are specified, and then it goes on to say that proceedings for the recovery of compensation shall not be maintainable "unless a claim for compensation in respect of such accident has been made within six months of the occurrence of the accident." It appears to me beyond all doubt we have in this case a claim for compensation made, by the raising of proceedings on the 31st day of October 1900, which was within the six months required by the Act. If this claim for compensation, which has taken the form it now has of an application to the Sheriff as arbiter, is not a claim for compensation, I do not see what would constitute such a claim. The essential thing is, that an employer is to get notice of a claim for compensation any time within six months. The Act does not say it shall be in a particular form. The Act does not say that it shall not be in the form of a summons—a petition before the Sheriff, as required in Scotland. There is nothing in the Act which says that after having made the claim in that form, you are not to go on in the same form, and to use it as the foundation of arbitration proceedings under this Act. And that is really the question here. I say nothing about whether the letter preceding the serving of the application was in itself sufficient, for it was not required as a notice of claim. As to whether it might not be sustained as a claim under the 2d section, it was said that it could not because it does not specify the amount. I prefer to reserve my opinion as to that; but I think there is an absolutely good answer to the objection taken in this case, in respect that the claim was in time, being given by the raising of the action within the six months. That being so, I see no reason why the action should not be subsequently proceeded with.

With reference to the second question, it is quite a different one, and I agree with your Lordship on it also. The matter is this—when the applicant was injured he was earning sixteen shillings a week, and the duty fell upon the Sheriff, by the second section of the First Schedule of the Act, to make inquiry, and fix the amount of weekly payment to be made to him, subject to the direction that regard should be had to the difference between the average weekly earnings before the accident and the average amount which he was able to earn after. That was the proposition presented to the Sheriff by the Act. The Sheriff tells us that he entered into all the required inquiry. He gave all relevant consideration to it, and he came to the conclusion that the wage-earning capacity was diminished, and diminished apparently to the amount of six shillings a week, because he fixes that sum, and it is found as a fact in this case. Nobody objects, so far as I understand, to the amount fixed by the Sheriff. Nobody says it should have been more, and nobody says it should have been less. Therefore it is difficult to say why, having been found entitled to that sum by the Sheriff, he should not get it. But it is said that he is barred from getting any compensation at all, because he has declined the offer made by the appel-

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lants to give him the same weekly wages as before. Now, the Sheriff has found in point of fact that this workman cannot earn the same wages as before by reason of his injuries. I see nothing to bar a man who has been so injured, and whose capacity to earn wages is not the same as before, from recovering compensation. We are told that he shall not recover compensation because he did not accept an offer made to him of employment at wages equal to his former earnings. I see nothing of that in the Act. If a man says, "I am unable to earn what I did before, or to resume the work I had before, and I am not going to do it," I see nothing in that to prevent the Sheriff from finding (as he has done) that the wage-earning capacity is diminished to the amount of six shillings per week. And it is neither diminished nor increased by the fact that he will not accept the offer. I cannot see why it should be decided otherwise.

LORD M'LAREN.—As has been pointed out, there is no question at all about notice of the accident, because that point has been finally determined by the Sheriff acting as the statutory arbitrator. But then the Act of Parliament provides, or rather makes it a condition of the right to compensation, that within six months after the cause of claim has arisen a claim of compensation shall be made. It appears from the stated case that a letter was written by the injured man's agent two days before the expiration of the six months, and a claim in the form of a petition to the Sheriff was lodged on the following day, both these writings being within the period of six months allowed by the statute. And therefore if either of these be a claim in the sense of the statute, it is a claim made in due time. But it was argued to us that the letter was not a claim in the sense of the Act, because no sum of compensation was specified; that it was merely an intimation of a right to compensation in general terms. Then as to the petition, it is said that it was not the kind of claim which the Act of Parliament required; that the Act contemplates a claim of an informal kind, instead of these more contentious proceedings which form the subject-matter of the arbitration. Reliance was placed on both sides on the case of *Powell* v. *The Main Colliery Company, Limited.*[1] I need hardly say that while, according to the best interpretation of the statute, employers of labour within Scotland are not indulged with the luxury of an appeal to the House of Lords, they are most fully entitled to the benefit of all the law that may be laid down by the House of Lords in appeals from English decisions under the same Act of Parliament. But when we look at the case of *Powell*[1] the first thing that one notices is that the decision of the Court of Appeal, which was under review by the House of Lords, was a decision to the effect that an informal claim made within six months was insufficient, because in the opinion of the learned Judges what the statute required was a formal request for arbitration filed in a County Court. Now, such a proceeding, indeed, was taken, but was not taken within the period of six months, and would not have been available on the point in question. But having read the decision I cannot find that any member of the Court of Appeal, or any of the Judges who took part in the decision of the House of Lords, ever doubted that a request for arbitration filed in a County Court would have

[1] L. R. [1900], A. C. 366.

been a good claim if made within the statutory period of six months. The House of Lords had not to consider that point at all, although it is pretty evident what their decision would have been, and the decision in *Powell* [1] is only a decision that an informal notice will satisfy the requirements of the statute. As the Lord Chancellor puts it,—"The claim made in this case was made for a definite amount in respect of an accident described by its date, and, as I say, I should think no person, unless forced to give an artificial meaning to the words of the section which I have read, could doubt that it was a 'claim for compensation.'" But while my opinion is that a petition to the Sheriff in Scotland is a perfectly good way of making a claim, I cannot say that I would regard the decision in *Powell's* [1] case as authority for the proposition that the agent's letter in this case was also a good claim. I should prefer, in common with your Lordship, to reserve my opinion on that point, because it may arise in other cases. I shall only say that if I should have the misfortune to be obliged to prefer a claim of this kind, I think I would not risk it upon a letter which did not state the amount of damage which I wished to be found due to me.

Passing to the second question, whether the Sheriff ought to have refused to make an award, in respect that the railway company had offered to continue to the claimant the wages he had been accustomed to receive, I think there is, perhaps, a distinction in regard to the rights of employers and employed in this respect, because if the claimant had been willing to accept this offer, or if he had said, "I am quite willing, at all events, to give a trial to my old work at that wage," then I think his right would remain to have an inquiry as to the extent to which he was disabled from earning wages, and to have a sum found due to him. It may very well be that in such a case a weekly sum of money might be awarded under the qualification that this weekly payment was not to take effect so long as the claimant was working for full wages to his old employers. But in this case the claimant does not desire to work at his trade as an engine-cleaner, and one can understand that, after the accident he sustained, he might have an insuperable distaste to continuing in this employment. That, however, does not help us very much to a solution of the question, because the only point I think under this question is, whether we can find in the statute authority to refuse the compensation to which the workman would otherwise be entitled, on the ground that he declines to continue in the service of his employer. It seems to me that if we were to hold that this was a condition of the right to compensation, we should be introducing a new condition into the statute, which, as I read it, is not to be found there. The conditions are carefully defined in the 2d section, and are defined in such a way that, I venture to say, it would be impossible to impose upon employers a burden in favour of a man who by choice was leading a life of idleness, because the arbitrator is to inquire into the man's ability to earn a wage, and he is only to give him compensation for his disablement in respect of the accident. But that is a very different condition from what is proposed—that the right to compensation should be conditional on the claimant consenting to continue in the service of the same employer.

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LORD KINNEAR.—I agree that it is not desirable in this case to express any opinion as to the effect of the agent's letter of the 30th October if that letter had not been followed by any other procedure within the six months. Whether that would be a perfectly sufficient claim in the sense of the statute or not is a question that does not seem to me to arise, for the reasons which your Lordships have already pointed out. Therefore I desire to reserve my opinion upon it. But I think that the application to the Sheriff, which was made on the 31st of October, and which was certainly within the six months, is a perfectly sufficient claim to satisfy the conditions of the statute. All that the statute requires is that a claim shall be made, and the document, which is said not to be a sufficient claim, sets out perfectly clearly and distinctly everything which can enter as an element into the composition of a claim under the statute. It sets out the fact of the accident, the fact that the applicant demands compensation, and the amount of the compensation which he demands, and I cannot see anything more which requires to be specified in order to make a perfectly good claim. It is not the less a good claim because it happens to be in one of the forms contained in the schedule to the Sheriff Court Act of 1876. In the case of *Powell*[1] it was held in the House of Lords that a claim made by a workman under this statute does not require to be a formal judicial claim, but that it may be made in any manner, however informal, provided, of course, that it is made clear to the employer on whom it is served what the intention of the claim is. But there is nothing in the opinions of the learned Lords to suggest that a claim is any the worse because it is formal. The decision that you may adopt any form you like in stating your case does not prevent you from taking the ordinary form which is adopted in certain proceedings in the Sheriff Court. The only point which, it appears to me, the appellants could make upon this part of the case was suggested in Mr Ferguson's argument that the employer is entitled to an opportunity for considering whether he will settle the claim otherwise than by going to the Sheriff, and it was said that a petition in the Sheriff Court was premature. Mr Ferguson's argument was that it was premature because it was a proceeding only to be taken failing certain other proceedings which are pointed out by the statute. In the first place, if there is a committee representative of the employer and his workmen, then they may settle it; and in the second place, if there is no committee, then the question is to be settled by a skilled arbitrator agreed to by the parties, and it is only in the absence of agreement that it is to be settled by a County Court Judge in England or by a Sheriff in Scotland. But then it is only if no objection is made by either party that a representative committee is to settle the matter, and it is only if both parties agree that it is to be settled by an arbitrator nominated, and there cannot be clearer evidence that one of the parties does not mean to agree to either of those methods, and is demanding to go at once before the Sheriff, than the presentation of a petition in the Sheriff Court. But even if the application were premature on the ground suggested, the only consequence would be that it might be dismissed as a petition in the Sheriff Court, but it would still remain a perfectly sufficient intimation of the

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workman's claim to satisfy the requirements of the statute. Therefore it appears to me that that objection completely fails.

As to the second point, I agree with your Lordships. The material point appears to me to be that all the considerations which ought to go to affect the maintenance of a claim for compensation are very plainly set out in the case stated by the Sheriff-substitute, and have been fairly considered by him. I confess that it appears to me that a great part of the appellants' argument was based upon a misconception of the question which is really raised in this appeal, and especially of that part of the argument which was founded upon the second section of the First Schedule. We have nothing to do in this appeal, as I think, with what the Sheriff is required to consider in estimating the amount of the award which he is to give. If it had been said that certain facts, and, in particular, the fact upon which so much weight was laid, that the railway company have offered this man employment and that he had refused it, had been brought before the Sheriff, and that he had refused to consider it, I daresay that might have been a relevant objection to his award. And if it could be shewn that such a refusal was due to a failure on the part of the Sheriff to have regard to one of the things which the second section requires him to consider, we should have to send the case back to him. But nothing of the kind is stated in the case. It is perfectly clear, from the statement of the case, that the Sheriff has had regard to all these facts which the appellants bring before us, because they are all very clearly set out in the case, and having had regard to them all he has proceeded to fix the amount of the compensation. Now, that, we, of course, cannot review, and we are not asked to review it, but the only point that was taken is this, not that that compensation was not reasonable, not that it has not been fixed upon a careful consideration of all the elements which the statute requires and which the Sheriff is bound to take into account, but that although it may be a proper award, the respondent is not entitled to have decree for the amount, because his employers have offered him an employment which he has declined to accept. I can quite see the force of what Mr Salvesen said, that in many cases it is very right and proper for a company to give a workman such employment as he may be fit for after he has been injured in their service, although he is no longer a perfectly able-bodied man, and it may be very right that an injured workman to whom such an offer is made should accept it, and should not endeavour, as Mr Salvesen said, to eat the bread of idleness. All that is perfectly proper, but it merely suggests considerations for an arbitrator in estimating the amount of his award. If he should find, upon taking all these considerations into account, that the compensation due under the statute is so much, then this Court cannot interfere with the process by which he has reached that conclusion. The point really came to this, that the respondent was bound in law to undertake the work which was offered to him by the railway company. I confess I know of no principle in law which would enable us to affirm that proposition. I can conceive no reason why he should be bound in law to accept an employment which he does not choose to accept, although the offer and refusal may be properly taken into account in fixing the amount of his compensation. When one looks at the case and finds that what is set out is that the man is satisfied that he is

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not equal with one hand to the work which he used to do when he had two hands, and that the Sheriff says that that is matter of fact, that he is not equal to his former work of engine-cleaner, and that he could not get full wages at that work if he tried it, it seems to me that it would be a very arbitrary proceeding in a Court of law to say that in these circumstances the man was bound to undertake the work merely because it was offered to him. I am therefore unable, with your Lordships, to find anything in the statute which would justify our saying that the respondent is to be deprived of compensation, because in the circumstances set out in this case he has declined to undertake the work which the railway company offered to him.

THE COURT pronounced this interlocutor:—"Find, in answer to the first question in the case, that the proceedings were competently maintained; and, in answer to the second question, that the respondent is in the circumstances entitled to be awarded the sum of six shillings per week, and decerns."

ALEXANDER ROSS, S.S.C.—GORDON, FALCONER, & FAIRWEATHER, W.S.—Agents.

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AGNES BROWNLIE OR CONWAY AND OTHERS, Pursuers (Reclaimers).—*Watt, K.C.—A. M. Anderson.*

THOMAS KENNEDY DALZIEL AND OTHERS, Defenders (Respondents).—*Guthrie, K.C.—M'Lennan.*

Process—Several Defenders—Conclusion for one sum of damages against several defenders for different wrongs—Amendment of Record—Amendment to make incompetent action competent—Reparation.—An action was raised by the widow and children of a deceased workman concluding for £500 in name of damages for injury to their feelings, caused (*a*) by an unauthorised *post-mortem* examination of the body of the deceased by two medical practitioners, and (*b*) by their removing and retaining portions thereof. The action was directed against (1) the two medical men, and also against (2) the employers of the deceased, and (3) the law-agent of the latter. It was averred that the examination was made by the first set of defenders upon the joint instructions of the others.

Held (*aff.* judgment of Lord Kincairney) that the action was incompetent, in respect that while the conclusion was for one sum of damages against the whole defenders, the grounds of action alleged consisted of two separate wrongs, with the latter of which (the removal and retention of portions of the body) it was not stated, and could not legitimately be inferred, that the employers or their law-agent were implicated.

Opinion that amendment of the record would not be permissible, to the effect of making the action competent by striking out the averments dealing with the latter wrong.

1ST DIVISION. Lord Kincairney.

ON 3d June 1898 Stephen Conway sustained certain injuries while employed as a labourer by Messrs J. & A. Mitchell, builders, Glasgow. He raised an action of damages against Messrs Mitchell, in the course of which he died. His widow as his executrix was sisted as pursuer, and the case went to trial, resulting in a verdict in favour of the defenders.

Thereafter the widow of the deceased and his children raised the present action, in which four persons were called as defenders, viz., Dr Thomas Kennedy Dalziel and Dr Robert Macneil Buchanan, both medical practitioners in Glasgow; Messrs J. & A. Mitchell; and Thomas M'Lelland, writer in Glasgow, the law-agent of Messrs Mitchell.

The action concluded against the defenders jointly and severally,

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or severally, for £500 damages. The grounds of action alleged by the pursuers were as follows:—(Cond. 4) "By instructions of the said J. & A. Mitchell and of their agent, the said Thomas M'Lelland, or one or other of them, the said Doctors Dalziel and Buchanan, on the day after the death of the said Stephen Conway, went to the said Mrs Conway's house and made a *post-mortem* examination of the said Stephen Conway's body. . . . The said *post-mortem* examination was made by the said two doctors wrongfully, no legal authority to make the same having been received by them or by those who instructed them. . . ." (Cond. 5) "A considerable time after said examination was made the pursuers learned that the said two doctors, when they made the said *post-mortem* examination, cut out and abstracted from the body several internal organs, namely, the liver, the gall bladder, and parts adjacent. These organs were taken away by them, and are still in their possession. The said organs were cut out and taken away without the consent of the pursuers. . . ." (Cond. 6) "The action of the defenders in causing a *post-mortem* examination of the said Stephen Conway's body to be made hurt the feelings of the pursuers. Had the pursuers been aware of what was proposed to be done, they would have taken steps to prevent the said examination from taking place. The pursuers would never have consented to the said examination, the idea of the body of the deceased being subjected to a *post-mortem* examination being repellant to them. Since they learned of the internal organs having been abstracted, their feelings have been much more hurt and wounded. The pursuers are all the persons who are entitled to sue for reparation in respect of said unauthorised *post-mortem* examination."

The defenders pleaded;—(1) The action is incompetent as laid.

On 15th November 1900 the Lord Ordinary (Kincairney) dismissed the action as incompetent.*

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* "OPINION.—This is an action of damages brought by the widow and children of Stephen Conway, who suffered an injury while in the employment of the defenders J. & A. Mitchell, builders, Glasgow. He raised an action of damages against his employers, and in the course of the action he died. His widow and executrix was sisted in his stead as pursuer. She appealed for jury trial, which took place and resulted in a verdict for the defenders J. & A. Mitchell, who were found entitled to expenses, which have not been paid.

"The damages concluded for in this action are for injury to the feelings of the pursuers, caused by the unauthorised *post-mortem* examination of the body of Stephen Conway and the abstraction of certain internal organs. The action is directed against (1) Drs Dalziel and Buchanan, who made the *post-mortem* examination; (2) Messrs J. & A. Mitchell; and (3) Thomas M'Lelland, writer, the agent employed by them. It is averred that Drs Dalziel and Buchanan in making the *post-mortem* examination acted on the instructions of J. & A. Mitchell and of their agent, Thomas M'Lelland, 'or one or other of them.' The conclusion is for decree for £500 against these defenders, 'jointly and severally, or severally.'

"The pursuers founded on the case of *Pollock* v. *Workman*, 9th January 1900, 2 F. 254, which was, like this, an action of damages for an unauthorised *post-mortem* examination, and was directed against the doctor who made the examination, and the law-agent and his principal, who employed the doctors. It was thus the same as the present action in these respects. The Lord Ordinary (Kyllachy), affirming the competency and relevancy of the action, adjusted issues. The action was thrown out in the Inner-House on the ground (apparently not pleaded in the Outer-House) that it was sued

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wrongs, although it may be said that the first gave occasion for the commission of the second. But this is not sufficient to justify the pursuers in treating them as if they constituted one and the same wrong for which each and all of the defenders were liable.

It is not an ordinary incident of a *post-mortem* examination that separate organs of the body should be removed and never replaced. This is a much more serious wrong than the *post-mortem* examination itself. All the defenders are relevantly charged with the commission of the lesser wrong, but it is equally clear that as regards the more serious wrong, the removal of parts of the body, the first defenders and their law-agents are not relevantly charged. From the averments and from the nature of the case the doctors alone could be made responsible for such a step as removing parts of the body. There is no averment, and there is no justifiable inference, that they were instructed or authorised to do this.

The action has not been properly framed, and is incompetent as it stands, but it is suggested that the difficulty might be met by deleting the part of it relating exclusively to the two doctors. It would then be open to the objection that the sum concluded for as recompense for two wrongs remained the same although the chief cause of injury or damage was left out of consideration. There is, in my opinion, no authority for such an amendment under the Court of Session Act, 1868, and it would therefore not be competent to allow it.

LORD M'LAREN.—I agree in all respects with the judgment of the Lord Ordinary, which brings out very clearly all the points in the case. On the merits I have nothing to add. As to the question of amendment, I think it right to notice that the pursuer had the opportunity of amending her record in the Outer-House. After the Lord Ordinary's judgment she might have considered whether she could maintain the action in its present form, and counsel might then come here with a definite amendment. I do not remember any case in which a party has asked the Court for a judgment, leaving it to the Court to amend his record for him; it is for the party whose pleading is defective to table his amendment. But even supposing that there was an amendment before us, in proper form, I should have the greatest difficulty in allowing any amendment which would make this action competent. The powers of amendment conferred by the Court of Session Act, 1868, are, speaking generally, conferred for the purpose of enabling the parties to raise the true question in issue; but here there are two questions in issue, and according to the form in which the case is put we are unable to deal with either of them. It appears to me that the pursuer can only raise the question she desires to raise by separate actions against the separate wrongdoers, and no amount of amendment would convert this action into two separate actions. I do not know what aspect the case might bear if the pursuer had offered to withdraw her action as against Messrs Mitchell and the law-agents. It might be that counsel would then be able to make out a relevant and competent action against the doctors. But no such proposal is made, and I agree with your Lordships that the judgment of the Lord Ordinary should be affirmed.

LORD KINNEAR.—I concur, and have nothing to add on the main ques-

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LORD PRESIDENT.—This action is directed against three different sets of defenders—the first, a firm of builders; the second, their law-agents; and the third, two medical men. The pursuers' claim is against all these defenders jointly and severally. But when we come to the pursuers' condescendence we find two separate and distinct wrongs alleged, viz., the *post-mortem* examination of the deceased, and the abstraction and retention of certain organs of his body. All the defenders are alleged to have been concerned in the commission of the first wrong—the first set of defenders as having instructed the law-agents, the law-agents as having instructed the doctors, and the doctors as having actually made the examination. So far the case is consistent. But the pursuers aver another and independent wrong, viz., the removal and permanent retention of certain organs of the body. This is a wrong in which the first and second sets of defenders are not alleged to have been concerned. It is not averred that the organs were removed and retained at their request or on their instructions, and it could not be said that the removal and retention were ordinary incidents of a *post-mortem* examination. It might perhaps have been possible to regard the temporary removal of the organs for the purpose of laboratory examination as an incident of a *post-mortem* examination, but this cannot be suggested with regard to their permanent retention.

There is thus a single conclusion for £500, while there are two separate and distinct claims made against different persons—the first against all the defenders, while the second is only against two of them, and accordingly the summons as it stands is incompetent both on principle and on the authority of the cases relied on by the defenders.

There is no offer on the part of the pursuers to amend the summons, and therefore it is not necessary to consider whether amendment would be permissible, but I may say that it would be difficult to grant a motion for an amendment which would have the effect of permitting the pursuers to sue exclusively upon the first of their two grounds of claim for a sum which they have named as reparation not for that wrong, but for both the wrongs which form the grounds of the action as it stands. For these reasons I am of opinion that the Lord Ordinary is right, and that his interlocutor should be adhered to.

LORD ADAM.—I agree with the Lord Ordinary and with your Lordship. The two wrongs alleged as grounds of action are distinct and separate

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remove these organs or to retain them. The averment is made against the doctors alone, and it is unconnected with the jury trial. As made, the pursuers would be entitled to prove that the doctors had committed this wrong for their own private purposes. Suppose they did so, could the other defenders be made liable for that wrong? I do not think they could on this record. If that be so, then the cases of *Barr*, *Taylor*, and *Sinclair* apply; and on the principle of these cases the action must be dismissed as incompetent.

"The defenders plead further that the pursuers are not entitled to insist except on condition of making payment of expenses in the previous action. I do not require to decide that, but may say that I do not think the plea supported by authority."

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wrongs, although it may be said that the first gave occasion for the commission of the second. But this is not sufficient to justify the pursuers in treating them as if they constituted one and the same wrong for which each and all of the defenders were liable.

It is not an ordinary incident of a *post-mortem* examination that separate organs of the body should be removed and never replaced. This is a much more serious wrong than the *post-mortem* examination itself. All the defenders are relevantly charged with the commission of the lesser wrong, but it is equally clear that as regards the more serious wrong, the removal of parts of the body, the first defenders and their law-agents are not relevantly charged. From the averments and from the nature of the case the doctors alone could be made responsible for such a step as removing parts of the body. There is no averment, and there is no justifiable inference, that they were instructed or authorised to do this.

The action has not been properly framed, and is incompetent as it stands, but it is suggested that the difficulty might be met by deleting the part of it relating exclusively to the two doctors. It would then be open to the objection that the sum concluded for as recompense for two wrongs remained the same although the chief cause of injury or damage was left out of consideration. There is, in my opinion, no authority for such an amendment under the Court of Session Act, 1868, and it would therefore not be competent to allow it.

Lord M'Laren.—I agree in all respects with the judgment of the Lord Ordinary, which brings out very clearly all the points in the case. On the merits I have nothing to add. As to the question of amendment, I think it right to notice that the pursuer had the opportunity of amending her record in the Outer-House. After the Lord Ordinary's judgment she might have considered whether she could maintain the action in its present form, and counsel might then come here with a definite amendment. I do not remember any case in which a party has asked the Court for a judgment, leaving it to the Court to amend his record for him; it is for the party whose pleading is defective to table his amendment. But even supposing that there was an amendment before us, in proper form, I should have the greatest difficulty in allowing any amendment which would make this action competent. The powers of amendment conferred by the Court of Session Act, 1868, are, speaking generally, conferred for the purpose of enabling the parties to raise the true question in issue; but here there are two questions in issue, and according to the form in which the case is put we are unable to deal with either of them. It appears to me that the pursuer can only raise the question she desires to raise by separate actions against the separate wrongdoers, and no amount of amendment would convert this action into two separate actions. I do not know what aspect the case might bear if the pursuer had offered to withdraw her action as against Messrs Mitchell and the law-agents. It might be that counsel would then be able to make out a relevant and competent action against the doctors. But no such proposal is made, and I agree with your Lordships that the judgment of the Lord Ordinary should be affirmed.

Lord Kinnear.—I concur, and have nothing to add on the main ques-

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tion, except that I entirely agree with the Lord Ordinary on the question of competency, and therefore I say nothing about the other points discussed in his Lordship's opinion, since we cannot consider them in an incompetent action. As regards the question of amendment, no formal proposal to amend the record has been made; but there has been such an expression of a wish to amend as would, according to our ordinary practice, have induced us to allow the pursuer's counsel an opportunity of considering whether he intended to propose an amendment. It is therefore proper to consider, as your Lordships have done, whether any amendment which the pursuer could propose should be allowed. Now, the only amendment suggested is to strike out of the record all those averments which are directed against the doctors specially, as distinguished from those averments which are directed against them in common with the other defenders. But the object of striking out these averments is not to amend the record in order to bring out the true point at issue between the parties, but for the purpose of turning an incompetent action into a competent one by striking out a ground of action set forth in the condescendence, and so enabling the conclusions of the summons to be read in a totally different sense from that which they bear as originally framed. I think that is not within the powers conferred by statute or by practice. I do not know, however, that the question of amendment is very material, because, if it were allowed, it could only be on conditions, and one of these conditions must be the payment of all expenses incurred in discussing an incompetent action, which means all the expenses incurred before the action was made competent by the amendment. I do not think, therefore, that the refusal to allow amendment entails any hardship upon the pursuers. In whatever way they set about it, they cannot convert a bad action into a good one at the expense of their adversary, but only at their own.

THE COURT adhered.

HENRY ROBERTSON, S.S.C.—AULD, STEWART, & ANDERSON, W.S.—Agents.

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M'Donald v. Kydd.

ARCHIBALD M'INTYRE M'DONALD, Pursuer (Reclaimer).—*Campbell, K.C.—Blackburn.*
WILLIAM ANDERSON KYDD, Defender (Respondent).—*Salvesen, K.C.—W. Brown.*

Lease—Retention of Rent—Obligation of landlord to put subjects into habitable repair.—The proprietor of a farm let it for nineteen years from Whitsunday 1897, but did not, prior to the entry of the tenant, put the farm buildings into habitable condition and repair. During the first two years of the lease the proprietor made certain repairs on the buildings, and the tenant paid the rent until Whitsunday 1899, when he declined to pay the half year's rent then due, on the ground that he was entitled to retain the rent until the landlord put the buildings into habitable condition and repair. The proprietor then brought an action for the half year's rent, alleging that by the repairs which he had executed the buildings had been put into habitable condition and repair, and pleading that in any view the tenant was not entitled to retain the rent.

Held, after a proof, (1) that the farm buildings were not in habitable condition and repair; and (2) that the tenant was entitled to retain the rent until the landlord had fulfilled his obligation to put the buildings into habitable condition and repair.

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June 14, 1901. M'Donald v. Kydd.

2D DIVISION. Sheriff of Aberdeen, Kincardine, and Banff.

BY lease, dated 22d and 30th April 1897, Archibald M'Intyre M'Donald, as commissioner for the Earl of Crawford, proprietor of the lands of Echt, let the farm of Tillyboy, part of these lands, to William Anderson Kydd, for the period of nineteen years from Whitsunday 1897, at the rent of £81, 10s. The lease contained this clause:—"Further, in respect the proprietor has put the roof of the barn and the whole other buildings on the farm in habitable condition and repair, the said William Anderson Kydd binds and obliges himself and his foresaids to keep the whole houses during the currency of this lease in habitable condition and repair, and to leave them in the like condition at the expiry thereof, ordinary tear and wear excepted."

In 1899 the Earl of Crawford sold the lands of Echt, including the farm of Tillyboy, to Mr Pirie, with entry at Whitsunday 1899, and Pirie having intimated to Kydd that he would not take over the farm buildings of Tillyboy as being in habitable condition and repair in terms of Kydd's obligation in the lease, Kydd retained the half year's rent due to Lord Crawford at Whitsunday 1899, on the ground that Lord Crawford had not put the farm buildings in habitable condition and repair.

Mr M'Donald, as Lord Crawford's commissioner, then brought this action in the Sheriff Court at Aberdeen against Kydd for £40, 15s., being the half year's rent.

The pursuer averred;—(Cond. 4) "At the term of Whitsunday 1899 the defender was due to the pursuer the sum of £40, 15s., being the half year's rent then payable, and the same is still unpaid. The said lease is referred to for its terms. *Quoad ultra*, the defender's averments in answer are irrelevant, and are denied. The pursuer has implemented all his obligations under said lease. Averred that the defender has regularly paid all the rents due under the said lease, except the sum now sued for, without question; and that he made no complaint as to the state of the buildings on the said farm until payment of the rent now sued for was demanded."

The defender answered;—(Ans. 4) "Denied. Explained and averred that although the said lease of the said farm of Tillyboy bears that 'the proprietor has put the roof of the barn and the whole other buildings on the farm in habitable condition and repair,' these repairs had not, as a matter of fact, been then performed, but were to be performed before or at defender's entry to the said farm, nor, with the exception of certain repairs on the roof of the byre, have any of them been done yet. Averred, in particular, that the roof of the barn and stable on said farm—which are one continuous building—is so dilapidated, and the floors of the lofts of said premises are so worn, as to render the said premises unfit for occupation or use; and averred further that the hen-house and water-closet on said farm are also so dilapidated as to be practically of no use to the defender. The pursuer has been called upon to carry out the repairs necessary to put the buildings on the farm into habitable condition and repair, but he has failed to do so. The defender has all along expressed his willingness to pay the rent now sued for on these repairs being executed, and has consigned the sum sued for in the hands of the Clerk of Court . . . The defender has, since his entry to the said farm, continued to make application to the pursuer to carry out the repairs on the buildings on the said farm necessary to put them into habitable condition in terms of the said lease, but that, notwithstand-

ing promises to have that done, the work remains unperformed, as above stated." No. 145.

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The pursuer pleaded;—(1) The sum sued for having become due by the defender in terms of his lease at Whitsunday last, the pursuer is entitled to decree as craved. (2) The defender is barred by his actings from insisting on the present defence. (3) The defender's averments, so far as relevant, can be proved only by writ or oath.

The defender pleaded;—(1) In respect the defender has not got possession of the entire subjects let to him under the said lease, he is entitled to retain the rent now sued for until such possession is given to him. (2) The pursuer having failed to implement his obligations under the said lease, is not entitled to insist on the performance by the defender of the counterpart of these obligations.

On 28th February 1900 the Sheriff-substitute (Robertson) pronounced an interlocutor finding that the defender's averment, that the repairs had not in point of fact been carried out at the date of the lease, could be proved only by the writ or oath of the pursuer.

Thereafter the pursuer lodged a minute in which he stated "that the repairs on the farm of Tillyboy contemplated by the parties had not been carried out at the date of the lease between the pursuer and the defender; that after the date of said lease the pursuer, as commissioner foresaid, did put the buildings on the farm into habitable condition and repair, so far as he was bound to do, and executed other works on the said buildings in addition to those he was under obligation to perform; that at the date when Lord Crawford's ownership of the said farm ceased, all the repairs to which the defender was entitled under his bargain had been carried out, but that the pursuer had promised the defender to do certain repairs on the roof of the barn and stable wing of the steading on said farm, viz.: to point the skews and ridges of said roof so far as was necessary, and replace any loose or broken slates thereon; and that the pursuer, as commissioner foresaid, is still willing, and now formally tenders, to carry out said repairs on the said roof."

The defender lodged the following answers:—"Admitted that pursuer offered to defender to point the skews and ridges of the roof of the barn and stable wing of the steading on the defender's said farm of Tillyboy, but that defender would not accept that offer as a fulfilment of the obligation on the part of the pursuer to put the said barn and stable into habitable condition and repair. *Quoad ultra* the pursuer's averments in said minute are denied; and averred that the barn and stable wing on the said farm was not, at the date of the lease between pursuer and defender founded on, in habitable condition and repair, and has not been repaired in any way whatever since that date; averred further that the repairs on said roof tendered by pursuer would not, even if carried out, put said wing into habitable condition and repair."

The Sheriff-substitute then, in respect of the admission in the pursuer's minute, allowed a proof *prout de jure* of the respective averments on record and in the minute and answers thereto.

The proof having been led, the Sheriff-substitute, on 16th October 1900, pronounced the following interlocutor:—"Finds . . . (3) that defender avers and pleads, but has failed to prove, that for the period to which the said half year's rent is applicable, he did not get possession of the subjects let to him, or that the proprietor failed to implement his obligations to him under his lease: Finds therefore,

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that said rent is due and payable, and decerns therefor, with interest, in terms of the conclusions of the action; finds pursuer entitled to expenses," &c.

On appeal the Sheriff (Crawford), on 18th December 1900, pronounced the following interlocutor:—"Sustains the appeal; recalls the interlocutor appealed against: Finds . . . (4) that by the lease the pursuer was bound to put the roof of the barn and the whole other buildings in habitable condition and repair; (5) that the defender was bound, on this being done, to keep them in the same condition and repair during the currency of the lease, and leave them in the like condition at the expiry thereof; (6) that the barn and stable wing and hen-house and earth-closet were not in habitable condition and repair at the defender's entry, and that nothing has been done to put them in repair; (7) that the pursuer has offered to execute certain repairs mentioned in the minute of tender, No. 9 of process; (8) that the said repairs would not be sufficient to put the buildings into habitable condition and repair; (9) that the estate has been sold, and the new proprietor has intimated to the defender that he holds him responsible for those buildings not being in habitable condition and repair: Finds in law (1) that the pursuer is bound to put the said buildings in habitable condition and repair; (2) that the defender is entitled to retain the said rent until that is done: Therefore dismisses the action, and decerns: Finds the defender entitled to expenses," &c.

The pursuer appealed.*

LORD JUSTICE-CLERK.—The case we are dealing with here is the case of a written lease under which stipulations are made by both sides, and one of the stipulations made by the landlord contains various things, and among others, and principally, that a certain rent shall be paid to him at certain terms. There are, on the other hand, in the lease certain obligations which he undertakes towards the tenant. Certain of these obligations which he has undertaken towards the tenant I think it is plain have not yet been fulfilled—that is to say, the commissioner of the gentleman who was the landlord has not fulfilled during the time the property was held by him those prestations which had been made in favour of the tenant in the lease. I think he has failed in fulfilling his part in these respects.

Now, the real question comes to be, not whether the tenant is entitled to demand damages for the failure of the landlord to fulfil his obligation to him, but whether the landlord can directly and at once enforce the prestations in his favour in the lease, while he has failed, and is still failing, to fulfil the prestations in favour of the other party. I think he cannot, and that is a sufficient ground on which this case may be decided, and I would decide it accordingly. I ought to point out that, of course, here the landlord is in no danger as to

* *Cited at the hearing.*—Gray v. Renton, Dec. 10, 1840, 3 D. 203; Broadwood v. Hunter, Feb. 2, 1855, 17 D. 340, 27 Scot. Jur. 587; Kilmarnock Gas Company v. Smith, Nov. 9, 1872, 11 Macph. 58, 45 Scot. Jur. 43; Guthrie v. Shearer, Nov. 13, 1873, 1 R. 181; Hardie v. Duke of Hamilton, Feb. 2, 1878, 15 S. L. R. 329; Munro v. M'Geochs, Nov. 15, 1888, 16 R. 93; Stewart v. Campbell, Jan. 19, 1889, 16 R. 346; Johnston v. Hughan, May 22, 1894, 21 R. 777.

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he amount of the rent, for the money is consigned and perfectly safe, and he only question is, whether he is entitled to insist on receiving that noney while he is in the position of not having fulfilled the conditions he ndertook.

LORD YOUNG.—I concur. The facts of the case are simple enough. The elation of the parties is that of landlord and tenant. When the tenant ntered into possession, the leasehold premises were not in a tenantable ondition—not in a condition in which the landlord was bound by his bligation as landlord to put them. That is admitted in a minute which was given in for the purpose of overcoming a difficulty arising from an expression in the contract of lease itself, that the farm premises had been put into proper condition. The minute acknowledges on the part of the landlord that they had not been put into that condition, and that the landlord was accordingly bound, notwithstanding the expression in the lease that they had been put into that condition. He proceeded to put them into a better condition, but according to the tenant they had not at Whitsunday 1899 been put into the condition into which the landlord was bound to put them. The tenant had paid his rent notwithstanding up to that term, but, his attention being then particularly directed to the matter by the purchaser of the property, he intimated to the landlord that he would not pay the rent until they were put into that condition. Upon that this action is brought, and a general question is raised as to whether rent can be withheld by a tenant upon an illiquid claim of damages against the landlord for omitting to do something which by the lease he was bound to do. Now, many cases may occur in which a tenant would not be allowed to retain his rent until it is decided whether something under the lease which the landlord was bound to do had been done or not. But here the simple question is, whether by the operations which the landlord had directed to be made, and which had been paid for prior to Whitsunday 1899, the premises, which were not in the condition into which he was bound to put them prior to these operations, had then been put into that state or not. There is no other question; and I agree with the Sheriff and with your Lordship that according to the evidence the farm premises have not been put into the condition into which the landlord was bound to put them. I therefore concur with the judgment of the Sheriff, and think that this appeal ought to be refused, and that with expenses.

LORD TRAYNER.—I am of the same opinion. The claim which is sought to be enforced by this action is a claim for rent, and payment of rent is the obligation on the defender under the contract of lease. But the contract imposed obligations on both parties—the landlord and the tenant. The tenant's obligation is to pay the rent—the landlord's obligation is to give a tenantable subject. Now, I am disposed to put my judgment simply upon the application of the general rule, that where a person seeks to enforce the terms of a contract against another he is excluded from doing so if it can be shewn that he is in default himself in the obligation that the contract puts on him. I think the case has been a little embarrassed by the introduction of the fact that there has been a change in the proprietorship of

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the subject. I think this case must be decided without reference to that change of proprietorship at all. It suggests, no doubt, a reason why the defender should set up this plea now which he did not set up six months or twelve months ago; but I think it does not affect the question to be determined, nor the judgment to be pronounced on it. I think the pursuer's case has failed, and the Sheriff has properly dismissed the action on the ground that the pursuer cannot enforce a contract the obligation in which binding on himself he has failed to fulfil.

LORD MONCREIFF.—The Sheriff finds in point of fact that the barn and stable wing and hen-house and earth-closet were not in habitable condition and repair at the defender's entry, and that nothing has been done to put them in repair; that the pursuer has offered to execute certain repairs mentioned in the minute of tender, and that the said repairs would not be sufficient to put the building into habitable condition and repair. I think the evidence establishes these findings in fact. The findings in law are—"(1) that the pursuer is bound to put the said buildings in habitable condition and repair; (2) that the defender is entitled to retain the said rent until that is done; therefore dismisses the action." Now, I think that is a sound ground in law for the decision of the case. It is simply this, that the landlord has not fulfilled his obligation under the lease, and therefore is not in a position to demand payment of the rent. Mr Blackburn maintained that in order to a good plea of retention of rent it was necessary that the tenant should establish damage to the amount of the rent retained. I do not agree in that. I have no doubt that the Court is entitled to take cognisance of the kind and amount of damage alleged by the tenant, and that they will not allow retention of rent where the damage complained of by the tenant is trivial. But where the damage sustained is solid and substantial, then I do not think it essential that the tenant in order to make good a plea of retention should prove what specific amount of damage he has sustained. What he demands is not damages, but that the landlord should fulfil his obligation to put the buildings in order before he demands payment of the rent.

There is only one other point that requires to be noted, namely, the plea of acquiescence. It is maintained that this tenant, by occupying for three years and paying rent, discharged the landlord of his obligation. I think the explanation of that is very simple, and that is, that the landlord very properly had been recognising his obligation, and had been fulfilling and discharging it bit by bit till the time came when he sold the property. Now, very likely, if the property had not been sold the tenant would have waited the landlord's time and have given him an opportunity of completing the work as he was doing. But the property having been sold, I think that was a proper time for the tenant to bring things to a point, and to call on the landlord to fulfil his obligation. Therefore I have no hesitation in agreeing that the decision of the Sheriff should be affirmed.

THE COURT dismissed the appeal, found in fact and in law in terms of the findings in fact and in law in the interlocutor appealed against, and dismissed the action.

DUNDAS & WILSON, C.S.—TAWSE & BONAR, W.S.—Agents.

AGNES FORSYTH, First Party.—*Constable.*
MRS MARGARET FORSYTH, Second Party.—*Graham Stewart.*
THOMAS HILL AND ANOTHER (Cruickshank's Trustees), Third Parties.—*Crabb Watt.*

No. 146.

June 14, 1901.

Forsyth v. Forsyth.

Destination—Condition—Clause of Devolution—Repugnancy.—Robert Cruickshank, by gratuitous *inter vivos* disposition, disponed certain heritable subjects to Mrs Forsyth, his daughter, in liferent for her liferent use allenarly, and to her daughter Miss Agnes Forsyth in fee and to the heirs of her body, heritably and irredeemably, "but these presents are granted under the express condition and declaration that . . . in the event of the said Agnes Forsyth dying before attaining the age of twenty-five (without leaving issue) survived by me, the said subjects shall revert to me, and these presents shall, *ipso facto*, become void and null, and in that event I shall be entitled to deal with the subjects as my own, and to sell or burden the same as freely as if these presents had never been granted; and in the event of my predeceasing my granddaughter before she attains said age, the subjects shall transmit to my said daughter, and failing her, to my own heirs whomsoever."

The disposition was recorded in the Register of Sasines on behalf of Mrs Forsyth in liferent allenarly and Miss Agnes Forsyth in fee, and Mrs Forsyth entered into possession of the subjects.

The granter of the disposition died before Miss Agnes Forsyth had attained the age of twenty-five.

Held that the clause of transmission to Mrs Forsyth in the event of the granter dying before Miss Forsyth had attained the age of twenty-five was repugnant to the gift of the fee to Miss Forsyth, and was ineffectual, and that the fee of the property belonged to Miss Forsyth.

2D DIVISION.

BY *inter vivos* disposition dated 21st June 1898 Robert Cruickshank, ironfounder, Denny, disponed certain heritable subjects belonging to him in Kirkintilloch as follows:—"I, Robert Cruickshank, ironfounder, Denny, for the favour and affection which I have and bear to my daughter and granddaughter after mentioned, do hereby assign and dispone to my daughter Margaret Cruickshanks or Forsyth, wife of James Forsyth, baker, Kirkintilloch, in liferent for her liferent use allenarly, and to my granddaughter Agnes Forsyth, daughter of and residing with the said Margaret Cruickshanks or Forsyth, in fee, and to the heirs of her body, heritably and irredeemably, All and Whole." Then followed a description of the subjects, after which the disposition continued,—"But these presents are granted under the express condition and declaration that these presents shall be exclusive of the *jus mariti* and right of administration of the present husband, or of any husband whom my said assignee and disponees may marry, that the liferent to my said daughter is purely alimentary, and shall not be assignable by her nor arrestable for her debts, nor attachable by the diligence of her creditors, and also that the said Agnes Forsyth shall not be entitled to borrow on the security of the subjects disponed, or to grant obligations burdening the same, or to sell or dispone the same during the lifetime of me and my wife without my consent or the consent of my wife, should she survive me, and in the event of the said Agnes Forsyth dying before attaining the age of twenty-five (without leaving issue) survived by me, the said subjects shall revert to me, and these presents shall, *ipso facto*, become void and null, and in that event I shall be entitled to deal with the subjects as my own, and to sell or burden the same as freely as if these presents had never been granted; and in the event of my predeceasing my granddaughter

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before she attains said age, the subjects shall transmit to my said daughter, and failing her, to my own heirs whomsoever; and I assign the rents; and I assign the writs; and I grant warrandice; and I consent to registration hereof for preservation.—In witness whereof," &c.

This disposition was recorded in the Register of Sasines by the authority of the granter on 25th January 1899 on a warrant of registration on behalf of Mrs Forsyth in liferent for her liferent use allenarly, and of Miss Agnes Forsyth in fee. The liferentrix thereafter entered into possession of the subjects.

Mr Cruickshank died on 27th July 1900.

He was survived by his widow, by a son, and by two daughters, one of whom was Mrs Forsyth.

Miss Agnes Forsyth, the daughter of Mrs Forsyth, also survived her grandfather. At the date of his death she had not attained the age of twenty-five years.

Mr Cruickshank left a trust-disposition and settlement dated 2d April 1889, whereby he conveyed his whole means and estate, heritable and moveable, real and personal, to trustees for the purposes therein specified.

In December 1900 a special case was presented by (1) Miss Agnes Forsyth, first party; (2) Mrs Forsyth, second party; and (3) Mr Cruickshank's trustees, third parties.

The questions of law were,—"(1) Does the fee of the property conveyed by Mr Cruickshank in his disposition of 21st June 1898—(*a*) Belong to the first party, Agnes Forsyth? or (*b*) Does it belong to the second party, Mrs Forsyth? or (*c*) Does it fall to be administered by the third parties, Mr Cruickshank's trustees, as part of the general trust-estate? (2) In the event of question (*c*) being answered in the affirmative—Is the right of the third parties to administer the property subject to the second party's liferent thereof?"

The first party maintained that, by virtue of the recorded destination, she was fiar of the property absolutely, subject to the liferent of Mrs Forsyth, her mother. With reference to the clause of transmission to her mother, she submitted that it was a mere substitution defeasible at her pleasure; or, otherwise, that it was repugnant to the gift in the destination itself, and could not receive effect; or, otherwise, that it applied only in the contingency of her dying before she reached the age of twenty-five.

The second party contended that the granter having predeceased the first party before she attained the age of twenty-five, the fee of the property belonged to the second party; or, in any event, that her liferent over the property still subsisted.

The third parties maintained that the gift to Agnes Forsyth being conditional upon her attaining the age of twenty-five years before the death of the granter, and this condition not having been fulfilled, the gift was not effectual. They further maintained that the clause of transmission to Mrs Forsyth was repugnant to the gift of the liferent in the destination; or, otherwise, that the destination itself and the clause of transmission were ambiguous, and could not receive effect. They therefore claimed the property for the general purposes of the trust.[1]

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[1] *Cited by first party.*—Mackay v. Campbell's Trustees, Jan. 13, 1835, 13 S. 246; Young's Trustees v. Young, July 19, 1867, 5 Macph. 1001, 39 Scot. Jur. 611. *By second party.*—Lawson v. Imrie, June 10, 1841, 3 D. 1101; Ersk. Inst. iii. 8, 45.

At advising,— No. 146.

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LORD JUSTICE-CLERK.—The deed in this case contains a gift of the fee of certain estate belonging to the granter to the first party, the liferent being given to her mother, the second party. The question is, whether under a special clause occurring in the latter part of this deed the fee is, in the circumstances which have occurred, taken away from the first party so that she is divested and the fee goes to the second party. The granter desired to provide against certain cases which might occur. He provides that if the first party should predecease him before reaching twenty-five years of age without leaving issue the property is to revert to him. He then adds the clause which raises the question, which is—"And in the event of my predeceasing my granddaughter (the first party) before she attains said age, the subjects shall transmit to my said daughter (the second party), and failing her, to my own heirs whomsoever." Now, if this clause were to be taken as an expression of intention in the sense of its words, it would, if the event contemplated occurred, completely upset what upon the rest of the deed was his plain intention, viz., that his granddaughter and her family should benefit by having the fee of his estate after the expiry of a gift of liferent to her mother. Under such a reading as the second party maintains, if the first party married and had children, but the granter died a day before she attained twenty-five years, both she and her children would be deprived of the benefits which he had by the rest of the deed expressly conferred upon her and her issue, even were she to attain twenty-five years and live for many years afterwards. This result would be absolutely repugnant to the whole of the rest of the deed. It cannot be doubted that the clause has been badly drawn, and I think it would not be difficult to guess what it was really intended to effect. But I think it must be held that it is ineffective to deprive the first party of the right of fee conferred upon her, and that the first branch of the question in the case should be answered in the affirmative, and the other branches in the negative.

LORD YOUNG.—I agree. In my opinion the only operative clause in the deed regarding this heritable property is the clause whereby the granter assigns and dispones the same to his daughter in liferent for her liferent use allenarly, and to his granddaughter in fee. The liferent is distinctly given to his daughter and the fee to his granddaughter. The deed was duly recorded, and there is therefore a completed right in these two parties. With respect to the clause to which your Lordship has referred, I think it is inoperative to affect the clause to which I have referred. The questions should therefore be answered as your Lordship proposes.

LORD TRAYNER.—Lord Moncreiff has kindly communicated to me the import of his opinion, and I concur with his Lordship.

LORD MONCREIFF.—In this case the first party, Miss Agnes Forsyth, and the second party, her mother Mrs Forsyth, are infeft in fee and liferent respectively in certain subjects which were disponed to them *inter vivos* by

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Robert Cruickshank, the father of the second party, and the grandfather of the first party.

The deed contains a clause of devolution or return in the following terms:—"And in the event of my predeceasing my granddaughter" (that is, the first party) "before she attains said age" (twenty-five years) "the subjects shall transmit to my said daughter" (the second party), "and failing her, to my own heirs whomsoever."

When Robert Cruickshank died on 27th July 1900 Agnes Forsyth had not attained the age of twenty-five years, and it is contended on behalf of the second party that right to the fee of the property has now devolved on her.

The clause of devolution occurs in a fee-simple disposition, and is not fenced with irritant and resolutive clauses. But such clauses of devolution or return, although not frequently met with in a fee-simple destination, are not necessarily to be refused effect. They are or may be a condition of the grant.

But if a clause of the kind is to receive effect, and the person who is infeft in fee in a heritable property is to be divested in respect of it, it must be expressed in clear and unambiguous language.

The difficulty in this case is that although we may surmise that some words (probably "and of her dying without leaving issue") have been omitted, the clause as it stands, taken literally and apart from its context, is grammatical and can be given an intelligible meaning, viz., that if the disponer predeceases Agnes before she reaches the age of twenty-five, the property is to devolve on her mother or revert to the disponer's heirs. So far there is no ambiguity, and improbable as it is that this clause as it stands expresses the disponer's intention, I have some hesitation in refusing to give effect to its apparent meaning.

But when it is contrasted with a clause of return, which occurs in an earlier part of the deed, I think we have sufficient grounds for holding that it may be rejected on the ground of repugnancy. The earlier clause runs thus—"And in the event of the said Agnes Forsyth dying before attaining the age of twenty-five (without leaving issue) survived by me, the said subjects shall revert to me, and these presents shall *ipso facto*, become void and null, and in that event I shall be entitled to deal with the subjects as my own, and to sell or burden the same as freely as if these presents had never been granted."

Under this clause it will be observed (1) that if Agnes predeceases the disponer before attaining the age of twenty-five, the subjects do not transmit to her mother, but at once revert to the disponer absolutely, with the result apparently that even the second party's liferent vanishes.

But (2), if Agnes leaves issue, the subjects do not revert to the disponer, even although she predeceases him before reaching the age of twenty-five.

Turning now to the concluding clause of devolution, it provides that even if Agnes survives the disponer, and whether she has issue or not, the subjects are to transmit to the second party (who under the former clause would have got nothing at all if Agnes had predeceased the truster before reaching twenty-five without leaving issue, and who would not have got the fee of the estate if Agnes had left issue) and failing her to the disponer's heirs.

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Suppose that the second party predeceased the disponer and Agnes, we hould then have to deal with two clauses of return. Under the first one, f Agnes predeceased the disponer before reaching the age of twenty-five eaving issue, the property would not return to the disponer. But under he second clause, if the disponer predeceased her before she reached that ge, she would, although she had issue, be immediately divested, and the ubjects would revert to the disponer's heirs, which seems absurd.

Although with some difficulty, I think that the second clause is epugnant, and that we are entitled to refuse to give effect to it.

I therefore answer question 1 (*a*) in the affirmative, and 1 (*b*) and 1 (*c*) in the negative.

THE COURT answered the first branch of the first question of law in the affirmative, and the second and third branches of the question in the negative.

JAMES SKINNER, S.S.C.—CHARLES MUNRO, S.S.C.—J. W. DEAS, S.S.C.—Agents.

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Stirling-Maxwell v. M'Farlane.

SIR JOHN MAXWELL STIRLING-MAXWELL, Pursuer and Reclaimer.—*Guthrie, K.C.—J. H. Millar.*
DONALD M'FARLANE, Defender.—*Salvesen, K.C.—Craigie.*

Superior and Vassal—Feu-contract—Construction—Stipulation for additional feu-duty for ground "on which buildings shall be erected."—A feu-contract provided that the vassal should pay to the superior "besides the feu-duty above stipulated, the sum of two shillings sterling of additional feu-duty for every square pole of the said piece of ground on which buildings shall be erected."

A singular successor of the original vassal acquired part of the subjects, upon one acre of which he erected a public laundry. The buildings occupied about one half of the acre, the remainder being occupied by a road forming the approach to the laundry, a road of an average breadth of 7 feet surrounding it, and a grass slope separating the buildings from a reservoir.

Held (*rev.* judgment of Lord Stormonth-Darling) that the additional feu-duty was payable for the whole acre, the ground not built on being properly accessory to the buildings, and incapable of separate occupation.

1ST DIVISION. LdStormonth-Darling.

IN 1852 the late Sir John Maxwell of Pollok feued about twelve acres of his estate to William Young, at a feu-duty of £5 per acre. At that time the ground was occupied by the mansion-house of Auldhousefield, and by a grass park, but, as it was contemplated that in the course of time it might come to be used for building, the feu-contract contained a provision for an additional feu-duty in that event.

The provision was as follows:—"To be holden of and under the said Sir John Maxwell, and his heirs and successors, in feu-farm, fee, and heritage for ever, for the yearly payment to him and them of the sum of £60, 4s. 10d. sterling of feu-duty . . . And also the said William Young and his foresaids, paying yearly to the said Sir John Maxwell and his foresaids, besides the feu-duty above stipulated, the sum of two shillings sterling of additional feu-duty for every square pole of the said piece of ground on which buildings shall be erected, excepting an addition to the mansion-house of Auldhousefield and a porter's lodge which the said William Young and his foresaids may erect without being liable for any of the said additional feu-duty, which feu-duty shall begin to run from the first term

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of Whitsunday or Martinmas after the erection of the buildings in respect of which the same is exigible shall have been commenced, and shall be payable along with the feu-duty above stipulated, half-yearly, at Whitsunday and Martinmas . . ."

About 1890 Donald M'Farlane, laundryman, Pollokshields, acquired from the trustees of the original vassal a portion of the subjects, extending to about 7¾ of an acre. On part of the ground so acquired, about an acre in extent, he established a public laundry, with a reservoir and bleaching-green attached.

The present action was raised by the superior, Sir John Stirling-Maxwell of Pollok, against M'Farlane, to have the additional feu-duty payable under the feu-contract determined. The summons concluded for payment of feu-duty on the basis that additional feu-duty was payable for 1 acre 20¼ yards.

The defender contended that he was only liable for additional feu-duty for 2 roods 9 poles, the space actually covered by buildings.

The case was heard by the Lord Ordinary (Stormonth-Darling) in the Procedure-roll, where a plan of the ground occupied by the laundry was produced. The nature of the question at issue and the areas affected are described as follows in the Lord Ordinary's opinion:—"The actual space covered by the buildings and outbuildings of the laundry is about 2 roods 9 poles, but the space enclosed within red lines on the plan produced is a little over an acre, the difference being accounted for by roads and grass borders. The pursuer makes no claim to additional feu-duty in respect of other parts of the defenders' ground, which contain a reservoir, bleaching-green, and pasture-land; but he claims it in respect of the space enclosed within red lines on the plea that the whole of that space is, in the sense of the feu-contract, ground on which buildings have been erected, although to the extent of nearly one-half it is open to the sky. The defender, on the other hand, says that additional feu-duty is payable only for ground actually covered with buildings."

On 11th January 1901 the Lord Ordinary dismissed the action.*

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* "OPINION.— . . . The question lies within narrow compass, and receives little aid from authority. Mr Craigie, for the defender, referred to cases on the meaning of 'lands built upon or used for building purposes' in section 128 of the English Lands Clauses Act (section 121 of ours). Mr Hepburn Millar, for the pursuer, referred to cases on the meaning of 'part of a house' in section 92 of the same Act (section 90 of ours). But I do not think that either class of cases helps one much in construing this contract. Certainly the cases as to 'part of a house' do not, because they all proceed on the principle that the word 'house' in the law of England includes all that would be carried by the devise of a house, and they go back to the definition given by Lord Coke, who says that it includes the 'buildings, curtilage, orchard, and garden,' adding, that even 'six acres of land may be parcel of a house.' That, of course, goes much too far for the pursuer's case.

"It is not an unreasonable view of the contract to say that its purpose was to keep the feu-duty at a low rate so long as the ground continued to be used for a mansion-house and park, but to increase it so soon as the ground came to be used for ordinary commercial purposes. Perhaps this view receives some support from the exception in favour of an addition to the existing house and the erection of a porter's lodge. There is also something to be said for the suggestion that, once ground has been staked out for building, it would be inconvenient to inquire too curiously whether

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The pursuer reclaimed, and argued;—The clause covered whatever could reasonably be called ground built upon,—in other words, the site of the building. A building site would ordinarily mean the ground staked out for the building, and would certainly include such ground, in addition to what was actually covered by stone and lime, as was necessary for access to the building, and for light and air. According to the Lord Ordinary's view only what was roofed-in would be included, so that a court-yard surrounded by the building would be excluded. This was too narrow a construction. The pursuer did not claim the additional duty for the reservoir; he limited his claim to what was plainly included in what was properly the site of the building,—its approach roads, and the bank which protected it from the reservoir.

Argued for the respondent;—The clause was free from ambiguity. "Land built upon" belonged to a different category from "land used for building purposes." The pursuer's construction of the clause required that he should add words to the clause, and make it read "piece of ground on which buildings shall be erected, *and the ground pertaining thereto.*" If the literal and unambiguous construction contended for by the defender was adopted there would be no difficulty in applying the clause, but the pursuer's construction would lead to numerous difficulties, and in particular it would be impossible to fix any limits to the extent of ground which might be said to be accessory to the buildings, and which would therefore be included.

LORD PRESIDENT.—The clause of the feu-contract which we have to construe in this case is certainly very peculiar, and I am not surprised there should be difference of opinion as to its meaning. The construction put upon the clause by the Lord Ordinary attributes a very narrow signification to the language used, and would have the effect of determining that the obligation to pay additional feu-duty only applies to ground actually built upon, excluding all the surrounding ground, although it might be the only

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every square yard of it is covered with stone and lime. To take the whole enclosure has the merit of simplicity.

"But then comes the difficulty of knowing where to stop. One enclosure might provide for a garden of an acre in extent, another might have only a back court measuring a few square yards. Could it be said that the first of these was ground on which buildings had been erected? I think it is not too much to expect that a superior who is stipulating for an additional payment from his vassal in a certain event should define the event in unequivocal terms. If his meaning was what the pursuer suggests, a few more words would have placed it beyond doubt. Clauses of this kind do not create a restriction on the use of property, and may not therefore fall directly under the rule of construction adopted in *Russell* v. *Cowper*, 9 R. 660; but they impose a pecuniary burden, and therefore must be construed with a certain amount of strictness *contra proferentem*.

"I do not know that the argument from inconvenience goes very far. The basis of calculation provided by the contract is two shillings for every square pole, and there can be no great difficulty in arriving at the additional feu-duty for the actual space covered by a building when the measure is no larger than that. On the whole matter I incline to think that defender's construction of the contract is preferable to the pursuer's, because it is in literal accordance with the words used. And it harmonises with the view (which is a perfectly intelligible one) that the purpose of the clause was to encourage the leaving of open spaces."

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access to the building, or might be absolutely necessary to its comfortable occupation and enjoyment. I have never seen a clause similar to this, if the interpretation put upon it by the vassals and adopted by the Lord Ordinary is right. It is quite unusual that a clause dealing with the feuing of ground for building should deal separately with the ground actually covered by stone and lime, and the rest of the site or stance.

Looking at the actual words of the clause which we have to construe, viz., "piece of ground on which buildings shall be erected," one would be inclined to regard the words as meaning the site of the building in its ordinary acceptation, including, besides the ground actually covered by stone and lime, such additional ground as is necessary for access, or for the admission of light and air, or the like,—in short, whatever may be necessary for the reasonable use and enjoyment of the building.

Another test for the construction of the clause is supplied by considering what would pass under a lease, demise, or bequest of the house, and I apprehend that there can be no doubt that in these cases such accessories as I have mentioned would be included.

The question then comes to be, whether, adopting the interpretation suggested, the ground in respect of which pursuer claims the additional feu-duty falls within the clause. It includes the approach roads, as to which it appears to me that there can be no doubt, and a grass slope which practically forms a side of the reservoir in connection with the laundry. Even if it had been only ornamental I should have been inclined to hold that the grass slope was a proper accessory of the buildings, but it appears to me to be more clearly accessory when it forms the bank which protects the buildings from the water in the reservoir. If, therefore, the principle of construction which I have indicated is reasonable—as I think it is—this is, in my opinion, a strong case for applying it. The construction adopted by the Lord Ordinary would exclude what might be just as essential to the use and enjoyment of the building as the ground upon which it actually rests.

I therefore think that the judgment of the Lord Ordinary should be recalled, and that the pursuer should obtain decree in terms of the conclusion of the summons.

LORD ADAM concurred.

LORD M'LAREN.—The question raised by this reclaiming note depends on the true construction of the stipulation for additional feu-duty whereby it is provided that the defender shall pay "the sum of two shillings sterling of additional feu-duty for every square pole of the said piece of ground on which buildings shall be erected." The defender says that the meaning of this provision is that the additional feu-duty is payable only for ground covered by buildings, and the Lord Ordinary, after some discussion of the question of construction, sums up his opinion as follows:—"The basis of calculation provided by the contract is 2s. for every square pole, and there can be no great difficulty in arriving at the additional feu-duty for the actual space covered by a building when the measure is no larger than that. On the whole matter I incline to think that the defender's construction of the contract is preferable to the pursuer's, because it is in literal accordance with the words used." Now, I notice

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that the Lord Ordinary, while pointing out the difficulties which would result from the application of the principle of construction for which the pursuer contends, has not gone so fully into the difficulties which arise out of the defender's construction, and I think the argument for the defender shewed the great difficulty he had in bringing his position within the compass of an exact definition. I agree that we must not ascribe too wide a meaning to the clause, but I think that the Lord Ordinary in his judgment, and the defender in his argument, have carried the principle of economical construction a little too far, because the argument comes to this, that no additional feu-duty is to be paid except for so much of the building as is covered by a roof. It is easy to see that this definition of the phrase "piece of ground on which buildings shall be erected" breaks down when it is applied to buildings in general, whether for commercial or residential purposes. Take, for example, the case of a factory chimney, which might possibly cover more than a pole of ground, the defender's contention would make it necessary for him to affirm that the additional feu-duty would not have to be paid for the ground occupied by the chimney. A similar case would be that of a quadrangle, or what is called a "well," for the admission of light and air, or even the recesses between projecting gables in a country house. I think it is impossible so to measure the ground for the purposes of feu-duty so as to exclude such spaces. Now, when I put the question, why are such spaces to be included, the answer must be that they are physically so related to the house as to be incapable of separate occupation. But if that is the principle, it would cover the ground which is in dispute here, which consists of an approach and a walk surrounding the main building of the average width of 7 or 8 feet, with the addition of a sloping grass bank, which is really the retaining-wall of the reservoir. It is not suggested that these small pieces of ground could be used in any other way. On the other hand, I desire to guard myself against being supposed to hold that a garden or a lawn, which though connected with a house or building were yet capable of separate occupation, would be liable to additional feu-duty on the ground that they were land on which a building was erected. There may be cases where there might be more than two views to be considered —cases where part of the land in controversy might be liable to additional feu-duty and part not, but in this case I understand that there are only the two views, that no intermediate construction is possible, and I agree with your Lordships that the judgment of the Lord Ordinary should be recalled and the pursuer found entitled to decree in terms of his conclusions.

LORD KINNEAR concurred.

THE COURT recalled the interlocutor of the Lord Ordinary, and granted decree for the sum sued for.

CARMENT, WEDDERBURN, & WATSON, W.S.—GEORGE INGLIS & ORR, S.S.C.—Agents.

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Whyte v. Whyte.

DAVID WHYTE, Pursuer.—*Wilson, K.C.—Scott Brown.*
SARAH JANE WILDSMITH OR WHYTE, Defender (Reclaimer).—*Guy —J. B. Young.*

Parent and Child—Aliment—Son learning business or profession.—A son, twenty years of age, who was in the course of learning the business of a

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the subject. I think this case must be decided without reference to that change of proprietorship at all. It suggests, no doubt, a reason why the defender should set up this plea now which he did not set up six months or twelve months ago; but I think it does not affect the question to be determined, nor the judgment to be pronounced on it. I think the pursuer's case has failed, and the Sheriff has properly dismissed the action on the ground that the pursuer cannot enforce a contract the obligation in which binding on himself he has failed to fulfil.

LORD MONCREIFF.—The Sheriff finds in point of fact that the barn and stable wing and hen-house and earth-closet were not in habitable condition and repair at the defender's entry, and that nothing has been done to put them in repair; that the pursuer has offered to execute certain repairs mentioned in the minute of tender, and that the said repairs would not be sufficient to put the building into habitable condition and repair. I think the evidence establishes these findings in fact. The findings in law are—"(1) that the pursuer is bound to put the said buildings in habitable condition and repair; (2) that the defender is entitled to retain the said rent until that is done; therefore dismisses the action." Now, I think that is a sound ground in law for the decision of the case. It is simply this, that the landlord has not fulfilled his obligation under the lease, and therefore is not in a position to demand payment of the rent. Mr Blackburn maintained that in order to a good plea of retention of rent it was necessary that the tenant should establish damage to the amount of the rent retained. I do not agree in that. I have no doubt that the Court is entitled to take cognisance of the kind and amount of damage alleged by the tenant, and that they will not allow retention of rent where the damage complained of by the tenant is trivial. But where the damage sustained is solid and substantial, then I do not think it essential that the tenant in order to make good a plea of retention should prove what specific amount of damage he has sustained. What he demands is not damages, but that the landlord should fulfil his obligation to put the buildings in order before he demands payment of the rent.

There is only one other point that requires to be noted, namely, the plea of acquiescence. It is maintained that this tenant, by occupying for three years and paying rent, discharged the landlord of his obligation. I think the explanation of that is very simple, and that is, that the landlord very properly had been recognising his obligation, and had been fulfilling and discharging it bit by bit till the time came when he sold the property. Now, very likely, if the property had not been sold the tenant would have waited the landlord's time and have given him an opportunity of completing the work as he was doing. But the property having been sold, I think that was a proper time for the tenant to bring things to a point, and to call on the landlord to fulfil his obligation. Therefore I have no hesitation in agreeing that the decision of the Sheriff should be affirmed.

THE COURT dismissed the appeal, found in fact and in law in terms of the findings in fact and in law in the interlocutor appealed against, and dismissed the action.

DUNDAS & WILSON, C.S.—TAWSE & BONAR, W.S.—Agents.

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The defender reclaimed.

She argued that support beyond want was all that could be claimed, and that a youth of twenty receiving £40 a year could not be regarded as in want. She cited the undernoted authorities.[1]

Counsel for the respondent were not called upon.

LORD PRESIDENT.—The reclaimer Mrs Whyte, is the defender in an action at the instance of her son, David Whyte, for aliment. The pursuer is at present a stockbroker's clerk or clerk apprentice. He received a good education from his mother, and about a year and a half ago he entered a stockbroker's office with her knowledge and apparently with her approbation, with the intention of learning that business. His salary was at first £30 a year, but it was afterwards raised to £40, and this is now his whole income. Up till a few months ago he lived in his mother's house, but shortly before this action was raised, she turned him out of the house and refused to take him back. Beyond what is stated in answer 5, which is

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house, and intimated that she would on no account receive him back. He has ever since then been living in lodgings and doing the best he can upon the modest salary he receives in his office, namely, £40 a year. He says that is not sufficient for his decent support, according to the station in life he occupies and the business in which he is engaged. I think it may be accepted that upon £40 a year no man can live respectably and without incurring debt who has to appear every day at an office of the description in which the pursuer is, and to discharge the duties he has to discharge. Two things in law which are perfectly settled are, that aliment cannot be demanded by a child from a parent where the child is in a position to maintain himself, having health and strength to enable him to do so; but that aliment is awarded when it can be shewn that the child is unable to keep himself. The age at which a youth may be expected to earn his livelihood differs according to his station in life. A youth of twenty in the working classes may quite well be able to maintain himself without any assistance, but a youth who has been educated like the pursuer, and kept at school till he was sixteen years of age, and who has since been living with his mother in a house the assessed rental of which is £60 a year, is, I think, fairly entitled to expect that he shall be put into something of the nature of a profession, or at all events into a business which it may take him a little while to learn; and that is the position of the pursuer at this moment. The case of *Smith* v. *Smith* (13 R. 126) establishes that after a son has been put into a profession, although it may be totally insufficient to keep him, the father is not bound to pay aliment so long as he offers to take his son back to his house.

"There are two differences between that case and this. This young man has not been able to start in his business; he is still learning it; and the defender denies him the shelter of her house. At any moment she might have put an end to this action by offering to take him back, but she declines to do that. The question then is, whether the law can compel her to give that exceedingly modest rate of aliment, which is all that a Court

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[1] Fraser, Parent and Child, p. 104; Ayton v. Colvill, 1705, M. 451; Maidment v. Landers, May 25, 1815, F. C., revd. 6 Dow, 257; Maule v. Maule, July 9, 1823, 2 S. 464 (N. E. 415), revd. 1 W. & S., 266; A B v. C D, March 9, 1848, 10 D. 895, 20 Scot. Jur. 290,—(effect of misconduct on part of child); A v. B, March 6, 1858, 20 D. 778, 30 Scot. Jur. 422; Bain v. Bain, March 16, 1860, 22 D. 1021, 32 Scot. Jur. 447; Thom v. Mackenzie, Dec. 2, 1864, 3 Macph. 177, 37 Scot. Jur. 86; Smith v. Smith, Nov. 4, 1885, 13 R. 126.

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before she attains said age, the subjects shall transmit to my said daughter, and failing her, to my own heirs whomsoever; and I assign the rents; and I assign the writs; and I grant warrandice; and I consent to registration hereof for preservation.—In witness whereof," &c.

This disposition was recorded in the Register of Sasines by the authority of the granter on 25th January 1899 on a warrant of registration on behalf of Mrs Forsyth in liferent for her liferent use allenarly, and of Miss Agnes Forsyth in fee. The liferentrix thereafter entered into possession of the subjects.

Mr Cruickshank died on 27th July 1900.

He was survived by his widow, by a son, and by two daughters, one of whom was Mrs Forsyth.

Miss Agnes Forsyth, the daughter of Mrs Forsyth, also survived her grandfather. At the date of his death she had not attained the age of twenty-five years.

Mr Cruickshank left a trust-disposition and settlement dated 2d April 1889, whereby he conveyed his whole means and estate, heritable and moveable, real and personal, to trustees for the purposes therein specified.

In December 1900 a special case was presented by (1) Miss Agnes Forsyth, first party; (2) Mrs Forsyth, second party; and (3) Mr Cruickshank's trustees, third parties.

The questions of law were,—"(1) Does the fee of the property conveyed by Mr Cruickshank in his disposition of 21st June 1898—(*a*) Belong to the first party, Agnes Forsyth? or (*b*) Does it belong to the second party, Mrs Forsyth? or (*c*) Does it fall to be administered by the third parties, Mr Cruickshank's trustees, as part of the general trust-estate? (2) In the event of question (*c*) being answered in the affirmative—Is the right of the third parties to administer the property subject to the second party's liferent thereof?"

The first party maintained that, by virtue of the recorded destination, she was fiar of the property absolutely, subject to the liferent of Mrs Forsyth, her mother. With reference to the clause of transmission to her mother, she submitted that it was a mere substitution defeasible at her pleasure; or, otherwise, that it was repugnant to the gift in the destination itself, and could not receive effect; or, otherwise, that it applied only in the contingency of her dying before she reached the age of twenty-five.

The second party contended that the granter having predeceased the first party before she attained the age of twenty-five, the fee of the property belonged to the second party; or, in any event, that her liferent over the property still subsisted.

The third parties maintained that the gift to Agnes Forsyth being conditional upon her attaining the age of twenty-five years before the death of the granter, and this condition not having been fulfilled, the gift was not effectual. They further maintained that the clause of transmission to Mrs Forsyth was repugnant to the gift of the liferent in the destination; or, otherwise, that the destination itself and the clause of transmission were ambiguous, and could not receive effect. They therefore claimed the property for the general purposes of the trust.[1]

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[1] *Cited by first party.*—Mackay v. Campbell's Trustees, Jan. 13, 1835, 13 S. 246; Young's Trustees v. Young, July 19, 1867, 5 Macph. 1001, 39 Scot. Jur. 611. *By second party.*—Lawson v. Imrie, June 10, 1841, 3 D. 1101; Ersk. Inst. iii. 8, 45.

in the line of business to which his mother agreed that he should be brought up. No. 148.

June 15, 1901. Whyte v. Whyte.

LORD KINNEAR concurred.

THE COURT adhered.

HENRY WAKELIN, Solicitor—FRANK M. H. YOUNG, S.S.C.—Agents.

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June 18, 1901. Menzies v. Wentworth.

SIR ROBERT MENZIES, BARONET, Pursuer (Reclaimer).—*Sol.-Gen. Dickson—E. H. Robertson.*

BRUCE CANNING VERNON WENTWORTH AND J. S. ROBERTSON-LUXFORD, Defenders (Respondents).—*Chree.*

JAMES CLARK BUNTEN, Defender (Respondent).—*Shaw, K.C.—Wilson, K.C.—Scott Brown.*

ALEXANDER STEWART, Defender (Respondent).—*Clyde—J. H. Millar.*

ALASDAIR STEWART ROBERTSON, Defender (Respondent).—*Sandeman.*

Fishing—Trout-fishing—Loch—Riparian Proprietors—Joint right of fishing—Abuse of right—Regulation by Court—Allocation of boats for fishing according to extent of frontage to loch.—The owners of several properties which together surrounded a loch had a joint right or common property in the loch, and a joint right of fishing trout over all the loch. One of the proprietors raised an action against the other proprietors for declarator that the trout-fishing was being injured and destroyed by excessive fishing by the defenders from boats on the loch, that the pursuer was entitled to have the fishing regulated according to such rules and regulations as the Court might think proper to frame, that the exercise of the right of trout-fishing should be regulated among the parties concerned to the effect that sixteen boats only should be allowed to fish on the loch, the boats being allocated among the proprietors in proportion to the extent of the frontage of each property along the loch, or in such other way as the Court might think fit.

After a proof the Court (*aff.* judgment of Lord Stormonth-Darling) *dismissed* the action, the Lord President, Lord Adam, and Lord Kinnear holding that the pursuer had failed to prove that the exercise of the joint right of trout-fishing by the defenders or any of them had been such as to constitute an abuse of the said right or to call for judicial regulation; Lord M'Laren holding that the rights of the proprietors in the fishing being equal rights, it was not possible consistently therewith to allocate the use of the loch in proportion to frontage, and that such allocation was the only remedy demanded by the pursuer in his summons.

Opinion (*per* Lord M'Laren) that a proprietor of fishing is not bound to wait until he can prove actual injury before coming to the Court for regulation, and that the facts established by the proof were such as to warrant the Court's interference.

(VIDE *Menzies* v. *Macdonald*, March 10, 1854, 16 D. 827, June 10, 1856, 2 Macq. 463.)

1ST DIVISION. LdStormonth-Darling.

ON 12th September 1899 Sir Robert Menzies, of that ilk, Baronet, the heir of entail in possession of the lands and barony of Rannoch, raised an action to have the exercise of trout-fishing in Loch Rannoch regulated by the Court. He called as defenders all the proprietors who in addition to himself had lands fronting on the loch. These were:—B. C. V. Wentworth (Dall and Meall Dubh), with a frontage of 5¾ miles; J. C. Bunten (Kinloch), ¼ mile; A. Stewart (Innerhadden), 1⅞ miles; I. S. Robertson-Luxford (Croiscrag), 3½ miles; A. Stewart Robertson (Struan), 150 yards. The frontage of the pursuer's lands was about 10¼ miles.

The conclusions of the summons were for declarator:—"(*First*) That

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the trout-fishing in Loch Rannoch is being injured and destroyed: (*Second*) That this injury and destruction are being caused by and in consequence of excessive fishing by the defenders, or some of them, or by those authorised by the defenders, or some of them, from boats on the said loch: (*Third*) That the pursuer is entitled to have the fishing in the said loch regulated according to such rules and regulations as the Court may think proper to frame for the preservation of the fishing and the rights of the various riparian proprietors on the said loch: (*Fourth*) That the exercise of the said right of trout-fishing in the said loch by the pursuer and the defenders, and by those duly authorised by the pursuer and defenders, or by any of them, ought and should be regulated among the various parties concerned rateably as follows, viz.:—that no more than sixteen boats should be allowed to fish on the said loch, and that the said sixteen boats should be allocated among the parties having right to fish in said loch in proportion to the extent of frontage along or to the said loch which the land of each person having such right possesses, and which would result as follows:—To the pursuer eight boats: to the defender the said Bruce Canning Vernon Wentworth three boats; to the defender the said James Clark Bunten one boat; to the defender the said Alexander Stewart one boat; to the defender the said John Stewart Odiarne Robertson-Luxford two boats; and to the defender the said Alasdair Stewart Robertson one boat; or otherwise in such a way and manner and according to such other system of regulation as shall seem right and proper to our said Lords, and shall by them be determined in the process to follow hereon: And it having been so found and declared, or whether it shall be so found and declared or not, our said Lords ought and should pronounce a decree regulating the said fishing in the specific manner above set forth, or should pronounce a decree for regulating the said fishing in the said loch in such other way and manner and according to such other regulations as to our said Lords shall seem proper: And further, the defenders, and all others having or pretending right from them, or any of them, ought and should be interdicted and prohibited from exercising the right of trout-fishing in any part of the said loch except in the manner determined by and in conformity with the regulation of the Court."

The Loch of Rannoch is rather more than ten miles in length and less than a mile in breadth. It lies, roughly speaking, east and west, the flow of water being towards the east end, where the river Tummel emerges. The land on the northern shore, with the exception of a quarter of a mile (Meall Dubh) at the east end of the loch is in the barony of Rannoch. The whole of the southern shore, with the exception of a mile at the south-east corner of the loch (Innerhadden), was, in the beginning of the century, in the barony of Struan; but Struan, which also extended round the east end of the loch, was from time to time subdivided into smaller properties, of which Croiscrag, Dall, Kinloch, and Meall Dubh, abutted on the loch.

In the end of the eighteenth century Loch Rannoch and its islands were the subject of mutual actions of declarator between Menzies of Rannoch and Robertson of Struan. These actions were conjoined. The result of them was a judgment pronounced on 18th December 1798, and adhered to on 2d July 1799, finding "that Sir John Menzies and his trustees have an exclusive right to the two islands in Loch Rannoch: That both parties have a joint right or common property in the loch of Loch Rannoch, and a joint right of sailing, fishing,

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Suppose that the second party predeceased the disponer and Agnes, we ould then have to deal with two clauses of return. Under the first one, Agnes predeceased the disponer before reaching the age of twenty-five ving issue, the property would not return to the disponer. But under e second clause, if the disponer predeceased her before she reached that e, she would, although she had issue, be immediately divested, and the bjects would revert to the disponer's heirs, which seems absurd.

Although with some difficulty, I think that the second clause is pugnant, and that we are entitled to refuse to give effect to it.

I therefore answer question 1 (*a*) in the affirmative, and 1 (*b*) and 1 (*c*) in ie negative.

THE COURT answered the first branch of the first question of law in the affirmative, and the second and third branches of the question in the negative.

JAMES SKINNER, S.S.C.—CHARLES MUNRO, S.S.C.—J. W. DEAS, S.S.C.—Agents.

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Stirling-Maxwell v. M'Farlane.

SIR JOHN MAXWELL STIRLING-MAXWELL, Pursuer and Reclaimer.—*Guthrie, K.C.—J. H. Millar.*

DONALD M'FARLANE, Defender.—*Salvesen, K.C.—Craigie.*

Superior and Vassal—Feu-contract—Construction—Stipulation for additional feu-duty for ground "on which buildings shall be erected."—A feu-contract provided that the vassal should pay to the superior "besides the feu-duty above stipulated, the sum of two shillings sterling of additional feu-duty for every square pole of the said piece of ground on which buildings shall be erected."

A singular successor of the original vassal acquired part of the subjects, upon one acre of which he erected a public laundry. The buildings occupied about one half of the acre, the remainder being occupied by a road forming the approach to the laundry, a road of an average breadth of 7 feet surrounding it, and a grass slope separating the buildings from a reservoir.

Held (*rev.* judgment of Lord Stormonth-Darling) that the additional feu-duty was payable for the whole acre, the ground not built on being properly accessory to the buildings, and incapable of separate occupation.

1ST DIVISION. LdStormonth-Darling.

IN 1852 the late Sir John Maxwell of Pollok feued about twelve acres of his estate to William Young, at a feu-duty of £5 per acre. At that time the ground was occupied by the mansion-house of Auldhousefield, and by a grass park, but, as it was contemplated that in the course of time it might come to be used for building, the feu-contract contained a provision for an additional feu-duty in that event.

The provision was as follows:—"To be holden of and under the said Sir John Maxwell, and his heirs and successors, in feu-farm, fee, and heritage for ever, for the yearly payment to him and them of the sum of £60, 4s. 10d. sterling of feu-duty . . . And also the said William Young and his foresaids, paying yearly to the said Sir John Maxwell and his foresaids, besides the feu-duty above stipulated, the sum of two shillings sterling of additional feu-duty for every square pole of the said piece of ground on which buildings shall be erected, excepting an addition to the mansion-house of Auldhousefield and a porter's lodge which the said William Young and his foresaids may erect without being liable for any of the said additional feu-duty, which feu-duty shall begin to run from the first term

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of Whitsunday or Martinmas after the erection of the buildings in respect of which the same is exigible shall have been commenced, and shall be payable along with the feu-duty above stipulated, half-yearly, at Whitsunday and Martinmas . . ."

About 1890 Donald M'Farlane, laundryman, Pollokshields, acquired from the trustees of the original vassal a portion of the subjects, extending to about 7¾ of an acre. On part of the ground so acquired, about an acre in extent, he established a public laundry, with a reservoir and bleaching-green attached.

The present action was raised by the superior, Sir John Stirling-Maxwell of Pollok, against M'Farlane, to have the additional feu-duty payable under the feu-contract determined. The summons concluded for payment of feu-duty on the basis that additional feu-duty was payable for 1 acre 20¼ yards.

The defender contended that he was only liable for additional feu-duty for 2 roods 9 poles, the space actually covered by buildings.

The case was heard by the Lord Ordinary (Stormonth-Darling) in the Procedure-roll, where a plan of the ground occupied by the laundry was produced. The nature of the question at issue and the areas affected are described as follows in the Lord Ordinary's *opinion*. —"The actual space covered by the buildings and outbuildings of the laundry is about 2 roods 9 poles, but the space enclosed within red lines on the plan produced is a little over an acre, the difference being accounted for by roads and grass borders. The pursuer makes no claim to additional feu-duty in respect of other parts of the defenders' ground, which contain a reservoir, bleaching-green, and pasture-land; but he claims it in respect of the space enclosed within red lines on the plea that the whole of that space is, in the sense of the feu-contract, ground on which buildings have been erected, although to the extent of nearly one-half it is open to the sky. The defender, on the other hand, says that additional feu-duty is payable only for ground actually covered with buildings."

On 11th January 1901 the Lord Ordinary dismissed the action.*

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* "OPINION.— . . . The question lies within narrow compass, and receives little aid from authority. Mr Craigie, for the defender, referred to cases on the meaning of 'lands built upon or used for building purposes' in section 128 of the English Lands Clauses Act (section 121 of ours). Mr Hepburn Millar, for the pursuer, referred to cases on the meaning of 'part of a house' in section 92 of the same Act (section 90 of ours). But I do not think that either class of cases helps one much in construing this contract. Certainly the cases as to 'part of a house' do not, because they all proceed on the principle that the word 'house' in the law of England includes all that would be carried by the devise of a house, and they go back to the definition given by Lord Coke, who says that it includes the 'buildings, curtilage, orchard, and garden,' adding, that even 'six acres of land may be parcel of a house.' That, of course, goes much too far for the pursuer's case.

"It is not an unreasonable view of the contract to say that its purpose was to keep the feu-duty at a low rate so long as the ground continued to be used for a mansion-house and park, but to increase it so soon as the ground came to be used for ordinary commercial purposes. Perhaps this view receives some support from the exception in favour of an addition to the existing house and the erection of a porter's lodge. There is also something to be said for the suggestion that, once ground has been staked out for building, it would be inconvenient to inquire too curiously whether

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The pursuer reclaimed, and argued;—The clause covered whatever could reasonably be called ground built upon,—in other words, the site of the building. A building site would ordinarily mean the ground staked out for the building, and would certainly include such ground, in addition to what was actually covered by stone and lime, as was necessary for access to the building, and for light and air. According to the Lord Ordinary's view only what was roofed-in would be included, so that a court-yard surrounded by the building would be excluded. This was too narrow a construction. The pursuer did not claim the additional duty for the reservoir; he limited his claim to what was plainly included in what was properly the site of the building,—its approach roads, and the bank which protected it from the reservoir.

Argued for the respondent;—The clause was free from ambiguity. "Land built upon" belonged to a different category from "land used for building purposes." The pursuer's construction of the clause required that he should add words to the clause, and make it read "piece of ground on which buildings shall be erected, *and the ground pertaining thereto.*" If the literal and unambiguous construction contended for by the defender was adopted there would be no difficulty in applying the clause, but the pursuer's construction would lead to numerous difficulties, and in particular it would be impossible to fix any limits to the extent of ground which might be said to be accessory to the buildings, and which would therefore be included.

LORD PRESIDENT.—The clause of the feu-contract which we have to construe in this case is certainly very peculiar, and I am not surprised there should be difference of opinion as to its meaning. The construction put upon the clause by the Lord Ordinary attributes a very narrow signification to the language used, and would have the effect of determining that the obligation to pay additional feu-duty only applies to ground actually built upon, excluding all the surrounding ground, although it might be the only

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every square yard of it is covered with stone and lime. To take the whole enclosure has the merit of simplicity.

"But then comes the difficulty of knowing where to stop. One enclosure might provide for a garden of an acre in extent, another might have only a back court measuring a few square yards. Could it be said that the first of these was ground on which buildings had been erected? I think it is not too much to expect that a superior who is stipulating for an additional payment from his vassal in a certain event should define the event in unequivocal terms. If his meaning was what the pursuer suggests, a few more words would have placed it beyond doubt. Clauses of this kind do not create a restriction on the use of property, and may not therefore fall directly under the rule of construction adopted in *Russell* v. *Cowper*, 9 R. 660; but they impose a pecuniary burden, and therefore must be construed with a certain amount of strictness *contra proferentem*.

"I do not know that the argument from inconvenience goes very far. The basis of calculation provided by the contract is two shillings for every square pole, and there can be no great difficulty in arriving at the additional feu-duty for the actual space covered by a building when the measure is no larger than that. On the whole matter I incline to think that defender's construction of the contract is preferable to the pursuer's, because it is in literal accordance with the words used. And it harmonises with the view (which is a perfectly intelligible one) that the purpose of the clause was to encourage the leaving of open spaces."

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tute an abuse of the said right, or to call for judicial regulation: Therefore dismisses the action, and decerns."*

and his wife caught five dozen fish weighing between 14½ and 15 lbs.; on 25th June they caught three dozen weighing from 8 to 9 lbs.

Similar evidence was given by other witnesses.

John Fullarton, D.Sc., who had been for nine years scientific observer to the Fishery Board of Scotland, deponed that on the instructions of Mr Bunten's agents, he had visited Loch Rannoch, and stayed there from 23d to 31st May 1900. ". . . I dissected the trout and analysed the contents of the stomachs. I found that, whether caught at the one end or the other or in the middle, they had an abundance of food. A large proportion of their food consisted of crustacea—daphnedæ, ostracodes, and copepodes. Then during certain months of the year there are the larvæ of aquatic insects—the May-fly, stone-fly, and ephemeridæ. Some trouts contained not only insects, larvæ, and crustacea, but also small forms like diatoms, which you cannot see with the unaided vision. I examined the loch at various parts, and at the mouths of the rivers that flow into it, and I think there is no doubt that these rivers are bringing down considerable quantities of larvæ and insects. The floating or pelagic fauna are also a most important part of the food of the fish. These are chiefly crustacea. They are particularly abundant in Loch Rannoch. . . . The last day, or the second last day, I was there I joined Mr Speedy, who was there fishing, and we went up for a considerable distance along the north shore. The loch was like a sheet of glass, and the fish were just teeming. The place was simply boiling, and that over the greatest depths. I observed it with my own eyes. I have no doubt that just as the fish food supply is all over the loch, so the fish are all over the loch. . . ."

Greig Wilson, Ph.D., D.Sc., gave evidence to the same effect. "(Q.) So far as keeping up the stock of fish is concerned, do you think a great advantage to the loch would be to shoot a cormorant or two? (A.) A considerable advantage, though I do not think the take of a cormorant is enough to have any serious effect upon that great loch; but I would rather shoot a few cormorants than stop a few boats. However, I think the loch is over-supplied with fish, and there is no harm in either a man or a bird taking out the surplus. The very presence of cormorants indicates that there is an abundant supply of the food upon which they feed. . . . (Q.) Your opinion is that, looking to the extent of the water and the spawning ground, and the food, there is every provision for the fish that are found there, and that they are found in enormous quantities? (A.) Yes, and in good condition, relatively to which the amount taken by angling is infinitesimal. . . . I do not think that a dozen or twenty boats fishing over the loch from the Tower westward would affect the fishing. To a certain extent it would make the fish shy; but I believe that after a time there will be a sort of steady degree of shyness; I do not believe in the transmission of shyness from generation to generation. Speaking from my general knowledge of fish, I do not think flogging the water would have any effect. . . . I believe after the primitive condition is passed they are a little bit shy of the fly that they have had experience of."

It appeared to be the practice of anglers to put back into the water fishes under eight inches in length.

* "OPINION.—The purpose of this action is to have the trout-fishing in Loch Rannoch regulated by the Court, and the method of regulation proposed by the pursuer is that the Court should first fix the total number of boats which are to be allowed to fish on the loch, and then should allocate these among the six riparian proprietors in proportion to the extent of frontage possessed by each.

"The water rights in the loch have been the subject of two final judgments, one by this Court in 1799, and the other by the House of Lords in

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The pursuer reclaimed, and argued;—The parties had a common right of fishing in the waters of Loch Rannoch. *Prima facie*, where there had come to be a dispute with regard to the exercise of a common right over one indivisible subject, an occasion had arisen for regulation, and that was just the position here. The law of the present subject had been ascertained in the previous cases between the parties or their authors. In the case of *Menzies* v. *Macdonald*[1] the Court had in view that the joint right was liable to abuse, and had clearly determined that in such an event the Court would interfere and make regulations. That was quite consistent with the *dicta* on the subject in other cases.[2] The abuse of the fishing now was palpable, and the loch was rapidly losing its reputation for trout-fishing. The number of boats used by the defenders was largely increased—there were three hotels now instead of as formerly two small inns, and the fishing from these hotels was perpetual. The villagers also advertised rooms with the use of boats for fishing. It had to be kept in view that the fishable area was very restricted—only about 500 acres at the west end of the loch being available. Contrasted with the baskets which were formerly got, the baskets of the present day shewed an enormous falling away both in

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1856. In 1799 the pursuer's father, as proprietor of the barony of Rannoch, owned, practically speaking, the whole northern shore of the loch, while the southern shore (except a small portion towards the eastern end belonging to Stewart of Innerhadden) was the property of Struan Robertson as proprietor of the barony of Struan. Menzies and Struan were found to have 'a joint right or common property' in the loch. The rights of Innerhadden were not affected by this finding, because he does not seem to have been a party to the process. In 1828 Struan sold the lands of Kinloch, forming part of his barony, to General Macdonald. These lands had only a small frontage at the east end of the loch, but General Macdonald exercised the right of boating and fishing over the whole loch, and he built an inn upon his lands, the visitors at which were also allowed to fish. In 1853 the present pursuer raised an action against Macdonald to have it declared that he had no right of any kind in the loch, or otherwise that his right was limited to that part of the loch which was situated *ex adverso* of his lands. This case was sent to the whole Court, and, in accordance with the opinions of the majority of the Judges, it was held that the pursuer had not set forth any relevant ground in support of the leading conclusion of his summons, and the defender was assoilzied from the alternative conclusion. On appeal to the House of Lords this judgment was affirmed.

"In the opinions delivered both here and in the House of Lords a good deal was said about judicial regulation as a possible remedy for abuse in the exercise of the joint right. It undoubtedly formed part of the reasoning by which the result was reached that, while either of the co-owners might alienate any portion of his interest, and thereby transmit a right similar in quality to his own, the effect of the alienation could not give him and his disponee together a greater interest in the loch than he alone enjoyed before. Thus Lord Chancellor Cranworth said (I quote from 1 Paterson, App. 626)—'If indeed the effect of alienation by one or two co-owners

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[1] Menzies v. Macdonald, March 10, 1854, 16 D. 827, 26 Scot. Jur. 385, June 10, 1856, 2 Macq. 463, 19 D. (H. L.) 1, 28 Scot. Jur. 453.

[2] Scott v. Napier, June 11, 1869, 7 Macph. (H. L.) 35, 41 Scot. Jur. 475; Mackenzie v. Bankes, Nov. 30, 1877, 5 R. 278, June 27, 1878, 5 R. (H. L.) 192.

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the numbers and the weight of trout captured. The sporting tenants of the pursuer would no longer look at the loch as a sporting subject, and the terms of the estate leases had had to be altered to suit the change of circumstances. The direct effect of the over-fishing was that the fish now were not only very much smaller, but also much more difficult to take. There was no other cause to account for that but over-fishing. The Lord Ordinary described a state of things fully warranting regulations. He was really with the pursuer on the facts, but wrong in not allowing a remedy. The pursuer was not bound in any view to wait until he had actually suffered injury, but was entitled to protection from impending injury, and the Lord Ordinary's view (and it was well founded) was that the amount of fishing had reached a point beyond which it could not be carried with safety to the sport. The case of Loch Leven illustrated how far fishing, having regard to sport, could be carried. There twenty-two boats only were allowed, although the fishing area was very much larger than here, and every care in the matter of watching and

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should be to deprive the other owner of the full right as to his moiety, then that would give a right of action for regulation of the enjoyment.' Then, coming more directly to the matter now in hand, his Lordship said—'Suppose it were not possible for more than any given number of boats, say 1000, to be simultaneously engaged in fishing upon the lake, Menzies would be entitled to have 500 so employed, and Struan would be entitled to the other 500. Struan could not by alienating to others give a right to more than his due share. But if he keeps within that limit Menzies has no right to complain. It is the same thing to him whether the right is exercised by Struan himself or by others deriving title under him. In either case Struan or his disponees might be restrained from any excessive exercise of the right enjoyed in common with another; but Struan could not be prevented from exercising, subject to the liability to be thus regulated, the right incident to property in general of alienating it as he may think fit.'

"Beyond expressions like these, to the effect that judicial regulation of some kind would be competent and might be necessary, and that it must aim at preserving equality of rights between the two baronies, notwithstanding the division of one of them into several parts, there is unfortunately no indication of the principle upon which such regulation should proceed. In the Court of Session, indeed, it was conceded both by the majority and the minority that it might be difficult to find one. Lord Rutherfurd, who was the chief exponent of the views of the majority, said (at p. 847 of 16 D.)—'In like manner here, the right and interest of Sir John Menzies, if it extended to one-half, will not necessarily be reduced to a third, or a fourth, or a sixth, by the subdivision of the right and interest of his original co-proprietor. It may indeed be difficult for the pursuer in such a case as the present to establish encroachment or abuse, or to shew injury.' Similarly Lord Deas, who was in the minority, said (at p. 855)—'No means have been suggested, and none such appear to be practicable, whereby effect can be given to the right of property which will accrue to each additional common proprietor and yet leave Menzies in the same favourable position he was in before. For example, after the joint proprietors have been multiplied—it may be by studding the whole bank or the whole of Struan's estate with villas—can Menzies have the same means of fishing and fowling which he previously had? If so, the fish and fowls must be infinite.' Again (p. 856), 'It is said the possession may be regulated. But what kind of regulation would be practicable and consistent at once with the right of property vested in each new proprietor,

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restocking was taken. If the pursuer was right in the facts, it was idle to say that regulations were either unnecessary or were impossible because of the difficulty of framing or enforcing them. The respondents' argument to the contrary was just the argument of the minority of the Judges in the action of 1854, and it had been rejected. The exercise of a joint right of any kind was always subject to limitations,[1] and there was no reason why a joint right of sporting should not be regulated.[2] What amounted to excessive or ruinous exercise of a right must depend on the nature of the right affected. The right of the pursuer here was not a right of property in the uncaught fish, but the right to capture them,[3] and anything that injuriously affected that right, whether injury to the stock of fish, or overcrowding the loch with boats, so as to make angling physically impossible, or such excessive fishing as to make the fish unduly shy of capture, fell to be restrained or regulated. The proposed regulation by allocating boats in proportion to extent of frontage was equitable and fair, but it was competent to the Court, under the present action, to impose regulations of a different kind if it so thought fit.

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and with the rights of Menzies, has not been pointed out.' Then, after shewing how much simpler is the case of a grazing commonty, his Lordship adds—'But nobody has even suggested any analogous principle which would be applicable here, so as to fix the number of boats which each joint proprietor may put upon the lake, the number of persons and sojourners from each inn and villa who may embark in each boat, the hours or days of the week they are respectively to sail, shoot, and fish, and the corresponding restrictions which are to be placed on one or both of Struan and Menzies.' It may be that Lord Deas magnified a little the difficulties of regulation, in order to enforce the view that Struan could not subdivide his rights at all. But being now face to face with the difficulties which he anticipated, I confess that I strongly sympathise with these observations.

"As matters now stand, there are four proprietors standing in the original right of Struan; there is Innerhadden, whose right is independent of both the baronies; and there is the pursuer, whose barony remains undivided. The right of each one of these six proprietors is to boat and fish over the whole loch, and to do so by himself and others as much as he pleases, so long as he does not abuse his right by encroaching unduly on the rights of his neighbours. A Court of law must always be very chary of interfering with the free choice which is inherent in every right of property; and in a question of this kind it is extremely difficult to find the criterion by which it is to be held that legitimate use has passed into abuse. Plainly the use which one of the community chooses to make of his right cannot be made the measure for all the others. It is not enough for the complaining owner to say, as the pursuer in effect says here, 'I have only eight boats on the loch, therefore you, the others, must not have more than eight amongst you.' There must first be a determination as to the total number of boats which the loch is capable of carrying before the question of allocation can even be considered. And how is this determination to be reached?

"The answer would be greatly simplified if the case for the pursuer were

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[1] Governors of George Watson's Hospital v. Cormack, Dec. 14, 1883, 11 R. 320, at 323.

[2] Marquis of Huntly v. Nicol, March 12, 1896, 23 R. 610, *cf.* Earl of Aboyne v. Innes, June 22, 1813, F. C. July 10, 1819, 6 Paton's App. 444; Patrick v. Napier, March 28, 1867, 5 Macph. 683, at 693, 39 Scot. Jur. 346.

[3] Fergusson v. Shireff, July 18, 1844, 6 D. 1363, 16 Scot. Jur. 580.

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Argued for the respondents;—The *onus* of shewing that there was need for interference and regulation by the Court was on the pursuer, and he had not discharged it. It had been affirmed by *Menzies* v. *Macdonald*[1] that there was a joint right in each riparian proprietor of fishing over the whole loch. A proportionate allotment of such a right was absurd and impossible. The right could not be measured up in severalty. The entire right moreover must be threatened in order to warrant interference by the Court, and not the several or separate right vested in an individual proprietor. The entire right might be affected either in relation to the physical exercise of it, *e.g.*, by overcrowding so as to prevent free casting or boat-drifting, or in relation to the subject-matter of the right, viz.,—the stock of trout. There was no case presented on the first of these views, and the evidence failed absolutely to shew that the stock of trout in the loch had been in any way injured. Legal right, and not sport, was the ultimate test, and it was not enough for the pursuer to establish that he did not capture so many trout as formerly. The right of each proprietor was not to capture so many trout, or such and such a weight

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that the loch is being depleted of trout, by which of course I mean that, one year with another, a fair breeding stock is not being left. But that is not his case. There is no attempt to shew that the total yield of trout is not as large as it ever was, and the skilled evidence for the defenders establishes that the food supply is abundant, and the spawning ground sufficient. The real case for the pursuer is that, although as many trout may be taken now as formerly (and probably there are more), the average take per rod is not nearly so good, either in number or weight, and that this arises from the trout, and particularly the larger trout, being made shy by over-fishing. Now, I concede that, the right of trout-fishing being a sporting right, its value depends on the probabilities of success for an angler of average skill going out on a fairly good day. But then the test of what he may reasonably expect is not to be found in the great baskets of sixty years ago, to which the pursuer himself and Mr Fletcher Menzies speak, when the trout very seldom saw an artificial fly, and when there were probably not more than half a dozen boats on the loch, all told. That, I suppose, is the reason why preserved lochs are as a rule better than lochs which are practically open to the public. Indeed, the danger to preserved lochs arises from their being underfished, and probably in the pursuer's early days the fishing would not have been so good as it was if the balance had not been redressed by practices such as netting, spearing, and the use of set-lines and the otter, which are proved to have been common in Loch Rannoch and its feeders at that time, but are now either illegal, or, at all events, not in use. Mr Gregor Macgregor, who is much the most important witness for the pursuer, admits that even in his young days, *i.e.*, throughout the sixties, the loch was under-fished. Therefore the baskets which he was in the habit of getting, often weighing 20 lbs., and averaging 15 lbs., cannot be taken as a test of what the average angler might reasonably expect, now that the loch is no longer under-fished. I do not think that Mr Macgregor has much to say against the fishing down to 1878, when he had 'two very good days.' In this way, the pursuer's case comes to be that the fishing has fallen off during the last twenty-two years. Probably that is true; and I rather think the same might be said (Mr Malloch allows it) of every loch in Scotland which is practically open to the public. It is, of course, notorious that the taste for every form of sport, and the means of gratifying that taste, have enormously increased during the last quarter of a century. But it is open

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[1] 16 D. 827, 19 D. (H. L.) 1, 2 Macq. 463.

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of trout, but only to take his chance along with the other proprietors of catching as many trout as possible. To warrant interference it must be shewn, apart from physical interference or obstruction, that the subject-matter of the right—the stock of trout—was being absorbed or exhausted,[1] and there was no evidence, much less proof, of that. Enhanced difficulty in capturing the trout, or mere inconvenience, did not entitle the Court to interfere.[2] The whole of the evidence for the pursuer was of a very vague and indefinite character, and failed, for example, to establish what was the number of boats either at the present or at any earlier period. The enormous baskets spoken to by the pursuer and his brother were got at a time when the loch was really under-fished. For the last twenty years the fishing had been very much the same; it had not been proved that within that period the number of boats had been materially increased. On the facts the pursuer's case had entirely broken down. In any view the kind of regulation asked was in direct contradiction of each owner's right as ascertained and determined in the former case of *Menzies* v. *Macdonald*,[3] and could not in any event be adopted.

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to every one of the six joint proprietors of this loch, just as it would have been open to Struan, if he had retained the whole of his estate, to invite as many persons as he pleases to fish all over the loch; and the difficulty lies in saying at what point (there being no depletion of the breeding stock) the number of anglers plying the rod makes the sport of each so bad that it amounts to an abuse of the right.

"One can figure cases of joint right where the task of regulation would be comparatively simple. Take the case of a stretch of moor held in common,—and there are such cases. If one of two joint owners were, by himself or his tenant, to monopolise the first fortnight after the 12th of August, with the result, not of shooting all the birds, but of making them so wild that the other man could not get near them, it would be easy enough to say that the shooting of each must take place on alternate days, or on specified days in each week. But here what is asked is not of that nature. It is that the Court should define the number of boats which the loch may fairly carry throughout the season.

"Now, that being the nature of the pursuer's demand, I must say that he has supported it by evidence of the vaguest kind. He admits that ever since 1856 he has had in view the possibility of having to come to the Court for regulation. Yet he has taken no means to keep any record either of the baskets got by his tenants and keepers, or of the number of boats on the loch at any given period. Indeed, he closed his case without proving how many boats there are now; and I have had to glean chiefly from the evidence led for the defenders, what I think may be taken as approximately accurate, that the number is from forty-five to fifty, consisting of eight belonging to the pursuer, sixteen belonging to the three hotels, three belonging to the defender Struan Robertson, ten belonging to the defender Luxford, eight or ten belonging to sundry houses near the east end of the loch, including Innerhadden, and one or two at Dall. Probably this number is rather larger than it ever was, but I should have thought it vital to the pursuer's case to compare it with the number, say twenty years ago, when it was admitted that the fishing was still fairly good. There again every-

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[1] Earl of Aboyne v. Innes, June 22, 1813, F. C., July 10, 1819, 6 Paton's App. 444; Marquis of Huntly v. Nicol, March 12, 1896, 23 R. 610.

[2] Somerville v. Smith, Dec. 22, 1859, 22 D. 279, 32 Scot. Jur. 112.

[3] 16 D. 827, 19 D. (H. L.) 1, 2 Macq. 463.

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LORD PRESIDENT.—The question presented for decision in this case is whether sufficient grounds have been established for the Court interfering to regulate the exercise of the right of fishing for trout in Loch Rannoch by the riparian proprietors, or persons having their authority.

A century ago the property surrounding the loch belonged to the family of Menzies of Rannoch, now represented by the pursuer, and the family of Robertson of Struan, with the exception of a small portion at the south-east corner of the loch, which belonged to Stewart of Innerhadden. Speaking generally, the lands on the north side belonged, as they still belong, to Rannoch, and the lands on the south side belonged to Struan. The lands of Struan have since been subdivided into four parts, and the present proprietors of these are defenders in this action, as is also Stewart of Innerhadden.

The respective rights of the proprietors of Rannoch and Struan in Loch

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thing is vague; but it is tolerably certain that the addition of a third hotel last year, which the pursuer assigns as his reason for thinking it time to complain, has not materially added to the number. There are now six at the Dunalastair Hotel, five at the Bunrannoch Hotel, and five at the new hotel. Oddly enough the pursuer's own keeper gives fifteen or sixteen as the number at the two hotels when he first came to the district nineteen years ago. I think this must be an over-statement, for the other evidence seems to shew that between 1880 and 1899 the number kept at the two hotels was thirteen. Taking it so, the addition of three boats is not a very large one out of forty-five or fifty, and there is positively nothing to suggest that in the last twenty years there has been any increase in the number except at the hotels.

"When I turn to the baskets got, once more I find a want of reliable data. The reputation of anglers for severe accuracy about their takes is not perhaps of the highest, but that is an observation which applies all round. Discounting the pursuer's own evidence and that of his brother (as applying to a state of things which can never return), what remains? He says that his tenants do not now think the loch worth fishing, and that for the last five or six years he has had to give all of them leave to fish the private lochs on the estate, whether these are included in their shooting grounds or not. One may conjecture that a shooting tenant, on the off days when he wants to fish, might well prefer a preserved loch at some distance from his lodge to an open loch at his door. But not a single shooting tenant has come to give evidence; and there is no suggestion that the rents which they pay have gone down. Mr Malloch, a well-known sporting agent in Perth, says that, though he never fished Loch Rannoch, he has known it in connection with his business for twenty-five years; that when he began business it was a very good fishing loch, but that now he does not recommend it to first-rate anglers, because, judging from what he hears, the fishing has fallen off. Then there is Mr Gregor Macgregor. I have already indicated that I attach great importance to his evidence, both on account of his long and intimate acquaintance with the loch and his perfect independence as a witness. He has no doubt that since 1878 the fishing has fallen off very much—so much that when he visits Rannoch now he very seldom cares to fish. But then I think that the recollection of the good baskets of his youth makes him a little fastidious, and that he is hardly a fair representative of the average angler. The only recent basket which he mentions is one of twenty-one trout, weighing 7 lbs., got on 22d June this season. It happens that on that very day another angler, of I am sure not greater

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Rannoch have been determined by two important judicial decisions, one on 14th December 1798, adhered to on 2d July 1799, and the other a judgment of the whole Court on 10th March 1854, affirmed by the House of Lords on 10th June 1856. By the former judgment, which was pronounced in conjoined actions between Sir John Menzies of Rannoch and Colonel Robertson of Struan, the Court found that "both parties in this cause have a joint right or common property in the loch of Loch Rannoch, and a joint right of sailing, fishing, floating timber, and exercising all acts of property thereupon, and of drawing nets upon the shores thereof adjoining to their respective lands, but not upon the shores of the lands belonging to each other"; and decerned and ordained accordingly. In the action second mentioned, which was at the instance of the present pursuer against Major-General John Macdonald, who had acquired a portion of the barony of Struan, the Court, by a majority of the whole Judges, held that Struan was entitled to convey a share of the joint interest and property in the loch belonging to him, and that a disposition by him was a valid conveyance to

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skill, but with better luck, caught, along with his wife, sixty trout weighing nearly 15 lbs. Other baskets of recent years are spoken to which are about as good. Thus the witness Crawshay, on his best day last year, got fifty-eight fish weighing 15 lbs.; and the witness Chamberlain, on six consecutive days in 1894, got 146 fish weighing 57 lbs., which is equal to an average of nearly 10 lbs. a day of trout rather better than three to the pound. Perhaps the testimony of boatmen is not to be relied on too implicitly as regards accuracy, and I discount a good deal from their general evidence about the sport being as good as ever. But Macpherson speaks to a basket of forty-one trout, about four to the pound, being got within two hours in July 1898; Lamont was at the getting of twenty-four trout weighing 19 lbs. in 1894, and 25 lbs. (number not stated) in July 1896; M'Dougall speaks to fifty-two fish weighing 15 lbs. to one rod in July 1898, and Macfarlane to 32 lbs. for two rods some six or seven years ago. Now, of course, these are picked baskets, and do not represent what may ordinarily be expected; but, when such things are still possible, I find it very difficult to say that there is abuse of the joint right of that manifest and palpable kind which alone would entitle the Court to interfere. It may be (and I rather think it is the case) that the amount of fishing has reached a point beyond which it cannot be carried with safety to the sport. But such things tend to right themselves, because it is not in the interest of any of the joint proprietors to spoil the sport; and I do not think that this Court should ever be resorted to for compulsory regulation until at least an effort has been made to secure agreement within the community of owners. But the pursuer admits that he launched this action against his neighbours without making any attempt of that kind, because he thought it would be useless.

"There are several topics discussed in the proof which have not influenced my mind in the least. The experience of Loch Leven was referred to by both sides, but I do not think that any assistance is to be derived from the case of a loch so entirely different from Loch Rannoch, both in its natural features and its mode of treatment. Suggestions were made that the fishing might be artificially improved, but although that may be a fair enough subject for consideration by the proprietors themselves, it can have no bearing upon the present question, which relates solely to the loch in its natural state. For the same reason I have nothing to do with suggestions about the destruction of trout by cormorants and gulls. Even the scientific evidence, although interesting in itself, is relevant only as establishing that there is ample feeding for trout in the loch, because all the speculations

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his disponee of this joint interest, and this judgment was affirmed by the House of Lords on 10th June 1856. The Lord Chancellor (Lord Cranworth) in giving judgment said, that a disposition of a specific part of the lands constituting the barony, with the general words added, must be taken to give to the disponee of part of the lands of the barony, as pertinent thereto, the same rights in the lake, in respect of the parts so conveyed, as he had himself taken on obtaining a conveyance of the whole—"subject, of course, to the observation that as between Menzies on the one hand, and Struan and his disponee on the other, no greater or more extended rights could be enjoyed by the latter than if the whole of the barony had remained entire and unsevered." Although the proprietor of Innerhadden was not a party to either of these actions, the present case is presented upon the assumption that Innerhadden has rights in the loch similar to those pertaining to the baronies of Rannoch and Struan, and it appears that these rights have been exercised by the proprietors of Innerhadden from time immemorial. The discussion has been taken upon the footing that each of the six riparian proprietors has a right of fishing for trout by rod and line over the whole loch, and the object of the present action is to obtain judicial regulation of that right.

I did not understand it to be disputed by the counsel for the defenders that the Court would, upon sufficient cause shewn, have power to regulate the right of trout-fishing in a loch as between or among different proprietors interested in it, and the existence of this right of regulation was fully recognised in the previous cases already mentioned. The defenders, however, maintained that there has not been any abuse, or any excessive or undue exercise, of the right by any of them, and that consequently no case for interference by the Court has been established.

The pursuer in his summons seeks to have it affirmed as the ground for claiming judicial regulation: (1) "that the trout-fishing in Loch Rannoch is being injured and destroyed"; and (2) "that this injury and destruction are being caused by and in consequence of excessive fishing by the defen-

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about trout being found in the deep waters of the loch will never get over the fact that in practice the fishable area during the best months of the year is confined to about 500 acres at the west end and a strip of about 100 yards all round the margin. Probably Mr Mitchell is fairly accurate when he calculates this marginal area at about 500 acres more. These two areas represent all the water that is worth fishing with the fly during the summer, and any trout that are caught in the deep waters are caught only by trolling with small trout or the phantom minnow. I cannot help thinking that the pursuer's grievance arises largely from the fact that the hotel boats congregate over the shallow water at the Rannoch Lodge end of the loch; but that is the necessary result of the judgment of the House of Lords in 1856, which gave all the joint proprietors the right to fish over the whole loch. Their right to do so is one which the Court cannot disturb unless, as I have said, there is manifest and palpable abuse. The pursuer by the structure of his summons recognises that. His first declaratory conclusion is that the trout fishing in Loch Rannoch is being 'injured and destroyed'; and his second is that this injury and destruction are being caused by excessive fishing from boats on the loch. That is equivalent to an assertion of abuse leading to the substantial destruction of the joint right. The *onus* of proving such a case is a heavy one, and I am of opinion that the pursuer has failed to discharge it."

ders, or some of them, or by those authorised by the defenders, or some of them, from boats on the said loch," and the Court is asked to regulate the fishing by finding that no more than sixteen boats should be allowed to fish on the loch, and that these sixteen boats should be allocated among the parties having right to fish in the loch in proportion to the extent of the frontage of the land of each of them along or to the loch.

The first question, therefore, is whether it has been established that the trout-fishing in the loch is in fact being injured and destroyed in consequence of excessive fishing by the defenders, or any of them, or by persons in their right, and much evidence has been adduced both by the pursuer and by the defenders upon this question. If it was established that the fishing was being materially injured or destroyed by excessive fishing, I think that it would be the duty of the Court to interfere by way of regulation, because although trout-fishing is not, like salmon-fishing, a separate feudal estate, it is an incident of property having a distinct commercial value, and it is therefore entitled to the protection of the law as well as any other valuable incident of property.

In considering whether the pursuer has established material injury or destruction by excessive fishing, it is necessary, in the first instance, to form an opinion as to the standard by reference to which the question what constitutes excessive fishing should be tried. The recollection of the pursuer and his brother, Mr Fletcher Menzies, goes back for seventy years, when there were very few boats, and very little fishing on the loch, or, in other words, when the loch was not fished to anything like the extent to which it could have been without injury to it as a sporting subject. Indeed there is evidence of weight to the effect that in these early days, and until between thirty and forty years ago, the loch was rather under than over fished. Very little value was at that time attached to the right of trout-fishing, and it was not exercised to such an extent as it might well have been in the fair and advantageous administration of the riparian properties. I therefore think that the amount of fishing practised sixty, or even thirty, years ago cannot be taken as affording a standard any fishing beyond which must be held to be excessive. The number of boats on the loch in these early days was relatively small, probably five or six, and it has since increased to from forty-five to fifty, the principle increase being at the hotels,—there are now six at the Dunalastair Hotel, five at the Bunrannoch Hotel, and five at the New Hotel. It does not, however, appear to be established that except at the hotels there has been any material increase during the last twenty years, and even at the hotels the increase during that time does not seem to have been very great. No allegation is made that the number of boats is so great that they incommode or crowd each other on the fishing-ground, and it would appear that it rarely happens that a third of the boats on the loch are engaged in fishing at the same time.

But in the question whether the fishing is being materially injured or destroyed, the best, or at all events the most obvious, test would be a comparison of the number of fish caught at a time when the fishing is not alleged to have been excessive, with the number caught now, and I do not think it is proved that the aggregate number taken is smaller now than it was when it is not alleged that there was excessive fishing, although the

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average weight of the individual fish was probably greater then than it is now. The evidence on this question has been very fully and carefully dealt with by the Lord Ordinary, and it does not appear to me to be necessary to go through the details of it again. I may, however, remark that, in regard to this matter, as well as with respect to the number of boats on the loch twenty or thirty years ago as compared with the number now, the evidence is conflicting. Some anglers who have known the loch for many years say that since 1878 the fishing in it has fallen off so greatly that they do not now care to fish, but about the same time of which they complain, other anglers were obtaining good baskets. Probably the loch is now being as fully fished as it should be in the permanent interests of the riparian proprietors, but I cannot say that it appears to me to be proved that the fishing has been or is being destroyed, or even materially injured in the sense of being brought below what might be regarded as a fair standard of sport under the conditions now existing throughout the country.

I think that a different question would arise if it were established that the fishing was carried to such an extent as to destroy, or materially injure, what may be termed the breeding stock of fish, but the evidence does not appear to prove this to have been the case down to the present time. It is said that the fish are now much smaller than they were, and that this is proved, not only by the size of those caught, but by observation of those running up the streams for the purpose of spawning. The fact, however, that the majority of fish now caught are smaller than in former times may be partly, at least, accounted for by the fact that owing to the number of boats moving about on the loch, and the amount of angling from them, the larger fish are made shy and more difficult to catch. This view is confirmed by the fact that good baskets, including fish of fairly heavy weight, are still, not infrequently, obtained by skilful anglers. The increasing shyness of the fish is no doubt unfortunate for the unskilled angler or the angler of only average skill, but so long as the number or crop of the fish is not seriously diminished, I do not think that a case of material injury calling for the interference of the Court is made out.

It appears to me that the law does not require a community of proprietors, having interest in a common right of fishing, to observe the same standard of preservation of fish, or even of moderation in fishing, as the owner of a private loch might think fit to practise in his own interest. The Court should not, in my judgment, interfere unless the fishing is carried on in such a manner, or to such excess, as either to destroy or materially injure the reasonable enjoyment of the right. I was at first disposed to think that a *prima facie* case for regulation had been established by the pursuer, but upon a careful consideration of the evidence, it appears to me to fall short of what would be required to warrant our interference.

One of the peculiarities of the case arises from the fact that while the total area of the loch is about 4611 acres, not above 1000 acres of that area can be described as reasonably fishable ground, and the best part, during the summer and autumn months, is an area of between 400 and 500 acres at the west end, opposite to the pursuer's property. The result is that this portion—about a tenth of the entire area—becomes the usual fishing-ground, with the consequence that the fish become shy from being so frequently

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ast over. It is not wonderful that the pursuer should dislike so much ishing on the part of the loch opposite the residence of Rannoch Lodge, ut the right of the other proprietors to fish there results from the decision hat Rannoch and Struan, and now apparently each of the riparian proprie- ors, has a joint and equal right of fishing over the entire loch, so that each an fish at any part of it which he may prefer.

Upon the whole matter, it does not appear to me that there is sufficient proof either of destruction of, or of material injury to, the fishing to require or warrant the interference of the Court, and I am therefore of opinion that the judgment of the Lord Ordinary should be adhered to.

LORD ADAM concurred.

LORD M'LAREN.—In this case I concur in the proposed affirmance of the Lord Ordinary's interlocutor dismissing the action, but my opinion is based upon a different ground. The pursuer's demand, and, as I shall presently shew, his only demand, is that the rights of the proprietors of the fishing shall be allocated in proportion to the extent of "frontage" which each of the present proprietors possesses. But according to the judgment of the House of Lords in the previous case of *Menzies* v. *Macdonald*,[1] all the owners of the original baronies have equal rights, and each is entitled to communicate a share of his right to a feuar or disponee, but not so as to diminish the right of other tenants under the Crown. This, I think, is very clearly expressed in Lord Cranworth's speech in moving the affirmance of the judgment of the Court of Session; and it is also consistent with Lord Rutherfurd's opinion, which was concurred in by other Judges who supported the judgment of the Court of Session. Now, it appears to me that we could not make an order allocating the use of the loch in proportion to "frontage," consistently with the rights of the parties as already determined in the case of *Menzies* v. *Macdonald*,[1] and that no allocation on a different basis could be awarded under this action. This is, as I think, very clear on the face of the summons. Passing over the first and second conclusions, which relate only to the facts of the case, it is concluded third that the pursuer is entitled to have the fishing in the said loch regulated according to such rules and regulations as the Court may think proper to frame for the preservation of the fishing, &c. As I read this conclusion, the reference to the discretion of the Court is only for the purpose of ascertaining the kind of regulation which is desirable, not for the ascertainment of the measure of the rights of the proprietors. This is made clear by the terms of the fourth conclusion, where it is affirmed that no more than sixteen boats should be allowed to fish on the said loch, and that the said sixteen boats should be allocated amongst the parties having right to fish in said loch in proportion to the extent of frontage along or to the said loch which the land of each person having such right possesses, &c. The conclusion goes on to say, "or otherwise in such way and manner, and according to such other system of regulation as shall seem right and proper," &c.; but these general words appear to me to relate only to the mode of enjoyment; and it would not, in my view, be possible under this conclu-

[1] 2 Macq. 463.

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sion to frame regulations founded on the principle that each of the baronies had equal rights of fishing.

In the course of the argument the attention of counsel was directed to the discrepancy between the extent of the right claimed by Sir Robert Menzies and the extent of the right which he appears to enjoy according to the judgment in *Menzies* v. *Macdonald*;[1] but it was not proposed to amend the summons, and we are left to decide the question as it is submitted to us in the summons. Having formed this opinion, it may not be necessary that I should enter on the question, whether the facts as proved establish a case for regulation according to the true measure of the rights of the parties. But I may say that I have not been able to satisfy myself that the existing state of possession is satisfactory. The Lord Ordinary concludes his analysis of the evidence with this observation:—"It may be (and I rather think it is the case) that the amount of fishing has reached a point beyond which it cannot be carried with safety to the sport." I agree; but then my inference is, that in such a state of the facts regulation is necessary. I think that a proprietor of fishing is not bound to wait until he can prove actual injury before coming to the Court with an action which is in substance an appeal to the Court's equitable jurisdiction to restrain apprehended injury. But, for the reasons stated, I am of opinion that relief cannot be given in the manner concluded for in this action.

LORD KINNEAR.—I agree with your Lordship in the chair, and for the same reasons which you have explained, and which have been also explained very clearly by the Lord Ordinary. The first question that we have to consider when we are asked to make regulations is, what is the precise legal character of the right which we are to regulate, and in this case we are not left to define it for ourselves, because it has been already defined for us by two previous judgments of this Court and of the House of Lords. The effect of the right as so defined is, I think, entirely in accordance with the general rule of the law of Scotland with reference to fishing rights in lochs, as that is very clearly explained by Lord Selborne in the case of *Mackenzie* v. *Bankes*.[2] "If there are more riparian proprietors than one," the entire lake "belongs 'rateably' to them all. So far as relates to the *solum* or *fundus* of the lake, it is considered to belong in severalty to the several riparian proprietors, if more than one, the space enclosed by lines drawn from the boundaries of each property *usque ad medium filum aquæ* being deemed appurtenant to the land of that proprietor, exactly as in the common case of a river." But then, from the very nature of the circumstances, rights of boating, fowling, and fishing, which are to be exercised on the surface of a loch, cannot be conveniently enjoyed—indeed they cannot be practically enjoyed at all—in severalty, and therefore they must be enjoyed "over the whole face of the water by all the riparian proprietors in common." That is the right that the pursuer and defenders say they are entitled to enjoy—the right of fishing all over the whole face of the loch. But then it is laid down by the judgment of the House of Lords, and is, I think, an obvious corollary of the proposition I have cited from Lord Selborne, that this common right

[1] 2 Macq. 463.

[2] 5 R. (H. L.) 192.

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must be subject, in case of abuse, to judicial regulation. The question therefore comes to be, what will amount to abuse—such abuse as to require the interference of the Court? In the first place, it is evident from the very nature of the right that no one proprietor can complain that others do not confine themselves to their own part of the loch, but come upon water which he thinks ought to be exclusively his, because no part of the water is his or theirs. They have all a right to be everywhere, and if one part of the loch affords better fishing than another, every proprietor alike is entitled to have the benefit of that advantage, whether his riparian property is in the immediate vicinity of this better water, or at a distance from it. One can quite understand, as your Lordship has observed, that it may be very vexatious to a proprietor whose property is situated in relation to a loch in such a position as the pursuer's lodge of Rannoch is situated with reference to the loch, to find that whereas the water in the immediate proximity of his residence affords the best fishing-ground of the whole loch, it is generally occupied by boats that are always coming up from the other end, miles away; and I daresay this invasion of the best water may be especially annoying when such a proprietor has been accustomed at an earlier period to something very like exclusive enjoyment of one part of the loch. But then it is a condition of his right; it must be subject to the concurrent exercise of the same right by other people, whatever vexation and annoyance that may bring with it. Each proprietor has access to, and right to fish in, any part of the loch, and therefore the mere complaint of a proprietor that others are frequenting one part of the loch appears to me to form no ground for regulation at all. A regulation is a restriction of the enjoyment of a legal right, and where there can be no encroachment by one party enjoying such a right against the adverse or separate right of another party, it seems to me that the only excess which can afford ground for regulation or restriction of legal right must be such a use as amounts to abuse, either by destroying or materially diminishing the subject-matter of the right, or by destroying or materially diminishing the sporting enjoyment of the right. I do not quite follow the case which was suggested in argument, though there is certainly very high authority in support of it, that one of the common proprietors may be restrained if he takes more than his due share of the common right to the exclusion of others, because there are no shares. The right is not enjoyed in shares, but it is a right which from its very nature can only be enjoyed in common, and therefore one proprietor cannot exercise his right in excess so as either to injure the stock of fish or to injure the sport of fishing to the prejudice of another proprietor without equally injuring himself and all the proprietors in common. There is no room, so far as I can see, for a case of abuse by encroachment upon any right vested in the pursuer in severalty, and accordingly I think the pursuer has framed his summons with perfect logical accuracy when he asks it to be found as the first and, I think, indispensable step towards the regulation which he wishes us to make, that the trout-fishing in Loch Rannoch is being injured and destroyed, and in the second place, that this injury and destruction are being caused by excessive fishing by the defenders, or some of them, from boats upon the loch. These are the two propositions which lie at the foundation of the pursuer's case, and I think that in tabling them for con-

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sideration in the first place, he has acted on a perfectly accurate and logical conception of the nature of the right which is really vested in him. The question then comes to be, whether either of these propositions is proved. I think the terms of the first declaratory finding that it is proposed we should make are sufficiently comprehensive to cover the two cases which I have suggested might be made of abuse or excessive fishing. The trout-fishing may be injured either by the destruction or the great diminution of the total number of fish in the loch, or by the destruction of the enjoyment of trout-fishing as a sport. In either of these ways it appears to me that the common right might be encroached upon and destroyed, or at all events materially diminished by the action of particular proprietors. But then I agree with your Lordship, and with the Lord Ordinary, that as to the first of these two propositions there is no sufficient evidence to enable us to affirm it. There is conflicting evidence, and if the question were to be treated as one depending upon a balance of testimony, I confess I should say that the evidence of the defenders, in my opinion, prevails, because not only in numbers and quantity, but also in precision and in careful investigation, it appears to me to be weightier than any evidence that has been adduced by the pursuer. But apart altogether from any conflict of testimony, if the pursuer's evidence were taken alone, I should think it much too loose and indefinite to justify the Court in founding upon it any such conclusion as we are asked to found. The evidence of the pursuer and his witnesses taken alone probably comes to this, that there is some diminution in the baskets taken by particular fishermen on particular days—that on an average the fish taken are smaller than they used to be, and they are taken in smaller numbers. Now, I think that upon such a question as this the evidence of the pursuer himself and of Mr Fletcher Menzies is entitled to the greatest possible respect and weight, and I have no doubt that the same thing should be said as to the evidence of Mr M'Gregor. But then it is really nothing but a general opinion, and we must consider the point of view from which it is given. When witnesses, who have been accustomed to fish in a particular loch for so many years as these gentlemen have, say that they do not now find the fishing is so good as it was thirty, forty, sixty, or seventy years ago, I confess it seems to me very certain that the same kind of evidence might have been brought with regard to the same sport in any other loch, or with regard to any sport anywhere. But it really comes to no more than this, that the fishing is not so good as it once was, and if that is to be connected, as the pursuer's case requires it should be, with the condition that a greater number of people are fishing on the loch than used to be at the somewhat distant periods to which these witnesses speak, then it seems to me that it is a condition of the right which has been established as being in the pursuer and the other proprietors. It is a right which from its very nature can be exercised by a great number of people, and if the consequence of its being exercised by a great number of people is that it is not quite so good or so enjoyable as it would have been if it had been vested in one person alone who should have the entire control of the water, then I am afraid that is simply a consequence of the nature of the right of which no proprietor can be relieved. But then, if the evidence went a great deal further,—if it were conclusive as to the fact that the number of

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fish in the loch has been materially diminished,—that is only one step towards the pursuer's conclusion; and I must say I can really find no evidence—I do not say insufficient evidence, but I find no evidence—in the pursuer's case to enable me to take the further step and to say that that is owing to excessive fishing from too many boats. What strikes me most on considering the evidence of the pursuer as to the specific cause of any decrease of numbers which may be supposed to have taken place is the entire absence of any attempt at either theoretical or experimental investigation of the problem. If the fact is as is maintained by him it is, there is no evidence whatever as to the cause of it. What is relied upon is merely that there is a considerable amount of fishing now—a greater amount of fishing now than there used to be. Now, I cannot at all assent to the proposition that that is in itself conclusive evidence that over-fishing is the cause of the diminution of fish in the loch, if it were proved there was such a diminution. There may be many causes to account for the failure of anglers to have a successful day upon the loch. If the fish do not take readily, or if the smaller fish take more readily than the larger ones, I suppose every angler will have his own way of accounting for that phenomenon, and the probability is that many of their hypotheses may be wrong. But if we are invited to hold it proved that a particular cause has produced these effects, then I must say I should look for much more definite and explicit evidence than I find in the pursuer's case. If it be true that the larger fish are less eager to take the fly, and that a greater number of the small fish escape the voracity of the larger than used to be the case, it is very possible that that might be accounted for in various ways; and there is really no evidence at all to shew that it can only be accounted for by overfishing. Again, I think it a fatal defect that if we take the pursuer's case alone we should not be able to say either how many boats there are upon the loch, or how many boats may generally be sent out to fish at the same time, and certainly we have no evidence to enable us to say how many boats there ought to be. Then I think the evidence as to the question of the diminution of enjoyment of sport stands exactly in the same position. I do not at all assent to the argument which was maintained by one of the defenders' counsel that that is a matter which the Court ought not to take into account, either because of its being merely a pastime, or because the facts are too obscure for investigation. The enjoyment of trout-fishing as a sport is an incident of property, and therefore the Court is bound to recognise it, and I do not see that there should be any greater difficulty in ascertaining the facts than there is in ascertaining the facts in a great many other questions which are not within the range of common knowledge. But then the complaint which is made appears to me to be a great deal too vague for the Court to proceed upon. For the pursuer to make out that the enjoyment of sport had been destroyed or materially diminished, it would in my opinion be necessary to shew some definite case of interference with his own enjoyment. It was suggested in the course of the argument by one of the defenders' counsel, that if it could be said that the pursuer could not fish without being exposed to the imminent risk of another boat crossing his drift, that would be very good ground of complaint. I think it would, and I daresay—though I do not know—that some other illustra-

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tions of the same kind might be given. But whatever the complaint is, there must, in my opinion, be some definite ground upon which the pursuer can say, "The enjoyment of the sport is interfered with in this or that particular," and there is no attempt to make such a case in evidence. It appears to me, therefore, that upon both points the evidence fails. I should add that I entirely sympathise with Lord M'Laren in the difficulty which he feels in reconciling the specific manner in which it is proposed to regulate the right with the terms upon which the right has been fixed by the judgment of the House of Lords; because we are asked to measure the rights of the proprietors by reference to their frontage to the loch. I agree that there is very great difficulty in measuring the right in that way, because it is established, as I have already said, that in its exercise it has no relation to frontage at all. But then I should have great difficulty in seeing how it is to be regulated in any other way, and therefore I do not desire to express any decided opinion that if a case for interference had been made out, and if we had ascertained the exact number of boats which ought to be allowed to fish at one time on Loch Rannoch, we might not have been compelled to distribute that number amongst the various proprietors with reference to frontage. I agree it is not very logical, but I do not at present see any other very satisfactory means of making a distribution. The principle suggested in Lord Cranworth's judgment in the House of Lords seemed to be that Rannoch would be entitled to the same proportion of boats in competition with the other proprietors on the loch as it would have been entitled to before the subdivision of Struan into different properties. But what number of boats Rannoch would have been entitled to, and what number the other property of Struan would have been entitled to in these circumstances, we do not know. The great difficulty I should have in making any regulation arises at an earlier stage of the process of reasoning, and that is, to find any sound basis for determining any definite number of boats which may be allowed to all the proprietors together, and it is only when that has been done that we should be in a position to consider what proportion of the whole should be allowed to each. I do not think there is any evidence to enable the Court to define the numbers of boats that ought to be used on Loch Rannoch, and indeed I do not think there is any evidence to enable us to say that the number used is excessive; but if it is excessive—if it is more or less than the proper number—there is nothing, so far as I can see, to enable us to say what the proper number is. On the whole matter, therefore, I agree with your Lordship that the Lord Ordinary's interlocutor should be adhered to, but I do not think we have reached the stage at which we can usefully consider what the precise method of regulation should be in a case where a case for regulation had been made out.

THE COURT adhered.

W. & J. COOK, W.S.—A. P. PURVES & AITKEN, W.S.—DAVIDSON & SYME, W.S.—CHARLES P. FINLAY, W.S.—SKENE, EDWARDS, & GARSON, W.S.—MACKENZIE & BLACK, W.S.—Agents.

THOMAS CORBETT STEEL AND OTHERS (Thomas Corbett's Trustees), First Parties.—*Guthrie, K.C.—W. C. Smith.*
WILLIAM GILLIES AND ANOTHER (Curr Corbett's Trustees), Second Parties.—*Dundas, K.C.—Clyde.*
MRS MARGARET POLLOCK AND OTHERS, Third Parties.—*Guthrie, K.C.—W. C. Smith.*

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Corbett's Trustees v. Pollock.

Succession—Testament—Vesting—Vesting subject to defeasance—Direction to pay on death of liferenter—Accretion.—A testator directed his trustees to hold the residue of his estate, and to divide the annual proceeds thereof among three of his five children—Robert, Margaret, and Agnes; and on the death of the longest liver of the liferenters, to convey the residue in equal portions to and among the children respectively of the liferenters: "Declaring, however, that in the event of the death of any of my said children without leaving lawful issue, my said son John and my said daughter Susan, or in the event of their death leaving lawful issue, their said issue, shall be entitled to an equal share alongst with the issue of my other children, and that *per stirpes* and not *in capita* of the share of the residue of my said estates of which such child or children so deceasing without issue had or would have had the interest, and my said trustees are in that event directed so to divide, pay, or convey the same accordingly."

Held that as it could not be known till the death of the last survivor of the three liferenters whether such survivor would leave issue, no vesting of the share of a deceased liferenter who left no issue could take place before that event.

Held further, that the provision that in the event stated John and Susan's issue should be entitled along with the issue of the testator's other children to the share of a deceased liferenter, implied a provision that if either John or Susan and their respective issue failed, the share so set free did not fall into intestacy, but vested in the three remaining children of the testator or their issue.

1ST DIVISION.

THOMAS CORBETT, surgeon, Pollokshaws, died on 19th August 1855, leaving a trust-disposition and settlement, dated 30th June 1855, whereby he conveyed his whole estates, heritable and moveable, to trustees, with the exception of two properties about to be conveyed by him to his son John Campbell and his daughter Mrs Susan Steel respectively.

The truster disposed of the residue of his estate in the following terms:—"In the fourth place, I direct and appoint my said trustees to hold the whole remaining residue of my said estates, heritable and moveable, hereby conveyed, and to divide the annual proceeds thereof, after deduction of all charges, expenses, and outlays, as follows, namely, into sixteen equal shares, and to pay or deliver six shares thereof to the said Robert Corbett, and five shares thereof to each of my daughters Margaret Corbett and Agnes Corbett or Gilroy, and that half-yearly, at each term of Whitsunday and Martinmas, during all the days and years of their respective lives: Declaring that on the death of any of these my said children leaving lawful issue, my said trustees shall pay to such issue, equally among them if more than one, and if only one, then to him or her, the sum of eight hundred pounds sterling; and thereafter divide, and pay or deliver the annual interest or produce of my said means and estate amongst the survivors of my said children (excepting my said son John Campbell Corbett and my daughter Susan Corbett or Steel) in the like proportions before mentioned: Declaring, however, that, on the death of any of my said children without leaving lawful issue, the

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share of the annual interest or produce of my said estate falling, or that would have fallen and belonged, to such child shall be divided, and paid or delivered equally to or amongst my surviving children, including my son John Campbell Corbett and my daughter Susan Corbett or Steel:

"Declaring also that, on the death of the longest liver of my said children, Robert Corbett, Margaret Corbett, and Agnes Corbett or Gilroy, my said trustees shall realise the whole of my estates, and after the foregoing provisions of eight hundred pounds are paid, shall divide, pay, or convey the residue in equal portions to and amongst the children respectively of my said son Robert and of my daughters Margaret and Agnes; that is to say, one share to and amongst the children of each family: Declaring, however, that in the event of the death of any of my said children without leaving lawful issue, my said son John Campbell Corbett and my said daughter Mrs Susan Corbett or Steel, or in the event of their death leaving lawful issue, their said issue shall be entitled to an equal share alongst with the issue of my other children, and that *per stirpes* and not *in capita* of the share of the residue of my said estates of which such child or children so deceasing without issue had or would have had the interest; and my said trustees are in that event directed so to divide, pay, or convey the same accordingly."

The testator was survived by his five children.

One of the three liferenters, Margaret (Mrs Waddell) died on 18th October 1877 without issue. Her brother John predeceased her, leaving one son, William Curr Corbett, who died in 1885. Her sister Susan (Mrs Steel) survived till 1898 and left issue.

Of the other two liferenters, Robert died on 7th November 1888, leaving issue, and Agnes (Mrs Gilroy) survived till 6th September 1899, and left issue.

At the date of Mrs Milroy's death there survived—

1. Children of Robert.
2. Children of Mrs Gilroy.
3. Children of Mrs Steel.

Each of these *stirpes* claimed one-third of Mrs Waddell's share of residue. On the other hand, the trustees of William Curr Corbett, John's son, claimed one-fourth of Mrs Waddell's share, on the ground that it had either vested in his father at the testator's death, or in himself at Mrs Waddell's death.

A special case, in which the foregoing facts were stated, was presented by Mr Thomas Corbett's trustees, first parties, William Curr Corbett's trustees, second parties, and the surviving children of Robert Corbett, Mrs Susan Steel, and Mrs Agnes Gilroy, third parties.

The following contentions were presented by the second and third parties:—"On behalf of the second parties it is contended that, in consequence of the death of Mrs Waddell without issue, they are entitled to one-fourth of the share destined to her and her issue, on the ground that an interest in this share of residue vested *a morte testatoris* in John Campbell Corbett, subject to defeasance only in the event of Mrs Waddell leaving issue, and that William Curr Corbett succeeded to his father's interest upon his father's death in 1864; or otherwise, that as regards this share of residue, the substitution of the issue of the said John Campbell Corbett suspended vesting until his death in 1864, and that upon that event the said one-fourth of said share vested in the said William Curr Corbett, subject only to defeasance in the event of Mrs Waddell leaving issue; and that, in

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either view, upon Mrs Waddell's death without issue in 1877, the vesting of this share in either John Campbell Corbett or William Curr Corbett became absolute; or otherwise, that on the death of Mrs Waddell without issue a right to said one-fourth share vested in William Curr Corbett. They further contend, in the event of its being held that vesting was suspended until the death of Mrs Gilroy, that said one-fourth share fell into intestacy, and is divisible among the testator's heirs at the date of his death or their representatives.

"It is contended by the third parties, that the institution being in favour of a class of unascertained children the case is one to which the doctrine of vesting subject to defeasance does not apply; that the vesting of the share in question was suspended until the death of Mrs Agnes Corbett or Gilroy, the last surviving child of the truster, and the longest liver of the three liferenters; and that the surviving children of Robert Corbett, Mrs Susan Corbett or Steel, and Mrs Agnes Corbett or Gilroy, are now entitled to the said share of residue *per stirpes*."

The following questions of law were submitted for the opinion and judgment of the Court:—"(1) Did one-fourth of the share of residue destined to Mrs Waddell and her issue vest (*a*) *a morte testatoris* in John Campbell Corbett, subject to defeasance in the event of Mrs Waddell leaving issue? or (*b*) in William Curr Corbett as at the date of the death of John Campbell Corbett, subject to defeasance as aforesaid? or (*c*) in the said William Curr Corbett as at the date of the death of Mrs Waddell without issue? Or (2) Was vesting of said share suspended until the death of Mrs Gilroy in 1899? (3) If vesting of said share was suspended until the death of Mrs Gilroy, are the third parties entitled thereto *per stirpes*? Or (4) Is there intestacy with regard to the said share?"

Argued for the second parties;—The fee vested in William Curr Corbett on Margaret's death without issue. The only contingency requiring to be purified was the failure of issue of Margaret. That being purified by her death without issue, there was nothing left to prevent immediate vesting, though distribution of the estate was postponed until the death of the last liferenter. The principle of the case of *Bryson's Trustees* v. *Clark*[1] did not apply. A gift could well be made in a direction to pay.[2] If there was no vesting in William Curr Corbett, then the rule of *Paxton's Trustees* v. *Cowie*[3] fell to be applied, and the share in question fell into intestacy, the direction being that each *stirps* was to get an equal share, and there being no provision for accretion..

No argument was given by the second parties in support of the view that vesting took place subject to defeasance.

Argued for the third parties;—There was no vesting until the death of the last surviving liferentrix. There was no gift whatever except that contained in the direction to the trustees to realise and divide on the death of the longest liver of the liferentrices. The issue to take therefore must survive the date of distribution. Further, the issue were to take *per stirpes*. A *stirps* to take must survive. Both John and his son William died before Mrs Gilroy, and accordingly

[1] Bryson's Trustees v. Clark, Nov. 26, 1880, 8 R. 142.
[2] Thompson's Trustees v. Jamieson, Jan. 26, 1900, 2 F. 470, Lord Kincairney at 487, and Lord Stormonth-Darling at 493.
[3] Paxton's Trustees v. Cowie, July 16, 1886, 13 R. 1191.

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that *stirps* was extinct. The right of the other issue to take was not, on a sound construction of the clause, in any way conditional on there being issue of John alive to take also.

At advising,—

LORD ADAM.—The first question of law which we are asked is whether one-fourth share of the residue destined to Mrs Waddell and her issue vested (*a*) *a morte testatoris* in John Campbell Corbett, subject to defeasance in the event of Mrs Waddell leaving issue; or (*b*) in William Curr Corbett at the date of the death of John Campbell Corbett, subject to defeasance as aforesaid; or (*c*) in the said William Curr Corbett as at the date of the death of Mrs Waddell without issue. The second is whether vesting of said share was suspended until the death of Mrs Gilroy in 1899.

I do not think that the principle of vesting subject to defeasance has any application in this case.

The persons to whom the fee of the share liferented by Mrs Waddell is destined are, in the first place, John Campbell Corbett and Mrs Steel, and failing them, leaving issue, to their issue. There was thus a destination over in both cases, and it could not be known until Mrs Steel's death whether or not she would leave issue entitled to share, and she survived until 1898. But these persons were only to take along with the issue of the truster's other children, Robert and Mrs Gilroy, and, as in Mrs Steel's case, it could not be known until their deaths whether Robert or Mrs Gilroy would leave issue to take. It appears therefore to be clear that the persons to whom the fee of Mrs Waddell's share was destined could not be ascertained until the death of all the liferenters. In this case, as we have seen, the fee was given partly to persons known and existing at the time of the truster's death, and partly to certain classes called by description. Now, the law as regards vesting subject to defeasance as laid down in the case of *Steel's Trustees*,[1] is that where the fee is given to persons known and existing at the time, it must, in order to vesting, be given absolutely without further destination, which is not the case here, because there was a destination over to their issue; and where the destination is to a class called by description it depends upon whether the persons who constitute the class are ascertained at the date of the truster's death, or whether he or they cannot be known or ascertained till the death of the liferenter, or the occurrence of some other event. If the person or persons are not known, or the individuals who are to constitute the class are not ascertained at that date, the fee will not vest until the occurrence of the event which will determine who are the persons called, or the individuals composing the class are ascertained. That being the law, there could be no vesting of the fee of Mrs Waddell's share until the death of Mrs Gilroy, when only the persons to whom the fee was destined could be ascertained. But if the share of the residue destined to Mrs Waddell and her issue did not vest in the beneficiaries until the death of Mrs Gilroy, it is clear that a right to one-fourth share of it did not vest at any earlier period. I am therefore of opinion that the first question should be answered in the negative and the second in the affirmative.

[1] Steel's Trustees v. Steel, Dec. 12, 1888, 16 R. 204.

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The next question is whether the third parties are entitled to the share in question *per stirpes*, or whether there is intestacy with regard to the said share.

In my opinion the third parties are entitled to it. The direction of the truster is that John Campbell Corbett and Mrs Steel, or failing them, their issue, are to share with the issue of his other children. That appears to me to be very clearly an implied destination of the share to the issue of the other children, and that their right to a share is not contingent on there being issue both of John Campbell Corbett and Mrs Steel to share it with them. In fact Mrs Steel has left issue to share it with them.

I therefore think that the third question should be answered in the affirmative and the fourth in the negative.

The LORD PRESIDENT, LORD M'LAREN, and LORD KINNEAR concurred.

THE COURT answered the first question in the negative, the second in the affirmative, the third in the affirmative, and the fourth in the negative.

GRAHAM, JOHNSTON, & FLEMING, W.S.—SMITH & WATT, W.S.—Agents.

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THE REVEREND ROBERT M'MILLAN AND ANOTHER (Wilson's Trustees), First Parties.—*Craigie.*
GAVIN WILSON AND OTHERS, Second Parties.—*Craigie.*
GEORGE WILSON, one of the Second Parties.—*A. M. Anderson.*
HELEN SMALL KEILLER OR WILSON (Wilson's Executrix) AND OTHERS, Third Parties.—*M'Millan.*

Succession—Vesting—Survivorship—Gift conditional on survivance of liferenter.—A testator directed his trustees to "hold and invest" the residue of his estate "for behoof of the whole of my children equally among them in liferent, for their respective liferent alimentary uses allenarly, . . . and for behoof of the issue of my said children respectively, *per stirpes*, equally among them in fee, subject to the contingent exception and declaration after mentioned with regard to the issue of my sons William Wilson and James Wilson; and failing any of my said children by decease without leaving issue who may attain to the age of majority or be married, then to the survivors or survivor of my said children and the issue of their bodies respectively, *per stirpes*, who may attain to majority or be married, in liferent and fee respectively as aforesaid, subject to the said contingent exception and declaration after mentioned with regard to the issue of my said sons William Wilson and James Wilson . . . declaring always, and providing by way of exception, that in the event of the issue of my son William Wilson who may attain to the age of majority or be married exceeding in number the issue of my son James Wilson who may attain to the age of majority or be married, the shares of said residue falling to the issue of my said two sons . . . shall not be divided *per stirpes*, but shall be slumped together, and then divided *per capita* equally among the issue of my son William and the said issue of my son James."

William Wilson was survived by three children who attained majority, and was predeceased by two children, who also attained majority. James was survived by an only son, who attained majority.

The representatives of William's children who had predeceased him after attaining majority contended that as their parent had not died without leaving issue attaining majority, a share of the gift had vested in each of his five children, and founded upon *Hickling's Trustees*, 1 F. (H. L.) 7.

Held that the gift to issue being contingent, not only on the parent's

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leaving issue, but on such issue attaining majority or being married, the right did not vest in the issue as a class, but that the contingency affected each individual, so as to make it a condition of his taking (1) that he should survive the parent, and (2) that he should attain majority or be married.

Succession—Residue—Accumulations of income before fee has vested.—A testator gave a liferent of an equal share of the residue of his estate to each of his children and the fee to the issue of such child, vesting being postponed till the issue should attain majority or be married.

The trustees were empowered, in the event of a liferenter dying leaving issue, to apply "the annual proceeds of their presumptive shares," or such part thereof as they might think proper, towards the maintenance and education of such issue till they should attain majority or be married.

One of the testator's children died survived by a child, for whose maintenance and education the trustees applied part of the income of the share which the parent would have liferented. They accumulated the remainder of the income until the child's majority.

Held that the income so accumulated did not accrue to the child's share, but fell into residue.

1st Division.

GAVIN WILSON, sometime quarrymaster, Cambuslang, died in 1885, leaving a trust-disposition and settlement, by which he conveyed his whole means and estate to the trustees therein named. The fourth purpose of the trust-disposition and settlement was in the following terms:—"And in the fourth place, with regard to the residue and remainder of my means and estate, my said trustees shall hold and invest the same in their own names for behoof of the whole of my children equally among them in liferent for their respective liferent alimentary uses allenarly, . . . and for behoof of the issue of my said children respectively, *per stirpes*, equally among them in fee, subject to the contingent exception and declaration after mentioned with regard to the issue of my sons William Wilson and James Wilson; and failing any of my said children by decease without leaving issue who may attain to the age of majority or be married, then to the survivors or survivor of my said children and the issue of their bodies respectively, *per stirpes*, who may attain to majority or be married, in liferent and fee respectively as aforesaid, subject to the said contingent exception and declaration after mentioned with regard to the issue of my said sons William Wilson and James Wilson, . . . declaring always, and providing by way of exception, that in the event of the issue of my son William Wilson who may attain to the age of majority or be married exceeding in number the issue of my son James Wilson who may attain to the age of majority or be married, the shares of said residue falling to the issue of my said two sons, while they shall equal in amount when taken together the shares falling to the issue as aforesaid of any other two of my children, shall not be divided *per stirpes*, but shall be slumped together and then divided *per capita* equally among the said issue of my son William and the said issue of my son James; declaring also that in the event of any of my children dying leaving issue, it shall be in the power of my trustees until the arrival at majority or marriage of such issue, or any of them, to apply the annual proceeds of their presumptive shares, or such part thereof as they may think proper, towards the education, maintenance, and upbringing of such children, or any of them."

The testator's son William Wilson died in 1900, survived by three children who had attained majority, and by one who at the date of his father's death was a minor. He was predeceased by two children, who had also attained majority.

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James Wilson was survived by an only son, George Wilson, who attained majority.

On the death of William (who survived the testator and his brother James), a special case was raised by the children of William and James, in which one of the questions submitted to the Court was—"(1) Did a share of the fee or capital destined in liferent by said trust-disposition and settlement to the truster's two sons, William and James, vest in a grandchild who attained majority or was married, although such grandchild predeceased its parent?"

The surviving children of William and James (second parties) maintained that this question should be answered in the negative, on the ground that the gift to issue was by the terms of the trust-disposition limited to such of the issue as should survive their parent, as well as attain majority or be married.

The representatives of the children of William predeceasing him after attaining majority (third parties) maintained that the question should be answered in the affirmative. They contended that vesting took place in such of the issue of William and James as survived the truster and attained majority or were married, whether they did or did not survive their parent.

A further question was also raised depending on the following circumstances:—After the death of James, which occurred while his son George was in minority, the trustees had expended, under the powers in the trust-deed, certain sums out of the income which would have belonged to James had he survived, on the maintenance and education of his son George. George Wilson claimed the surplus of this income as having accrued to his share, and as payable to him on majority. The remaining parties maintained that it fell into residue.

The question on this part of the case was as follows:—"(5) Does the accumulated interest or income on the share destined to James Wilson in liferent fall to George Wilson, his son; or does said interest or income fall to be divided as part of the capital of the fee?"

Argued for the second parties;—The first question was whether the two children of William who predeceased him after attaining majority took a vested interest in the fee of the residue. The second parties maintained that this question should be answered in the negative. There were two conditions postponing vesting—the death of the liferenter, and the attainment of majority or marriage—until the death of the liferenter it could not be ascertained whether he would leave issue who should attain majority or be married, and there could be no vesting till that contingency had been determined. In *Hickling's Trustees* v. *Garland's Trustees*[1] the contingency postponing vesting was that the testator's daughters should leave issue, and it was held that the whole issue were entitled to participate if one should survive its parent. But here the additional condition that the issue should attain majority or be married shewed that the condition was personal, and that the benefit was limited to issue actually surviving.[2]

Argued for the third parties;—It was common ground that vesting was postponed till majority or marriage. This followed from the special declaration and exception relating to the issue of the testator's

[1] Aug. 1, 1898, 1 F. (H. L.) 7; Selby v. Whittaker, 1877, L. R., 6 Chanc. Div. 239.

[2] 1 F. (H. L.), *per* Lord Shand, p. 14.

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sons William and James. The case of *Hickling's Trustees*[1] was an authority in point that a contingent gift to issue on condition of a liferenter leaving issue became absolute if one child survived the liferenter, and it made no difference in principle that the condition was that the liferenter should be survived by issue attaining majority. But here the contingency postponing vesting was the contingency of the liferenter dying without leaving issue who should attain majority. This event had not happened either in the case of William or James, and the destination to their respective issue depended on the other provisions of the fourth purpose. In the special declaration and exception in regard to the issue of these two sons the distribution was to be *per capita* among the issue "who may attain to the age of majority or be married." Nothing was said about the issue surviving the parent, and if this was meant to be a condition of issue taking any share of the fee, it could hardly be doubted that it would have been made a condition of the *per capita* distribution among the two families.

As regards the fifth question, the undernoted authorities were cited.[2]

At advising,—

LORD M'LAREN.—This case relates to the vesting of the residue of the estate of Mr Gavin Wilson, who died on 20th February 1885. By the fourth purpose of his trust-settlement he directed his trustees to hold the residue and remainder of his estate for behoof of his children, "equally among them in liferent for their respective liferent alimentary uses allenarly," subject to a declaration with which we are not concerned, "and for behoof of the issue of my said children respectively, *per stirpes*, equally among them in fee," subject to a contingent exception and declaration which will presently be considered. It may be convenient to consider the effect of each part of the destination separately; and I may observe before proceeding further, that the directions which I have quoted would, *prima facie*, confer a life interest in common on the children who survived the testator and a right of fee on their issue, so that each surviving child of the testator would take an equal share in liferent without survivorship, and the issue of each child would take the fee of the share liferented by the parent.

The trust-settlement proceeds to say, "failing any of my said children by decease without leaving issue who may attain to the age of majority or be married, then to the survivors or survivor of my said children, and the issue of their bodies respectively, *per stirpes*, who may attain to majority or be married, in liferent and fee respectively as aforesaid," subject to the said contingent exception and declaration.

The hypothesis of this provision is that one or more of the testator's children may possibly die without leaving issue, in which event the provision of survivorship is to take effect. The plain meaning and effect of the provision is that, until the death of any one or more of the testator's children, or it may be until the number of the children is reduced by death to one, the destination of the fee is undetermined, because if the child dies

[1] 1 F. (H. L.) 7.

[2] *For George Wilson.*—Grahams v. Grahams' Trustees, Feb. 12, 1863, 1 Macph. 392, 35 Scot. Jur. 240; Ferguson v. Smith, Dec. 4, 1867, 6 Macph. 83, 40 Scot. Jur. 50. *For the remaining parties.*—Playfair's Trustee v. Hunter, July 18, 1890, 17 R. 1241.

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leaving issue the capital of the parent's share shall go to the issue, but if the child dies without leaving issue, the share will devolve in liferent and fee to the surviving children and the issue of their bodies who may attain to majority or be married.

In a recent case on appeal from this Court, an observation was made with which I entirely sympathise, to the effect that in such cases we ought first of all to endeavour to ascertain the meaning of the testator, from the words he has used, rules of construction being of secondary importance. In the present case the rule that words of survivorship are in general to be taken to refer to the period of payment would lead to the same conclusion as I have derived from the language of the will itself.

The condition of a right liferented by a parent passing to his issue is that the parent shall leave issue who shall attain to the age of majority or be married. If the condition had been only that the parent should leave issue, we might have held, on the authority of the case of *Hickling's Trustees*[1] in the House of Lords, that the condition was purified by the survival of any one member of the family, and that the benefit of the institution accrued to all the issue, including the representatives of those who had predeceased the parent. But the proper condition of the attainment of the age of majority or state of marriage appears to me to be a condition personal to each residuary legatee, and to imply that those legatees only who fulfil all the requirements of the complex condition are to participate.

The alternative construction involves the extraordinary assumption that the right of the representatives of a deceased grandchild of the testator is to depend on the event of another grandchild who survives attaining majority or being married in minority. This would be going a step further than the case of *Hickling's Trustees*,[1] and perhaps I may be allowed to say that the meaning attributed to the will in *Hickling's* case,[1] although arbitrary, was not unreasonable, while the construction which I reject in this case is I think not reasonable, and therefore not a probable construction.

We have also to consider the effect of what the testator calls the "contingent declaration and exception" applicable to the issue of his two sons William and James. This is to the effect that, in the event of the issue of William who may become major or be married exceeding in number the issue of James who may become major or be married, the shares falling to these two families are to be massed together and be divided *per capita*. Now, if it had been intended that the representatives of issue who might predecease their parent or die in minority should participate in the *per capita* division, it is in the last degree unlikely that this division *per capita* should have been made contingent on the majority or marriage of other members of the family. The number of participants in the division according to the construction which I reject would be just the same whether one or more than one of the family attained majority or were married, and the condition would have no practical effect except in the case of all the family dying in minority and unmarried, in which case the share was already given over to the issue of surviving children. But if we read the will in the sense that those only who attain majority or are married are to participate

[1] 1 F. (H. L.) 7.

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in the division, then the condition becomes intelligible, having for its object, no doubt, the simplification of the division of the estate and the equalisation of interests amongst the issue of William and James.

If the suggested construction is well founded, it follows that the first question should be answered in the negative and the third question in the affirmative. The second question does not arise, and the fourth question, which is consequential on the third, will be answered in the affirmative. In regard to the fourth question, I need only say that it was admitted by counsel, and is perfectly clear, that Jamesina, the daughter of James Wilson *secundus*, a great-granddaughter of the testator, falls within the meaning of the word "issue," and is entitled to a share in the division of the residue. The fifth question arises in this way. The testator's son James predeceased him, leaving one child, the claimant George. The trustees, acting within their powers, applied part of the income which would have come to James if he had survived towards the maintenance of his son George. After crediting the trust account with this payment there remains a surplus, derived from the accumulation of income, amounting to about £200. The question is, whether this money belongs to George, or is to be carried to account as residue. In my opinion the money is residue, first, because the testator in giving the trustees the power to apply income towards the maintenance of minor children describes it as the "annual proceeds of their presumptive shares"; and secondly, because, as I hold, no right vested in any of the testator's issue until majority. The income, so far as not required for the purposes of the power, is not specially appropriated, and is therefore residue. I think that the fifth question should be answered accordingly.

The LORD PRESIDENT, LORD ADAM, and LORD KINNEAR concurred.

THE COURT answered the first question in the negative, and found in answer to the fifth question that the accumulated income of the share destined to James Wilson in liferent fell into residue.

WILLIAM BALFOUR, S.S.C.—GILL & PRINGLE, S.S.C.—Agents.

No. 152. June 19, 1901. Sutherland v. W. M. Low & Co., Limited.

BENJAMIN SUTHERLAND, Pursuer (Respondent).—*Campbell, K.C.*—*Constable.*

W. M. LOW & COMPANY, LIMITED, Defenders (Reclaimers).—*Salvesen, K.C.*—*M'Lennan.*

Cautioner—Reduction—Facility and circumvention—Liability of creditor for misrepresentations by principal debtor—Agent and Principal.—In an action for reduction of a cautionary obligation in a bond granted by Thomson as principal debtor and by the pursuer as cautioner, in favour of Low, the following facts were proved:—Thomson, who was insolvent, being pressed by Low, who was one of his creditors, to obtain security for his debt, asked the pursuer, who was his brother-in-law, to become cautioner in a bond for the amount of the debt. The pursuer was a retired butler, seventy-eight years of age, and was infirm and facile. The pursuer refused to become cautioner without consulting his law-agent. Thomson then returned to Low and informed him of the pursuer's refusal. Low told Thomson to tell the pursuer that it was unnecessary to consult a law-agent, and that he would never be required to pay anything if he signed. Thomson told this to the pursuer, who then signed the bond without consulting his

law-agent. The fact that Thomson was insolvent was not disclosed to the pursuer. The pursuer was charged to pay the sum in the bond. No. 152.

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Held (*aff.* judgment of Lord Kincairney) that the cautionary obligation fell to be reduced.

Opinions that the bond would have been reducible even if Low had not been a party to the misrepresentation, as he had suffered no prejudice by the granting of the bond.

2D DIVISION. Lord Kincairney.

IN May 1900 Benjamin Sutherland, retired butler, 32 William Street, Edinburgh, brought an action against W. M. Low & Company, Limited, Burgh Saw Mills, 157 Great Junction Street, Leith, and also against Robert Thomson, 28 Loughborough Road, Kirkcaldy, and Robert Hunter, trustee under a trust-disposition for behoof of creditors granted by Robert Thomson. The summons concluded for reduction of a bond for £303, 15s. 1d., "at least in so far as the same affects the pursuer," which bond bore to be granted by Robert Thomson as principal debtor and by the pursuer as cautioner, in favour of W. M. Low & Company.

The pursuer averred (Cond. 1) that he was a brother-in-law of the defender Thomson, and that the managing directors of the defenders W. M. Low & Company, Limited, were Messrs William Maclachlan Low and John Low. (Cond. 2) "The pursuer is seventy-eight years of age. . . . He is quite unaccustomed to the transaction of business, and when any matter of business required to be done he has been in the habit of going for advice and assistance to Mr Patrick Blair, W.S. Though he is quite able to give directions for the management of his affairs when these are clearly explained to him, he is, and was at the date of the transaction after mentioned, weak and facile, apt to take representations and advice on trust from those upon whom he relies, and thus easily imposed upon." (Cond. 3) "In March 1899 the defender Robert Thomson was being pressed by certain creditors; . . . he consulted Mr John Low, of the defenders' company of W. M. Low & Company, Limited. . . . He was then insolvent. . . . In full knowledge of these facts Mr John Low, whose company were also creditors of Thomson, . . . took measures to obtain a preference for the account due to his company. . . . Thomson mentioned the name of the pursuer as a possible cautioner. Mr John Low thereupon instructed a bond to be prepared in which Thomson as principal debtor, and the pursuer as cautioner, purported to bind themselves to repay Mr Low's company . . . Mr Low then sent Thomson to Edinburgh with instructions to get the pursuer to become cautioner. . . ." (Cond. 4) "Thomson accordingly called on the pursuer on 21st March 1899, and asked him to become security; . . . but the pursuer stated that he could not do so without consulting his agent, Mr Patrick Blair. Thomson thereupon left the house, but returned again later, saying that he had seen Mr John Low, who had advised that it was unnecessary to get Mr Blair's advice, as the pursuer would never be called upon to pay the money; and by these and other misrepresentations, and by the use of persuasion and influence which the pursuer was not in a condition to resist, he at length induced the pursuer to sign the deed described in the summons." (Cond. 5) "The said signature was obtained by fraud or circumvention on the part of Thomson. He was well aware of the pursuer's condition, and unwarrantably took advantage of the reliance which was placed on him by the pursuer to impetrate the deed from him. He did not read over the deed to the pursuer, and he deliberately

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dissuaded him from taking independent advice about it. He concealed from the pursuer the state of his affairs, which, in the circumstances, it was his duty to disclose, and which made it practically certain that the pursuer would be called on to pay the bond . . . He also stated that the pursuer would never be called on to pay the money, and thereby induced the pursuer to believe that he was incurring no liability in signing the deed, whereas liability was, in the circumstances, inevitable. The pursuer signed the deed under essential error as to its nature and effect, induced by the misrepresentation and concealment above set forth . . ." (Cond. 6) "In procuring the pursuer's signature to the said deed by the means above described, Thomson acted upon the instructions of Mr Low, who was fully aware of the circumstances. After his first visit to the pursuer, Thomson went straight to Mr Low and reported what had taken place, and he was sent back by Mr Low with the deed in his hand for the express purpose of circumventing the pursuer, and obtaining his signature in spite of his scruples. Mr Low told Thomson . . . to tell the pursuer that it was not necessary to consult an agent, and that he (the pursuer) would never be called on to pay the money. These representations were untrue and misleading to the knowledge of Mr Low, and were fraudulent. They were made for the purpose of being passed on to the pursuer and misleading him, and they did mislead him. Assuming that Mr Low did not directly deceive the pursuer through the agency of Thomson, the pursuer avers that the said representations which Thomson made to him were untrue to the knowledge of Thomson, and were false and fraudulent, and that Mr Low had reason to suspect, and knew, or ought to have known, that Thomson had procured the pursuer's signature to the said bond of caution by means of fraudulent misrepresentation and concealment and by means of circumvention which the pursuer was not in a position to resist owing to his weakness and facility. Mr Low thereby acquired from the pursuer a gratuitous benefit." The pursuer then averred that he had been charged by the defenders W. M. Low & Company to pay the sum in the bond.

The pursuer pleaded, *inter alia*;—(1) The pretended bond described in the summons should be reduced, in any case so far as it affects the pursuer, in respect . . . (*b*) That it was fraudulently impetrated from the pursuer by the defender Robert Thomson. (*c*) That the pursuer, when he executed the deed, was weak and facile, and easily imposed on, and that the said Robert Thomson, taking advantage thereof, did by fraud or circumvention, procure the pursuer's signature thereto to his lesion. (2) In respect that the defenders W. M. Low & Company, Limited, instructed the said Robert Thomson to procure the pursuer's signature to the said pretended bond by the misrepresentations, and in the circumstances libelled, or otherwise in respect that they had reason to suspect, and knew, or ought to have known, that the said Robert Thomson had procured the pursuer's signature by the misrepresentations and in the circumstances libelled, the pursuer is entitled to decree of reduction as concluded for.

The defenders W. M. Low & Company alone lodged defences. They denied the material averments of the pursuer.

A proof was allowed. The import of the evidence sufficiently appears from the opinion of the Lord Ordinary.

On 22d January 1901 the Lord Ordinary (Kincairney) pronounced this interlocutor:—"Finds in fact (1) that the bond libelled was duly

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executed; (2) that when it was granted the pursuer was facile, and that the defender Robert Thomson, by fraud or circumvention, and by arrangement with the defenders W. M. Low & Company, Limited, procured his signature thereto; (3) that he did so on the instructions of the defenders the said W. M. Low & Company, Limited; (4) that these defenders are not entitled to retain the benefit of said bond procured as aforesaid: Therefore sustains plea one, subdivisions (*b*) and (*c*), and plea two for the pursuer; . . . Reduces, decerns, and declares in terms of the conclusion of the summons so far as the bond mentioned in said conclusion affects the pursuer, but subject always to the obligation by the pursuer contained in the minute for the pursuer, No. 111 of process: [See last paragraph of the Lord Ordinary's Note, p. 979.] Finds the defenders W. M. Low & Company, Limited, liable in expenses," &c.*

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* "OPINION.—. . . There is not much important conflict of evidence, and the facts are brought out sufficiently clearly. The circumstances under which the bond was granted are these:—It appears that in or about March 1899 Thomson owed Low & Co. above £300, and it also appears that Thomson had then several other pressing creditors, and that he was hopelessly insolvent, so much so that he granted a trust-deed for behoof of his creditors on 11th April 1899. He was, however, owner of a property in the burgh of Dysart, which was burdened by a bond for £500. It may, however, have been worth more than that, and if conveyed to Low & Co. it might have afforded security to some extent for Thomson's debt. But then it seems clear that if Low & Co. had taken a disposition of it in security it would almost certainly have been reduced as a gratuitous deed in favour of prior creditors, and therefore as a fraud on the other creditors of Thomson.

"Low & Co., as Mr John Low admitted in his evidence, were aware of the embarrassed state of Thomson's affairs, and they were confessedly desirous of obtaining security for their debt, even although it might have been a preference. But this simple mode of obtaining such a security and preference could not be adopted with safety. But Thomson's sister was married to a retired butler, Benjamin Sutherland, who apparently had money enough to be able to give sufficient security for the debt due to Low & Co., and it was arranged between Low & Co. and Thomson—it is not very clear which suggested the idea—that Sutherland should be asked to become security for the debt due by Thomson, and that Thomson should dispone to him his property in Dysart. This plan was carried out; Sutherland granted the bond now sought to be reduced, bearing date 21st March 1899, and Thomson by an *ex facie* absolute disposition, dated 20th March 1899, disponed the subjects in Dysart to Sutherland. Sutherland had not asked for this deed, and did not understand why it was granted. More motives than one might be imagined, but that is a question which it is not necessary to follow. The consequence of these transactions so long as unchallenged was this, that the defenders Low & Co. obtained the security of Sutherland for Thomson's debt, and Sutherland in exchange received Thomson's Dysart property for what it was worth, and Thomson's other creditors are deprived of that property. The whole benefit accrued to Low & Co., and the loss to Thomson's other creditors, and also to Sutherland if the value of the Dysart property burdened by the bond for £500 should prove to be less than Thomson's debt to Low & Co. This, however, is not an action of reduction by Thomson's trustee, and he has not as yet taken any step to recover the Dysart property. I do not suggest that he could have done so, seeing that it might be maintained that the disposition to Sutherland was an onerous deed." (His Lordship then adverted to a ground of reduction not now reported.)

"On the other grounds of reduction, however, I have come to a different

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LORD YOUNG.—I have given my best attention to this case, which is certainly peculiar, but depends, in my opinion, on principles which are well established.

I quite assent to the general proposition that a creditor who calls upon his debtor to find security for his debt is not at all responsible for any misrepresentations which his debtor may make to anyone to whom he goes for the purpose of getting him to become security for the debt. But the circumstances of a particular case may be such, and the conduct of the creditor in a particular case may be such, as to make him responsible if the security has been obtained in an objectionable manner; and the question here is simply whether, on the facts disclosed by a very voluminous proof and by the documents produced, the creditor, that is Low & Co.—I shall speak of them hereafter as Low—so acted as to be responsible for the manner in which this security was obtained, and whether it was obtained in such a

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conclusion, and think that the pursuer is entitled to prevail, although the point is narrow and not free from difficulty. It was no doubt natural and legitimate that Low & Co., who have been represented in this case by Mr John Low, should endeavour to get security for the debt due to them by Thomson; and no objection can be taken to Mr Low's request or demand that Thomson should procure such security, and that he should procure the security of his brother-in-law, if Low did not know—as he says he did not—of his great age and frail condition. But when the idea occurred to Low—it was to him and not to Thomson that the idea occurred—that Sutherland might be protected really or apparently by a disposition of Thomson's Dysart property, he came perilously near to a fraud on Thomson's other creditors. That, however, is not the question here raised, which is about fraud said to have been practised on Sutherland, not on Thomson's creditors.

"Now it is clear that Mr John Low never saw Sutherland, and any influence which he may have exerted to induce Sutherland to sign the bond must have been exerted through the instrumentality of Thomson. The first question, therefore, is whether Thomson induced Sutherland to sign the bond, and how he did so, and the second is whether Low and W. M. Low & Co., Ltd., are implicated in or answerable for the acts or representations of Thomson.

"But, in the first place, it is of course necessary to advert to the mental and bodily condition of Sutherland. I unfortunately did not see him, because he was not able to come to the Court, and it was necessary to take his evidence on commission. I do not think it proved that he was quite incapable of understanding the deed, or that he had not some idea about its nature. Indeed, the pursuer does not make that case on record, and does

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[1] *Cited by Defenders and Reclaimers*:—Railton v. Matthews, June 14, 1844, 3 Bell's App. 56; Hamilton v. Watson, March 11, 1845, 4 Bell's App. 67; Young v. Clydesdale Bank, Limited, Dec. 6, 1889, 17 R. 231; Wallace's Factor v. M'Kissock, Feb. 23, 1898, 25 R. 642, *per* Lord M'Laren at p. 652; Hockey v. Clydesdale Bank, Limited, Nov. 25, 1898, 1 F. 119, *per* Lord Trayner at p. 125.

By Pursuer and Respondent:—Owen & Gutch v. Homan, 1853, 4 H. L. Cases, 997, *per* Lord Cranworth at p. 1033; Davies v. London and Provincial Marine Insurance Company, 1878, L. R., 8 Ch. Div. 469, *per* Mr Justice Fry at p. 475; Cydesdale Banking Company v. Paul, March 8, 1877, 4 R. 626; Wardlaw v. Mackenzie, June 10, 1859, 21 D. 940, 31 Scot. Jur. 315.

manner and under such circumstances as to enable the surety to be relieved —to be "restored against"—what he ought never to have been required to do.

The circumstances of this case, although as I have said peculiar, are capable of being simply stated. The defender Low had a customer called Thomson who had become indebted to Low in a sum rather over £300, and Low was getting anxious about the debt, and accordingly made such inquiry as was necessary to inform himself beyond what he already presumably knew as to the circumstances of his debtor Thomson. Without going into the evidence I think the result is to shew that Low knew that Thomson was absolutely insolvent. Thomson had a small property worth some £500, but his debts were such that if his estates were wound up he would only pay a small dividend. Low was therefore anxious to have the payment of his debt secured as well as he could. He ascertained that Thomson had a brother-in-law—the pursuer—a retired butler, who was in a position, as his debtor Thomson quite truly informed him, to be good

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not plead that the deed was not Sutherland's deed. But he avers and pleads that he was feeble and easily imposed on, and that, in my opinion, has been proved. He was seventy-eight years old, and had apparently fallen into a condition of senility. Thomson was his brother-in-law, Mrs Thomson his sister, and Jane A. Thomson his niece and housekeeper. On this old man, Thomson, by arrangement with Low, called on 21st March, and he asked him to become security for him (Thomson). Thomson says that the sum he mentioned was £200. Considering the connection between them, it may be that Thomson thought that his request was not extravagantly unreasonable, and was one with which he might fairly hope that Sutherland would comply. But there is no doubt that on this occasion Sutherland did not consent, but declined to comply without consulting Mr Patrick Blair, W.S. Sutherland had been for many years in the service of Mr Blair and his father, and he was accustomed to consult Mr Blair whenever any business had to be done, and there could be nothing more natural and reasonable than that he should desire to consult him when asked to do so serious a thing as sign a bond of caution. On getting this answer Thomson did not then press his request further, but called on Low & Company at their office in Leith, where he saw Mr John Low, and informed him that Sutherland would not sign the bond without Mr Blair's advice. One might have expected that Mr Low would have recognised the reasonableness and propriety of Sutherland consulting Mr Blair on the occasion, and might have expressed his approval of that course, and so through Thomson's intervention have encouraged Sutherland to follow it. That would have been an honest course to take, although I do not say that Low was under a legal obligation to take it. But it is clear that Mr Low did not do that. He told Thomson that Sutherland would incur no danger, and that if the matter were fully explained to him there would be no difficulty. Mr Low's evidence does not strike me as perfectly frank, but I cannot doubt that he at least discouraged the idea of consulting Mr Blair. It is impossible to doubt that he felt that if Mr Blair were consulted there was little chance of the bond being executed, and that he sent Thomson back to Sutherland in order to persuade him that he incurred little or no risk in signing the bond, and that he might do it without consulting Mr Blair.

"After this interview with Mr Low Thomson returned to Sutherland's house, having with him the bond prepared and ready for execution. Thomson depones that he then repeated to Sutherland what Low had said to him, namely, that there was no necessity for Mr Blair knowing anything about it, and that all that was wanted was his name. Mrs Thomson and Jane

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security for a debt of £300. I think we must take it that Thomson also informed Low that Sutherland the retired butler was old and infirm, and—without using the word "facile"—that he was in such a condition that no man acting properly would go to him and ask him to put his name to a deed without the aid of a man of business.

Now, Low under these circumstances prefers to have this old butler's security to having a conveyance of his debtor's property, and one can see the reason for that, irrespective of a good moveable security being better than a conveyance of house property. Accordingly Thomson goes and tries, with the result that he comes back and communicates to Low that the pursuer would not put his name to a deed without consulting a man of business. I think Low had intelligence enough to know that if the pursuer went to a man of business the man of business would not allow the pursuer to become security for £300. But what does Low do? He says—"Oh, go back and urge him to sign the deed without consulting a man of business. Tell him he is in perfect safety; that a man of business is of no

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Thomson, who were present, substantially corroborate that evidence, and although I agree that the evidence of the Thomsons is not above suspicion, it is consistent with Low's evidence, or nearly so, and I think I may hold that Thomson is substantially correct in his account of what he said to Sutherland. Sutherland then signed the bond without consulting Mr Blair, persuaded to do so—as may be fairly presumed—by what Thomson had said. . . .

"A creditor or his debtor may be under no absolute obligation to make a full disclosure to a person who agrees to be a cautioner. But if a creditor or debtor actively dissuades the cautioner from consulting his legal adviser, then I think that very little more is necessary to warrant reduction. Although there may be no absolute duty of disclosure in a contract of surety, yet (to adopt the words of Justice Fry in *Davis* v. *The Provincial Marine Insurance Company*, Feb. 28, 1878, 8 Ch. Div. 469, 475, quoted by the pursuer's counsel) very little said, which ought not to have been said, and very little omitted, which ought to have been said, will avoid the deed. On this point the pursuer referred also to *Owen* v. *Homan*, 1853, 4 H. L. Ca. 997, 1033.

"Mr Low explains that he considered that Sutherland undertook no risk because of the conveyance by Thomson of the Dysart property, but I think that reason quite insufficient. There has been no reliable proof of the value of that property, and it appears to have been burdened with the full sum which could be borrowed over it, and there is no adequate proof that it was worth more, certainly none that it was worth the sum in the bond.

"I am therefore of opinion that—having in view the facility of Sutherland, the fact, which I think of great importance, that Sutherland was prevented from consulting his law-agent, and the false representation that he incurred no risk in signing the bond—enough has been proved to warrant the reduction of the deed in a question with Thomson, and as it appears to me that Thomson but repeated what Low had told him, with the view that he should repeat it to Sutherland, I think that the deed must be reduced in a question with Low also. I have assumed that Low in this matter binds the company by what he said and did. The contrary has not been pleaded or argued. I am of opinion on these grounds that plea 1 (*b*) and (*c*) and plea 2 for the pursuer should be sustained, and plea 3 repelled.

"I understood the pursuer to argue further that the deed ought to be reduced apart from all connection of Low or Low & Company with the misrepresentations of Thomson, on the ground that Low & Company are not entitled to retain any benefit derived from Thomson's fraud in terms of the

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use; that he will never be required to pay anything, and that he ought to sign the deed as your brother-in-law without consulting a man of business." Now, assuming that to be true, as I think it is, then in my opinion it puts Low in much the same position—I should say in entirely the same position—as if he had gone instead of Thomson, being acquainted with the pursuer, and had said this—"Oh, sign this. It will be a good thing for your brother-in-law, and a man of business is absolutely useless and unnecessary for your protection." I think it absolutely clear that if he had done that himself, he could not have enforced a bond which he had so persuaded the pursuer to sign; and I think he put himself in the same position in legal estimation, and for the purposes of those just and honest considerations which the law not only allows but requires, by sending Thomson with his instructions, and on his strong and urgent advice, to make these representations.

What we have to consider, then, is this, whether the pursuer—looking to the evidence as to his condition, his age, infirmity, and facility—should have been asked by any honest man to sign this bond for an insolvent brother-in-law without consulting his man of business. Ought we not, on the principles of justice which we administer in this Court, to restore the man into the position in which he was before he was induced to put his name to this deed? I think these considerations of justice require that the pursuer should be restored, by the reduction of the deed, to the position in which he was before he was induced to sign it. If Low had had no connection with the proceedings connected with the granting of the deed—if he had taken the deed *in bona fide*—it might not have been possible to restore the pursuer without inequity to Low. But in the first place I think, as I have already stated, that Low had a hand in getting the deed granted; and in the second place, even if he had not, I think that restoration might have been made, as required by justice to the pursuer, without doing any injustice to Low. What the Court inquires into in a matter of that kind is, has the other party, by the signing of the deed and giving it to him, been deprived of any advantage, of anything which he would have had had the deed not been signed. I think it is clear upon the evidence that Low was not deprived of any such advantage, and consequently that the restoration of the pursuer, which in my opinion justice requires, might be made without doing any injustice to Low. But it is unnecessary to decide that, if my opinion is sound that Low is himself responsible for the way in which the pursuer was induced to do what honestly he ought never to have been required to do.

I am therefore of opinion, on these grounds, and upon those which have

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brocard *nemo debet locupletari aliena jactura*, referring to *Clydesdale Bank* v. *Paul*, March 8, 1877, 4 R. 626, and *Wardlaw* v. *Mackenzie*, June 10, 1859, 21 D. 940. I am disposed to think that this argument is well founded, and applicable to the circumstances. Perhaps it is not very well pleaded, although I think the pleas may cover it.

"The pursuer lodged a minute to the effect that if the bond were reduced he undertook to execute and deliver in favour of the trustee for the creditors of Robert Thomson a disposition of the Dysart property which was conveyed by Robert Thomson to Sutherland. It is clear that the obligation to do so follows from reduction of the bond of caution."

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been stated by the Lord Ordinary in his note, that his Lordship's judgment ought to be affirmed.

LORD TRAYNER.—I agree. I think that the proof amply supports every fact on which the Lord Ordinary has pronounced, and if these findings in fact are right, I think the Lord Ordinary's conclusion in law follows as the necessary conclusion.

LORD MONCREIFF.—I am of the same opinion, and have very little to add. I think that in his note the Lord Ordinary correctly summarises the facts of the case, and I agree in the inferences which he draws from those facts. The question which we have to decide is really now narrowed to a very narrow and very sharp one. It is now admitted—at least I do not think it was strenuously disputed—that Sutherland was facile, and that he was induced to grant the bond of caution through the circumvention of Robert Thomson. The only question we have to decide is, whether the defender Low is affected by the fraud and circumvention used by Thomson in procuring this deed. I think that the case is a special one. I quite recognise the general law that a creditor is entitled to call on his debtor to furnish him with security, and that if he does not interfere he will not be affected by the means taken by the debtor to obtain it, unless indeed fraud is used and the creditor gets a gratuitous benefit through the fraud of his debtor. We have not to decide that question. I think there might have been room for argument if the circumstances of this case had raised it. But the case we have to deal with is a very different one, namely, that of a creditor who, not content with calling on his debtor to furnish security, himself interferes in the selection of the cautioner and puts unfair pressure on the cautioner, instructing the debtor to dissuade him from taking steps for his own protection which, if taken, would certainly have prevented him from becoming cautioner. In such a case I think the creditor forfeits all the benefit which enures to a creditor who abstains altogether from interference in such a matter. In the present case, therefore, the only question we have to consider is, whether in making his representations to Sutherland and preventing him from consulting his own agent Thomson was acting as the hand or agent of Low; and on that point I have not the slightest doubt. I think the evidence, to which I shall not refer, amply instructs that it was at Low's instigation that Thomson returned to Sutherland and induced him to abstain from seeing his own law-agent before signing this deed. On the whole matter I quite concur with your Lordships that the interlocutor should be affirmed.

LORD JUSTICE-CLERK.—I am of the same opinion. This is not a case of the general kind where a party gets into low water, goes to a friend, and persuades him to grant caution—on persuasions which are of the nature of professions of hope. In the ordinary case, when a man does that there is nothing in it which can be founded on as misrepresentation. But if he makes misrepresentations in regard to fact, then of course it becomes quite a different question. In this case the man was certainly hopelessly insolvent, and, whether he went first instigated by Low, or on the suggestion of Low,

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came back from Sutherland with the knowledge that Sutherland uld not act as he desired him to act without laying the matter ore his law-agent. Now Low, I think it is proved on the evidence, d Thomson there was no need for Sutherland to go to an agent. I nk no honest man of intelligence would have given that advice. He re plainly, I think, dishonest advice. I think he must have known fectly well that if his advice was not acted upon, and the person to om the advice was given did see an agent, no bond would ever have been nted. Therefore the only other question is whether Thomson in pressing t advice on the cautioner was acting for Low. I think it is satisfactorily de out that he was. Therefore I agree that the judgment of the Lord dinary is right.

THE COURT adhered.

BLAIR & CADELL, W.S.—JOHN BAIRD, Solicitor—Agents.

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J. M. SMITH, LIMITED, AND ANOTHER, Pursuers (Reclaimers).—*Campbell, K.C.—Cullen.*
JOHN WILSON (Colquhoun's Trustee), Defender (Respondent).—*Clyde.*

Company—Sale of Shares—Right of Pre-emption under Articles of Association by Company and other Shareholders—Right of Shareholder to withdraw offer to sell to Company.—Article 4 of the articles of association of company provided that "If any holder of Ordinary B shares wishes to sell is B shares, he shall, before doing so or transferring them to any party, ffer them to the company in writing, specifying the price which he is rilling to accept for said B shares, and the directors shall either take said hares on behalf of the company at such price, or intimate said offer to the ther Ordinary B shareholders, who may lodge sealed offers with the com- pany specifying the sum or price which they are willing to pay for such shares, and which offers shall be opened at a meeting of the directors to be held within fourteen days after the directors shall have given the aforesaid notice to the other shareholders, and the highest offer shall be accepted by the seller provided it is equal to or above the sum specified in his letter."

Where a holder of certain B shares offered them to the company under article 4 at a certain price and afterwards withdrew his offer before the company had either intimated its acceptance to the shareholder or intimated to the other B shareholders that the offer had been made, *held* that the offer had been validly withdrawn.

Question whether the shareholder would have been entitled to withdraw his offer after another B shareholder had lodged a sealed offer for the shares.

2D DIVISION Lord Low.

IN May 1900 J. M. Smith, Limited, Glasgow, and Robert Crawford, merchant, Glasgow, raised an action against John Wilson, C.A., trustee on the sequestrated estates of J. & D. T. Colquhoun, writers, Glasgow, and the partners thereof, concluding for declarator "that by virtue of the terms of an offer, dated 31st January 1900, addressed by the defender to the pursuers J. M. Smith, Limited, and an acceptance of said offer addressed by the said J. M. Smith, Limited, to the defender, dated 12th February 1900, and signed by the pursuer Robert Crawford, a contract was concluded between the said J. M. Smith, Limited, and the defender for the sale, under the terms of article 4 of the articles of association of said company, of 687 Ordinary B shares of said company, the said shares being"; and further, for declarator "that the defender is bound to implement said contract of

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sale by duly executing transfers and delivering the share certificates applicable to said shares to the pursuer the said Robert Crawford, or alternatively, and in any event, to the said J. M. Smith, Limited, and that in return for payment to the defender of the sum specified in his said offer as the price of said shares"; and for decree ordaining the defender, "upon payment of said price, forthwith to execute transfers and give delivery of said share certificates either to the said Robert Crawford, or to the said J. M. Smith, Limited, in conformity with the declaratory conclusion to be pronounced herein," and for interdict against the defender "selling the shares above specified, or from executing transfers thereof, or giving delivery of the share certificates applicable to the same to any person other than the pursuer Robert Crawford, or alternatively, the pursuers J. M. Smith, Limited, or in any manner or way other than as provided by the terms of articles 4 and 5 of the articles of association of the said J. M. Smith, Limited."

The pursuers averred (Cond. 1) that the defender, as trustee foresaid, was holder of 687 Ordinary B shares of J. M. Smith, Limited. (Cond. 2) "The defender, in realising the estates of said bankrupts, desired to sell, *inter alia*, said 687 Ordinary B shares, and in so doing was subject to the requirements of the articles of association regarding the transfer of said shares. Article 4, which secures a right of pre-emption in favour of existing B shareholders, is in the following terms, viz.:—'If any holder of Ordinary B shares wishes to sell his B shares, he shall, before doing so, or transferring them to any party, offer them to the company in writing, specifying the price which he is willing to accept for said B shares, and the directors shall either take said shares on behalf of the company at such price, or intimate said offer to the other Ordinary B shareholders, who may lodge sealed offers with the company specifying the sum or price which they are willing to pay for such shares, and which offers shall be opened at a meeting of the directors to be held within fourteen days after the directors shall have given the aforesaid notice to the other shareholders, and the highest offer shall be accepted by the seller, provided it is equal to or above the sum specified in his letter, and if the highest offer is below the sum specified in the letter of offer, the holder of Ordinary B shares so desiring to sell shall then be at liberty to sell his Ordinary B shares to any party (subject, however, to the stipulation in article 5), but not at a price below the highest sum offered by any of the other shareholders as aforesaid; and in no case shall Ordinary B shares be sold at a sum below the highest offer without giving the directors or the shareholders so offering the first option of acquiring said shares at the lower sum which the seller has agreed to take, and in every case the highest offerer as aforesaid shall be bound to take the Ordinary B shares at the price so offered by him.'"

(Cond. 3) "In terms of said article 4, the defender addressed to the pursuers J. M. Smith, Limited, a letter, of which a transcript is subjoined, viz.:—

"'154 St Vincent Street,
"'Glasgow, 31st January 1900.

"'Messrs J. M. Smith, Limited,
"'65 Hope Street.

"'*J. and D. T. Colquhoun's Sequestration.*

"'Dear Sirs,—I hereby offer to the company the following shares.

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[Then followed a specification of the shares, and of the prices at which they were offered.]

"'These shares are offered to you under article 4 of the articles of association of your company.'" [The remainder of the letter it is unnecessary here to quote.]

(Cond. 4) "Upon receipt of said letter, a meeting of the directors of the company was held, and at said meeting, on 3d February 1900, the pursuer Robert Crawford offered to buy all the shares at the prices before mentioned, which offer was accepted, 'should no higher offer be made by any other holder of B shares.' Thereupon the pursuers J. M. Smith, Limited, in terms of the procedure enacted by said article 4, made intimation of said offer to the existing Ordinary B shareholders of the company, and invited offers from them. Upon 10th February 1900 Mr Crawford, who was a holder of Ordinary B shares, put his offer in writing by a letter in the following terms, viz.:—

"'84 Miller Street,
"'Glasgow, 10th February 1900.

"'J. M. Smith, Limited.

"'Dear Sirs,—Referring to the offer received by you from the trustee on the sequestrated estate of Messrs J. & D. T. Colquhoun, of which a copy is annexed, I hereby offer for the whole of the Ordinary B shares therein mentioned the price attached thereto in the trustee's letter of offer, and to pay the amount of these prices in cash at once against delivery.—Yours truly, R. CRAWFORD.'

"The minutes of meetings of the said J. M. Smith, Limited, dated 3d, 9th, and 12th February 1900, are referred to."*

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* The following excerpts from minutes of meetings of the directors of J. M. Smith, Limited, were printed by the pursuers:—

Meeting of 3d February 1900,—"The following letter of 31st ultimo from Mr John Wilson, C.A., trustee on the sequestrated estate of J. & D. T. Colquhoun was read and considered:— . . . The directors resolved to accept and act upon the offer to sell 687 B shares at the prices mentioned in letter of offer, and to submit the same to the B shareholders of the company in terms of article 5 of the articles of association. Mr Robert Crawford, chairman of the company, thereupon intimated an offer for the whole of the 687 shares in question at the prices named by the trustee, which the directors agreed to accept, should no higher offer be made by any other holder of B shares."

Meeting of 9th February 1900.—"The directors resolved to refuse to agree to the proposed withdrawal of the trustee's offer contained in his letter of 31st January. It was also resolved to intimate at once to all the existing and qualified B shareholders of the company the offer to sell 687 B shares contained in Mr Wilson's letter of 31st January, and to receive offers for same under the conditions of article 5 of the articles of association, and requesting replies by 12 o'clock on Monday, 12th inst."

Meeting of 12th February 1900.—"The directors opened replies received from ordinary B shareholders with reference to the circular of the 10th inst. The following are the terms of the circular:—"

[The circular, which was dated 10th February 1900, set forth that the trustee on the Colquhouns' sequestrated estate had offered to sell the shares specified, under the conditions set forth in article 4 of the articles of association, at the prices specified,—"If you desire to lodge an offer for these shares, be good enough to forward me sealed letter of offer by 12 o'clock on Monday, 12th February."]

The minute continued,—"The only offer received was one from Mr

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(Cond. 5) "The said pursuer Robert Crawford was the only offerer among existing B shareholders for said 687 shares, and as the price offered by him was equal to the price specified by the defender in his letter of 31st January 1900, the said Robert Crawford became entitled to purchase said shares under the terms of article 4. The defender, however, has refused to execute transfers, and to deliver the share certificates applicable to said 687 shares, founding upon a letter addressed by him to the pursuers J. M. Smith, Limited, under date 5th February 1900, in which he writes as follows:—'I hereby withdraw and cancel the offer which I made to you on the 31st ult. of the following shares in your company'; and a list is appended of the said 687 shares. . . . The pursuers believe and aver that the defender has, in point of fact, either arranged, or is in course of arranging, to transfer said shares, in disregard of said conditions, to Mr D. M. Stevenson, merchant, Glasgow. Prior to the offer to the company, of date 31st January 1900, the defender had in fact advertised privately for offers for said shares, and had by printed conditions of tender provided that such private offerers should be, *inter alia*, subject to the right of pre-emption contained in the 4th article of said articles of association. Thereupon, and prior to said 31st January, Mr Stevenson concluded his transaction of purchase (subject to said conditions) with the defender. The offer of 31st January was then made, and Mr Stevenson induced the defender to withdraw his offer to the company, and is endeavouring to have the transaction with himself carried out in defiance of said articles of association."

(Cond. 6) "The said letter of 5th February 1900 was written by the defender after the pursuers J. M. Smith, Limited, had resolved at a board meeting to invite offers from their Ordinary B shareholders under the terms of said article 4, and the pursuers declined to admit the defender's right to cancel his offer pending receipt of such offers as might be received from said shareholders. Thereafter a letter was addressed by the pursuers jointly to the defender in the following terms:—

"'67 Hope Street, Glasgow,
"'12th February 1900.

"'John Wilson, Esq., C.A.,
"'Trustee on Sequestrated Estate of J. & D. T. Colquhoun.

"'Dear Sir,—We cannot recognise any right on your part to withdraw and cancel the offer of Ordinary B shares made by you on 31st ultimo under article 4 of our articles of association, and we hereby notify that we hold you to it. That offer has been intimated by our directors to our Ordinary B shareholders in terms of article 4. Only one of these has lodged an offer for the shares. The others have decided not to offer.

"'The offerer is Mr Robert Crawford, merchant, 84 Miller Street, Glasgow, who offers to pay the prices you asked in your letter of 31st ulto., for the whole B shares mentioned therein, and to pay in cash and at once against delivery.

Robert Crawford in the following terms:—" [quoted in cond. 4]. "Mr Crawford's offer being equal to the sum specified in Mr Wilson's letter of 31st ultimo as the price at which he offered his shares, the meeting instructed the secretary to intimate to Mr Wilson that his offer was accepted, and that Mr Crawford was the purchaser at the same price as that at which Mr Wilson had offered the shares to the company."

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"'Consequently, in conjunction with Mr Robert Crawford, who signs this letter along with us, we hereby accept your letter of 31st ulto., and call upon you to implement it to Mr Crawford, a copy of whose letter is annexed.—We are, yours truly,

"'J. M. SMITH, LIMITED,
"'J. M. SMITH,
"'Managing Director.
"'ROBERT CRAWFORD.'"

[The foregoing signatures were written across a 6d. stamp, and there were the signatures of two witnesses.]

(Cond. 7) "The defender in reply to said letter of 12th February 1900 maintained, and now maintains, the validity of the alleged cancellation of his offer, and the present action is necessary to vindicate said shares on behalf of the pursuers."

The pursuers pleaded;—(1) A contract for the sale of said shares having been duly concluded by said offer and acceptance, decree should be pronounced in terms of the conclusions of the summons for declarator and decerniture. (2) The defender having transferred, or being about to transfer, said shares and deliver share certificates therefor in breach of the conditions in the company's articles, interdict should be pronounced as concluded for.

The defender admitted that he had entered into a contract to sell the shares to Stevenson subject to the articles of association, and pleaded, *inter alia*;—(1) No title to sue. (3) The pursuers' averments being irrelevant and insufficient in law to support the conclusions of the summons, the action should be dismissed.

On 19th January 1901 the Lord Ordinary (Low) pronounced this interlocutor:—"Sustains the first and third pleas in law stated for the defender, dismisses the action, and decerns: Finds the pursuers liable in expenses," &c.*

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* "OPINION.—(After referring to the facts averred)—In these circumstances the pursuers maintain that the defender is bound to transfer the shares to Crawford at the price named. It was not disputed that, in view of the judgment of the House of Lords in *Trevor* v. *Whitworth* (12 App. Ca. 409), the power which was given to the company by the 4th article to purchase shares was illegal and void, but it was contended for the pursuers that the provision in the article, that shares which the holder desired to sell should be offered to the other holders of similar shares, was perfectly legal, and remained binding upon the members of the company. I do not see any reason why the articles of association of a company should not provide that a shareholder wishing to sell his shares should first offer them to the other shareholders. In the view, however, which I take of the case, it is not necessary to decide that question, but I shall assume that to that extent the 4th article was good and binding upon the defender.

"The question therefore is, whether the defender was entitled to withdraw his offer, and if so, whether he withdrew it timeously?

"It was said that the terms of the 4th article imply that if a shareholder offers his shares to the other shareholders he shall not withdraw his offer, but shall give them an opportunity of accepting it. The argument, as I understood it, was chiefly founded upon the provision that the offers of the other shareholders should be opened within fourteen days of the notice to them, which the pursuers argued implied an obligation on the defender's part not to withdraw the offer in the meantime. It seems to me that that provision was enacted in favour of the shareholder desiring to sell, for the purpose of ensuring that he should not be prejudiced by

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The pursuers reclaimed, and argued;—On a sound construction of article 4 of the articles of association the defender was not entitled to withdraw his offer to sell until he had given his fellow shareholders a reasonable opportunity of lodging offers to buy. This he had not done. The ordinary law of offer and acceptance did not apply. A material change of circumstances making it inadvisable for the defender to sell might in equity entitle him to withdraw his offer; but he made no averment of such a change of circumstances. On the contrary, he admitted that he intended to sell to Stevenson. This admission entitled the pursuers to interdict at any rate.

The argument for the defender sufficiently appears from the opinions of the Judges.

LORD JUSTICE-CLERK.—I have no serious doubt as to this case. It appears from the pursuers' averments that the defender, who is the trustee on a sequestrated estate, entered into a conditional contract with a gentleman of the name of Stevenson for the sale of certain shares belonging to the sequestrated estate, and having made this contract, he on 31st January 1900 did what he was bound to do under the articles of association of the company whose shares were the subject of the sale, he offered these shares for sale to the company before attempting to carry into effect his conditional sale of them to Stevenson, and the question is, whether having made that offer to the company, as I have said, on 31st January 1900, he was entitled to withdraw it on 5th February before he had received any acceptance of it. That, I think, is really the whole question in this action. Now, I can see no reason why he should not so withdraw his offer if he pleased. It was argued that if the company did not wish to buy the shares itself, each of the B shareholders was entitled to fourteen days within which to put in sealed offers to purchase the shares, and that the defender was bound to accept the highest of these offers provided it was not less than the sum at

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undue delay. But an offer to sell does not amount to any contract, and I am unable to see why, before a contract had been constituted by acceptance of the offer, the defender should not, if he saw fit, change his mind, and withdraw the offer.

"The pursuers, however, contended that the offer was accepted before it was withdrawn, and they founded upon Crawford's intimation at the meeting of directors on 3d February, that he was willing to buy the shares at the price mentioned, and the directors' acceptance of that offer, should no higher offer be made." [His Lordship then considered and rejected this contention, which was abandoned by the pursuers in the Inner-House.]

"The pursuers further founded upon the defender's admission that he has sold the shares to a third party, and contended that although the defender might be entitled to withdraw his offer because he had made up his mind to retain the shares, he was not entitled to do so for the purpose of selling them to someone outside the company, because, under the articles of association, he could only sell the shares to an outsider if no existing shareholder was willing to purchase them.

"It seems to me that the purpose for which the defender withdrew his offer is immaterial so far as the present action is concerned. The fact that he did explicitly withdraw it seems to me to be sufficient for the determination of the question whether or not a contract for the sale of the shares was concluded with Crawford. That is the only question which is raised in this case, and it in no degree affects, or is affected by, the question of the validity of any sale which the defender may have made to a third party."

proposition. Mr Campbell argued that the trustee had a duty to make that offer. I asked whether there was any authority for that, but none was cited to us, and I know of none. I assume that the trustee made the offer in the exercise of his duty as trustee, in the interest of the bankrupt estate which he represents, but I know of no principle or duty which forbids him to withdraw that offer before it has been accepted if he finds that he can get a better price for the shares. He will, I assume, have to realise the shares in the exercise of his duty as trustee, and in realising he will have to keep in view the provisions of clause 4 of the articles of association under which the bankrupts held the shares, but there is nothing in the case now before us which requires us to deal with that matter.

On the whole matter I agree with the Lord Ordinary, and think that his interlocutor should be affirmed.

LORD TRAYNER.—I am of the same opinion. The pursuers conclude for decree affirming (1) that there was a contract of sale; (2) for decree ordaining the defender to implement that contract; and (3) for interdict against the defender selling or transferring the shares which were the subject of the alleged contract otherwise than in accordance with that contract, or otherwise than as provided for in the articles of association of the pursuers' company. The conclusion for interdict obviously depends on the pursuers' success with regard to the other conclusions. If there has been no contract made such as the pursuers allege, no interdict can proceed which would deprive the defender of his right to deal with his shares in any way he pleases, consistently always with any conditions which may be validly imposed upon him by the articles of association. Against any infringement of the articles of association these articles afford the pursuers ample protection, and render any interdict on that account quite unnecessary. If the defender attempts to transfer his shares otherwise than as provided for in the articles of association, the pursuers may refuse to register his transfer.

If, however, the contract alleged was made, then the defender may be interdicted from doing anything which puts specific performance thereof out of his power. Accordingly, the main question in the case is, Was there a contract?

The alleged contract is said to have been constituted by offer and acceptance. I cannot assent to the view that any contract was here constituted by offer and acceptance. Article 4 of the articles of association, on which the question depends, is not very happily expressed. It begins by saying that "if any holder of Ordinary B shares wishes to sell his B shares he shall before doing so, or transferring them to any party, offer them to the company in writing, specifying the price which he is willing to accept for said B shares, and the directors shall either take said shares on behalf of the company at such price," &c. Now, I think that so far the use of the word "offer" is right enough. The idea is that the company if it pleased should accept the shareholder's offer to sell the shares by sending him a letter of acceptance and thereby completing the contract, assuming that the company could legally purchase its own shares. But the company did not accept, and never intended to accept, the shares which the defender offered to sell.

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contrary the reverse is now admitted—that the directors desired to take up the shares on behalf of the company. But on the 10th February 1900 the directors proceeded to follow the alternative course provided in article 4, by sending a circular letter to each of the B shareholders intimating that the trustee in the Colquhouns' sequestration had resolved to sell the shares specified under the conditions set forth in article 4 of the company's articles of association at the prices mentioned, and requesting the shareholder if he desired to offer for these shares to forward a sealed offer to the secretary of the company by twelve o'clock on Monday 12th February. On the same day, that is to say on the 10th February, a Mr Robert Crawford sent a written offer to purchase the shares at the prices specified by the trustee in his letter of 31st January. Then the directors of the company, according to their minute of meeting, on 12th February proceeded to open the replies from the B shareholders to the circular of the 10th February. The minute bore that Mr Crawford's letter, to which I have referred, was the only reply received, and then, after quoting Mr Crawford's letter, the minute stated that "Mr Crawford's offer being equal to the sum specified in Mr Wilson's" (that is, the trustee's) "letter of 31st ultimo as the price at which he offered his shares, the meeting instructed the secretary to intimate to Mr Wilson that his offer was accepted, and that Mr Crawford was the purchaser at the same price as that at which Mr Wilson had offered the shares to the company."

In the meantime, however, on 5th February, Mr Wilson, the trustee, had written to the company withdrawing his offer to sell the shares belonging to the bankrupts, and this action has been brought in consequence of that withdrawal of his offer by the trustee on 5th February. The trustee's letter of 5th February is a withdrawal of the offer to sell the shares, and it is expressed in terms as distinct and unequivocal as it is possible to use. The purpose of the action is in substance to have it declared that this distinct and unequivocal withdrawal of his offer by the trustee is invalid and ineffectual. The real pursuer of the action is Mr Crawford, the shareholder who had offered to purchase the shares, as the company, who also appear as pursuers, have really no interest in the matter, since the directors had resolved not to purchase the shares on behalf of the company, and the company appear as pursuers merely on the ground that their instance was necessary in justice to Crawford, in order to enforce the contract by which it is said the defender is under obligation to transfer the shares to him. Now, Crawford was under no obligation whatever to the defender or to anyone else in regard to these shares prior to his letter of 10th February, and that being so, I am unable to see on what principle it could be held that the defender was under any obligation to Crawford in regard to these shares when on 5th February he sent his letter withdrawing his offer to sell the shares. Besides, the persons to accept Crawford's offer were not the directors of the company; what article 4 says is that the offer "shall be accepted by the seller," that is in the present case the defender, the trustee for the Colquhouns, and he could not accept consistently with his letter of withdrawal of 5th February. It is said that the trustee, after making his offer of 31st January, was not entitled to withdraw that offer on 5th February. I know of no authority or principle in law or in reason for that

proposition. Mr Campbell argued that the trustee had a duty to make that offer. I asked whether there was any authority for that, but none was cited to us, and I know of none. I assume that the trustee made the offer in the exercise of his duty as trustee, in the interest of the bankrupt estate which he represents, but I know of no principle or duty which forbids him to withdraw that offer before it has been accepted if he finds that he can get a better price for the shares. He will, I assume, have to realise the shares in the exercise of his duty as trustee, and in realising he will have to keep in view the provisions of clause 4 of the articles of association under which the bankrupts held the shares, but there is nothing in the case now before us which requires us to deal with that matter.

On the whole matter I agree with the Lord Ordinary, and think that his interlocutor should be affirmed.

LORD TRAYNER.—I am of the same opinion. The pursuers conclude for decree affirming (1) that there was a contract of sale; (2) for decree ordaining the defender to implement that contract; and (3) for interdict against the defender selling or transferring the shares which were the subject of the alleged contract otherwise than in accordance with that contract, or otherwise than as provided for in the articles of association of the pursuers' company. The conclusion for interdict obviously depends on the pursuers' success with regard to the other conclusions. If there has been no contract made such as the pursuers allege, no interdict can proceed which would deprive the defender of his right to deal with his shares in any way he pleases, consistently always with any conditions which may be validly imposed upon him by the articles of association. Against any infringement of the articles of association these articles afford the pursuers ample protection, and render any interdict on that account quite unnecessary. If the defender attempts to transfer his shares otherwise than as provided for in the articles of association, the pursuers may refuse to register his transfer.

If, however, the contract alleged was made, then the defender may be interdicted from doing anything which puts specific performance thereof out of his power. Accordingly, the main question in the case is, Was there a contract?

The alleged contract is said to have been constituted by offer and acceptance. I cannot assent to the view that any contract was here constituted by offer and acceptance. Article 4 of the articles of association, on which the question depends, is not very happily expressed. It begins by saying that "if any holder of Ordinary B shares wishes to sell his B shares he shall before doing so, or transferring them to any party, offer them to the company in writing, specifying the price which he is willing to accept for said B shares, and the directors shall either take said shares on behalf of the company at such price," &c. Now, I think that so far the use of the word "offer" is right enough. The idea is that the company if it pleased should accept the shareholder's offer to sell the shares by sending him a letter of acceptance and thereby completing the contract, assuming that the company could legally purchase its own shares. But the company did not accept, and never intended to accept, the shares which the defender offered to sell.

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There is no contract, therefore, between the company and the defender as to the sale of these shares.

Article 4 then proceeds, after the passage which I have quoted, to make provision for the event of the company not purchasing the shares offered for sale, and it is in dealing with this alternative case that the mode of expression to which I have alluded is found. The article directs that if the company do not wish to purchase the shares, the company is to "intimate said offer to the other Ordinary B shareholders." But these shareholders are not entitled to treat the offer as an offer to sell made by the shareholder to them; on the contrary, what the article directs is, that such shareholders as please are themselves to make offers to the shareholder who wishes to sell, and he is to accept the highest of these offers on certain conditions specified. In short, if the company do not purchase the shares the position of offerer and acceptor is reversed. Now, I do not omit to notice that the defender's letter of 31st January is in the form of an offer to sell the shares, but it bears to be an offer under article 4 of the company's articles of association, and the only offer which a shareholder wishing to sell can make under that article is an offer to the company; he makes no offer to the other shareholders, and his offer, if not accepted by the company is, as an offer to sell, at an end. But it may be followed by offers to buy by such shareholders as may desire to purchase, and this will make a contract if followed by an acceptance by the selling shareholder. There was no reply to the defender's letter of 31st January until 12th February, when the directors of the company, according to their minute of that date, intimated to the defender that "his offer was accepted." But accepted by whom? Not by the company to whom alone the offer was made, but by one of the shareholders, Mr Crawford, to whom the defender had made no offer. Now, if there was no offer to Mr Crawford, there could be no acceptance by him or by the company on his behalf, and if there was no offer and consequently no acceptance, there could be no contract constituted by offer and acceptance. That being so, no decree can be given in terms of the first conclusion of the summons, nor can we order (in terms of the second conclusion) implement of a contract which had never been made.

I think that this is sufficient for the disposal of the action, but I agree with what has been said as to the defender's right to withdraw his offer, as he did on 5th February before there was any acceptance or professed acceptance of his offer. I can find nothing in article 4 to exclude him from exercising the ordinary right of a seller to withdraw an offer to sell before acceptance. I can find nothing to suggest that an offer made under article 4 is to be regarded as a "firm" offer binding the offerer not to withdraw his offer for fourteen days, and as the defender had withdrawn his offer before the 12th February, I think it was competently withdrawn whatever view may be taken of the so-called acceptance on that date.

I agree with the Lord Ordinary that we can take no account of the alleged sale by the defender of his shares to Mr Stevenson. If Mr Stevenson has any rights in regard to these shares, he will be entitled to enforce these rights if necessary in competent proceedings for the purpose, but we cannot enter into that question in this action, to which Mr Stevenson is not a party.

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LORD MONCREIFF.—I also think that the Lord Ordinary is right. The contention of the pursuers was that under article 4 of the company's articles of association a shareholder who has intimated to the company his intention to sell his shares was not entitled to withdraw that intimation although he has abandoned his intention of selling his shares, and although there has been no acceptance of an offer to sell in terms of the article. I am unable to spell any such condition out of article 4. There is no doubt that at common law a person who has made an offer to sell is entitled to withdraw the offer at any time before acceptance, unless he has bound himself to leave the offer open for a specified time. I cannot find anything in article 4 to introduce a condition altering the common law on this point. Now, the defender withdrew his offer to sell his shares on 5th February, before he received intimation of any acceptance of his offer, and I have no doubt that he was entitled so to withdraw his offer. It would have been a different question if any of the B shareholders had sent in an offer for the defender's shares before the defender had withdrawn his offer. In that case he might have been held bound. But as I have said the defender withdrew his offer before anything was done in the way of accepting it. As regards the conclusion for interdict, I do not think that the pursuers have set forth a relevant case, for they expressly aver that the alleged sale to Stevenson was subject to the right of pre-emption contained in article 4 of the articles of association.

THE COURT adhered.

J. W. & J. MACKENZIE, W.S.—WEBSTER, WILL, & Co., S.S.C.—Agents.

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Clark v. Glasgow, Dublin, and Londonderry Steam Packet Co.

JOSEPH CLARK, Pursuer (Respondent).—*A. S. D. Thomson.*
GLASGOW, DUBLIN, AND LONDONDERRY STEAM PACKET COMPANY, Defenders (Reclaimers).—*Campbell, K.C.—Spens.*

Reparation—Negligence—Safety of Public—Public Place—Pier—Injury caused by steamboat rope to person standing on pier—Contributory Negligence—Relevancy.—In an action of damages for personal injuries the pursuer averred that while he "was standing" on the steamboat quay at Greenock, a seaman on board an approaching steamboat belonging to the defenders threw a rope on to the quay in order that the steamboat might be made fast to the quay; that the rope was attached to a pillar for the purpose on the quay; and that the rope was negligently allowed to lie alongside another pillar nearer the edge of the quay; that the way which was on the steamboat was too great, and caused the rope to strain and then to spring over the last mentioned pillar and to swing violently across the quay, knocking the pursuer down and causing the injuries on account of which he sued; that the defenders were in fault in mooring the vessel in the manner adopted on the occasion in question; and that had the ordinary and safe method of mooring (which was specified) been followed, the accident would not have happened.

The defenders pleaded that the action was irrelevant, in respect, *inter alia*, (*a*) that the pursuer did not aver that he had any business requiring him to be on the quay on the occasion in question; and (2) that according to his own shewing he had been guilty of contributory negligence.

Held (*rev.* judgment of Lord Kyllachy, *dub.* Lord Moncreiff) that the pursuer had averred a case for inquiry, and was entitled to an issue.

Smith v. *Highland Railway Company*, 16 R. 57, *distinguished.*

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June 21, 1901. Clark v. Glasgow, Dublin, and Londonderry Steam Packet Co.

2D DIVISION. Ld. Kyllachy.

IN November 1900 Joseph Clark, ropemaker, Greenock, raised an action against the Glasgow, Dublin, and Londonderry Steam Packet Company, Limited, registered owners of the steamship "Olive," concluding for £200 as damages for personal injuries.

The pursuer averred;—(Cond. 2) "In or about the month of September 1899, the defenders advertised that the steamer 'Olive' would leave Glasgow for Dublin on Saturday 16th September 1899, and would call at the Steamboat Quay, Greenock. The steamer arrived opposite the said quay about six o'clock afternoon of the advertised date, and one of the deck hands or employees on board the boat threw a line or rope from the steamer to the quay, in order that the boat might be made fast to the quay. When this line or rope was thrown, the steamer was going at too great a speed."

(Cond. 3) "There are two rows of pillars or pawls on the said quay, to which ships can be made fast. The first row is at or near the edge of the quay, and each pawl or pillar in it curves away from the sea, and is provided at the tip of the curve with two iron horns. The second row is several yards back from the edge of the quay, and each pawl or pillar in it has an iron 'bonnet' or head. The iron horns and 'bonnets' are for the purpose of preventing the loop at the end of ships' ropes from slipping off the pawls or pillars. When the line or rope was thrown from the 'Olive,' one of the employees on board directed the man to whom it was thrown to place the loop at the end over one of the iron pawls or pillars in the second row, that is, one with a 'bonnet' or head, and this was done in accordance with said directions. Owing to the light weight of the steamer and the height of the tide, the deck was at a considerable height above the top of the iron pillars on the quay. The second row of pillars, over one of which the rope was cast, is higher than the first, and the defenders, or those for whom they are responsible, carelessly and negligently placed the loop of the rope over one of the pillars in the second row, instead of one in the first row, and having so done they carelessly and negligently allowed the rope to lie on the quay, at the side of a pillar in the first row. . . . The vessel was not moored in a proper manner. The ordinary and only safe practice at the Steamboat Quay when vessels are drawing little water and at high tide is to place the loop of the rope over a pawl in the first row."

(Cond. 4) "On the said 16th day of September, and at the said time, the pursuer was standing on the Steamboat Quay, considerably to the west of the pillar to which the stern rope was attached. The steamer had so much way on that she carried past the position of the pursuer. The strain put upon the foresaid rope by the rate of the steamer, and the distance she carried on, caused the rope to spring over the pillar in the first row, beside which it should not have rested in the exercise of due care and diligence on the part of the defenders. It swung violently across the quay against the pursuer and knocked him down, thereby breaking one of his legs. Had the ordinary and only safe practice of mooring in the circumstances been followed by the defenders, the pursuer would not have been injured. In any event the defenders, or those for whom they are responsible, ought to have checked the speed of the steamer by reversing her engines, and also to have put the rope right round a pawl in the first row before or immediately after placing the loop of the rope over a pawl of the second row, and further, they culpably failed to warn the pursuer of

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the danger attending the method of mooring which they adopted, which danger was well known to them."

The pursuer pleaded;—The pursuer having suffered loss, injury, and damage through the fault of the defenders, is entitled to reparation therefor; and the sum sued for, in name of reparation, being reasonable in amount, the pursuer is entitled to decree as concluded for, with expenses.

The defenders pleaded, *inter alia*;—(1) The pursuer's averments are irrelevant.

The pursuer having proposed issues for the trial of the cause, the Lord Ordinary (Kyllachy), on 12th January 1901, pronounced the following interlocutor:—"Having heard counsel for the parties on the issues proposed by the pursuer, sustains the first plea in law for the defenders, and in respect thereof dismisses the action, and decerns: Finds the defenders entitled to expenses; allows," &c.

The pursuer reclaimed, and argued that he was entitled to an issue.

Argued for the defenders;—The action was irrelevant, in the first place, because the pursuer did not aver that he had business requiring him to be on the quay,[1] and secondly, because on the facts averred by him he was in a position of obvious danger, and was therefore guilty of contributory negligence.

LORD JUSTICE-CLERK.—I think this case must go to trial. The pursuer may fail to prove his averments, but he by averring has undertaken to prove them, and I think that he is entitled to have an opportunity of proving them. The defenders say that he had no business to be where he was on the pier; that depends on the facts, and is a matter of defence. If again, the pursuer is proved to have been guilty of contributory negligence he will fail, but that too is a question of fact. Mr Spens quoted the case of *Smith*,[2] which he said was on all-fours with the present. But in the present case the man was in a public place where, *prima facie*, he had a right to be, while in the case of *Smith*[2] the pursuer was injured in a place where no one had any right to be except on business. *Smith*[2] was, further, a case of a person going between waggons on rails and being crushed. Now, a person going into such a dangerous situation must look out for himself so as to prevent accident.

On the whole matter, I think there should be in this case an inquiry into the facts.

LORD YOUNG.—In this case the Lord Ordinary has found the action irrelevant, and he has thought the matter so clear that he has not thought it necessary to write an opinion. I assume, therefore, that there were grounds worthy of serious consideration which satisfied him that the case was irrelevant, and Lord Moncreiff having intimated doubts as to the relevancy I think it right that I should state in a few words the view that I take of the case.

We have so much experience of speculative actions in cases of this kind that the averments of the pursuer should be carefully looked at. Now,

[1] Smith v. Highland Railway Co., Nov. 1, 1888, 16 R. 57, *per* Lord President Inglis, at p. 60.
[2] 16 R. 57.

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there is no doubt of this fact, that the pursuer had his leg broken on the spot and suffered serious injury. The defenders say that he should not have been where he was. But I must proceed on the assumption that he may establish that he had a perfect right to be where he was. I think, *prima facie*, that all piers where steamers arrive and depart are places open to the public. Members of the public while there must avoid putting themselves into dangerous positions, as steamers cannot arrive and depart without causing some danger. But I must assume that the pursuer was where he had a right to be, and that he was taking ordinary care of his own safety. I see nothing in his averments to the contrary. What he says is this:—(His Lordship then narrated the substance of the pursuer's averments). If the pursuer establishes these averments before a jury, I think he will establish his case. The defenders say that they can explain how the accident happened without fault on their part. If they do so they will succeed in their defence. But that has nothing to do with relevancy.

LORD TRAYNER.—I am unable to see any good ground for dismissing this action as irrelevant. The pursuer alleges certain faults on the part of the defenders, which he says resulted in an injury to him for which he claims compensation. The defenders say that the pursuer contributed by his own fault to the cause of his injuries. But that is a defence, not a plea against relevancy.

I agree with what your Lordship has said as to the case cited for the defenders. I think that case has no application. There the boy had no right to be where he was. Here the pursuer had, *prima facie*, a perfect right to be on the pier, and the defenders do not aver on record that he had no right to be there.

LORD MONCREIFF.—As all your Lordships are of opinion that the case should go to trial, I do not think it would serve any good purpose for me to say more than that I greatly doubt the relevancy of the pursuer's averments.

THE COURT recalled the interlocutor reclaimed against, approved of an issue for the trial of the case, and remitted to the Lord Ordinary to proceed.

EMSLIE & GUTHRIE, S.S.C.—BOYD, JAMIESON, & KELLY, W.S.—Agents.

No. 155. June 21, 1901. Mein's Trustees v. Mein.

JOHN COLIN MITCHELL AND OTHERS (Mein's Trustees), First Parties.—*Campbell, K.C.—A. M. Hamilton.*

MRS CHARLOTTE CAMPBELL MEIN, Second Party.—*C. N. Johnston—Grainger Stewart.*

Liferent and Fee—Rights of Liferenter and of Fiar—"Free annual income and produce" of residue—Profits from lease of colliery.—By trust-disposition and settlement a testator directed his trustees to pay "the free annual income and produce of the residue of my means and estate" to his widow in liferent. By a codicil he, *inter alia*, empowered his trustees to carry on and continue "for behoof of my whole estate" any business in which he was alone interested.

At the date of his death the testator was the tenant of a colliery, which the trustees carried on after his death.

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In a competition between the testator's widow and his trustees, the widow maintained that the whole net profits of the colliery fell to be paid to her as liferentrix; the trustees maintained that the net profits of the colliery fell to be treated as capital; or alternatively that these profits fell to be paid to the widow only after deduction of such a sum as would, with the value of the colliery plant, &c., provide, on the termination of the lease, a sum equal to the value of the testator's interest as at the date of his death.

Held that the net profits derived from the colliery were part of the free annual income and produce of the residue of the estate, and fell to be paid to the widow without deduction.

Strain's Trustees v. *Strain*, 20 R. 25, *followed*.

2D DIVISION.

ALEXANDER MEIN junior, coalmaster, Glasgow, died on 23d June 1899, leaving a trust-disposition and settlement, dated 7th May 1897, and a codicil thereto, dated 18th March 1899.

By the trust-disposition and settlement the testator conveyed his whole means and estate, heritable and moveable, real and personal, to trustees, for the purposes therein specified. The fourth purpose was in the following terms:—"In the fourth place, I direct my trustees to hold and apply, pay or convey the free annual income and produce of the residue of my means and estate for behoof of my said wife in the event of her surviving me during all the days and years of her life, and that at such terms as they may think proper, having reference to the dates of receipt by themselves of the income, and that in liferent for her liferent alimentary use allenarly: Declaring that it shall be in the power and option of my trustees to apply from time to time, and in such way as they may think proper, in addition to the income, such portion of the capital of my means and estate as they may think necessary for the comfortable support of my wife."

By the codicil the testator, *inter alia*, directed his trustees "to carry on and continue under the superintendence of themselves, or of any party they may appoint for that purpose, for behoof of my whole estate, for such period of time, and in such manner as they may think proper, any or all of the businesses in which I alone am interested at the time of my death, and that either by themselves alone or along with a partner or partners, whom I hereby authorise and empower them to assume on such terms and conditions as they shall think proper, and to extend or contract such business or businesses, or to let, lease, or sell the same, and that at such valuation or price, and on such terms and conditions as to payment of rent or purchase-money (and with or without security therefor) . . . and generally to do in regard to any business or businesses in which I may be interested as aforesaid whatever in the circumstances they may deem most beneficial to my estate though not herein expressed."

By the trust-disposition and settlement and the codicil the testator directed payment to be made of a number of legacies, some to be paid on his own death and the remainder on the death of his widow. After payment of the legacies and on the death of the widow, the trustees were directed to hold and apply, pay, and convey the residue to and for behoof of such charitable and benevolent institutions as they in their discretion, subject to certain directions specified, might select and in such amounts as they might think proper.

At the time of his death the testator, as sole partner of the Barnsmuir Coal Company, was tenant of a coalfield in Stirlingshire, under a lease for twenty-one years from Whitsunday 1882, with power to

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the lessees to put an end to the lease at Whitsunday 1885, Whitsunday 1888, Whitsunday 1890, and every third year thereafter, on giving six months' written notice to the proprietor. The lease would thus expire at Whitsunday 1903, unless the trustees as tenants exercised the power to terminate it at Whitsunday 1902. The lease excluded assignees and subtenants except with consent of the proprietor.

Questions having arisen as to the amount which Mrs Mein, the widow, was entitled to receive out of the profits of the colliery (which the trustees continued to carry on) under the liferent in her favour, a special case was presented.

The trustees were the first parties, and Mrs Mein was the second party.

The following facts were set forth in the case, in addition to those already narrated:—

The value of the estate left by the testator, after payment of debts, &c., and legacies payable on his death (exclusive of his interest in the colliery) was £9853, yielding about £290 a year.

The value of his interest in the colliery at the date of his death was £8625, 7s. 7d., including £2593 as the value of the tenant's interest under the lease.

The net profits of the colliery for the half year from the testator's death in the end of June 1899 to 31st December following amounted to £2062, 6s. 8d. The net profits of the colliery for the year ending 31st December 1900 amounted to £5195, 2s. 11½d. In reckoning these two sums as net profits, a deduction of 5 per cent was made for depreciation of plant.

"8. If at the expiry of the lease at Whitsunday 1903, or earlier termination thereof, the sum at which it was valued at the testator's death falls to be made forthcoming and available as capital of the estate, this can to a substantial and even a large extent be provided from the realisation of the colliery plant and machinery; but in so far as the proceeds thereof may fall short of the said sum of £8625, 7s. 7d., that amount would fall to be made up from the profits made in carrying on the colliery. This, however, would not require the whole amount of the profits, and after laying aside a sufficient amount out of profits to provide for this there would remain a considerable sum of profits to be disposed of in accordance with the directions in the testator's settlement."

The second party maintained that under the direction to the trustees in the fourth purpose of the trust-disposition and settlement to hold and apply, pay or convey the free annual income and produce of the residue of the testator's means and estate for her behoof during all the days and years of her life, she was entitled to the net profits derived from the colliery business calculated on the basis on which the above-mentioned sums of £2062, 6s. 8d. and £5195, 2s. 11½d. were brought out, so long as the colliery continued to be carried on. Alternatively, she maintained that she was entitled to said net profits after a sum was laid aside sufficient, along with the sum to be realised from the colliery plant and machinery, to secure that the amount at which the colliery business was valued at the testator's death should be extant as part of the capital of the trust-estate at the end of the lease.

The first parties maintained that the net profits from carrying on the colliery till the expiry of the lease fell into capital, and must be retained and invested by them so as to be available for distribution

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amongst the residuary beneficiaries on the death of the liferenter, and that the second party was entitled only to the income or revenue which should be derived from the investment of these profits.

The questions of law were:—"(1) Is the second party entitled to demand, and are the first parties bound to pay her, the net profits arising from carrying on the business of the Barnsmuir Colliery subsequent to the death of the testator, Alexander Mein junior? or otherwise, Is the second party entitled to demand, and are the first parties bound to pay her, the net profits arising from carrying on the business of the Barnsmuir Colliery subsequent to the death of the testator, Alexander Mein junior, after setting aside from these profits such sum as, along with the amount which shall at the expiry of the lease be realised from the colliery plant and machinery, shall then provide a sum equal to the value of the trustees' interest in the said colliery and lease, as this was ascertained at the death of the truster? (2) Is the second party entitled to demand, and are the first parties bound to pay her, only the interest which shall be derived from the investment by the first parties of the profits arising from carrying on said business subsequent to the death of Alexander Mein junior? or otherwise, What are the rights of the second party in reference to said colliery profits?"

Argued for the first parties;—(1) The whole profits derived from the colliery ought to be treated as capital. In so far as *Ferguson* v. *Ferguson's Trustees*[1] had been supposed to lay down a general rule, it might be said to be overruled by *Strain's Trustees* v. *Strain*.[2] But *Strain's Trustees*[2] did not expressly overrule *Ferguson*,[1] and did not itself lay down a general rule.[3] In the present case *Ferguson*[1] ought to be followed. The provision in the codicil empowering the trustees to carry on the business "for behoof of my whole estate" distinguished the present case from *Strain's Trustees*.[2] (2) At all events, such an amount of the profits ought to be set aside as would, along with the amount to be realised from the colliery plant, &c., provide a sum equal to the testator's interest in the colliery as at the date of his death. To do so was to do no more than any prudent trader would do in the management of his own business. It was really a question of accounting.

The second party argued that *Strain's Trustees*[2] had practically overruled *Ferguson*,[1] and ought to be followed.

At advising,—

LORD JUSTICE-CLERK.—We have heard the best that could be said on behalf of the trustees, who are anxious to carry out the wishes of the testator and to protect the estate for the benefit of the several charities which they are to select. I think the whole question, and the sole question, before us is, whether this case is ruled by the case of *Strain's Trustees*,[2] decided in a Court of seven Judges. I see no substantial difference between the

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[1] Feb. 23, 1877, 4 R. 532.
[2] July 19, 1893, 20 R. 1025.
[3] Freer's Trustees v. Freer, June 28, 1897, 24 R. 437. The first parties also referred to Wardlaw v. Wardlaw's Trustees, Jan. 23, 1875, 2 R. 368; Campbell v. Wardlaw, July 6, 1883, 10 R. (H. L.) 65; Baillie's Trustees v. Baillie, Dec. 8, 1891, 19 R. 220; Nugent v. Nugent's Trustees, Nov. 20, 1899, 2 F. (H. L.) 21; M'Laren on Wills, 3d edit., p. 616.

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two cases. I therefore think the decision in *Strain's* case[1] should be applied here, and that we should answer the first question in the affirmative.

LORD YOUNG.—I am of the same opinion. I had a difficulty at one time on the question spoken to briefly, but not too briefly, as to whether any deduction should be made in respect of depreciation of the residue of the estate, but I am now clearly of opinion that there is no room for such deduction. The object of the testator's bounty was to give some special legacies and the income of the residue to his widow, and then to provide that if there is any residue, that shall go to such charities as his trustees might select. I think this is not a case for making any deduction from the income and produce resulting from the trustees acting in the discharge of the duty imposed on them by the deed of carrying on the business. I think they have carried on the business properly under the direction of the deed, they being of opinion that that was the most profitable thing for those interested in the estate. Now, the interest of the widow in the estate, according to the case of *Strain*,[1] is the whole income and produce resulting from the carrying on of the business, and I gather it was the testator's intention that nothing should be deducted from that in order really to increase the residue for charitable purposes.

LORD TRAYNER.—I think with your Lordships that this case is ruled by the case of *Strain*.[1] I see no distinction between these two cases. In this case, as in *Strain's* case,[1] the testator authorised his trustees to carry on his business, which happened to be that of a coalmaster, and he directed that the whole income and produce of that estate should belong to his widow. It happens that in the two years in question there have been very large profits, but they might have been small if circumstances had been different. The testator meant his widow—the business being carried on by the trustees—just to get the profits as he had been getting them himself. Whether the profits of the business turned out to be much or little, it was the testator's intention that his widow should get them. With regard to the other point, viz., whether a sum should be set aside by the trustees out of the profits in order to keep up the capital of the estate to the value as at the date of the testator's death, I think the widow's right is not subject to any deduction with that view. She is no more bound to keep up the value of the estate in that way than she would be bound to make good any deterioration in value, such as might arise on a fall in the market price of stocks or shares forming part of the testator's estate.

LORD MONCREIFF.—I am of the same opinion. On the first question, we must follow the case of *Strain*,[1] which cannot be distinguished from the present. On the second point, we are told that the result of this business being carried on is that the capital value has been diminished to a certain extent, but that is a matter which the trustees had, no doubt, under consideration when they resolved to carry on the business. They were entitled to carry on the business if they thought fit, but the result of that was that

[1] 20 R. 1025.

e capital value has been diminished to a certain extent. If they did carry No. 155.
t the business, the widow was entitled to the whole profits and interest
sulting therefrom. Therefore I think there is no ground for making any June 21, 1901.
duction from those profits. Mein's Trustees v. Mein.

THE COURT answered the first alternative of the first question in the affirmative, and found it unnecessary to answer the other questions.

MILLAR, ROBSON, & M'LEAN, W.S.—J. & A. CAMPBELL & LAMOND, C.S.—Agents.

ANDREW WATSON, Pursuer.—*Shaw, K.C.*—*Horne.* No. 156.
THE CALEDONIAN RAILWAY COMPANY, Defenders.—*Clyde.*

June 22, 1901.

Watson v. Caledonian Railway Co.

Expenses—Jury Trial—Fees to medical men.—An action of damages for personal injuries brought against a railway company was settled the day before the trial, the defender being bound, *inter alia*, to pay the pursuer's expenses as taxed. On a consideration of objections to the Auditor's report, the Court, while *allowing* fees of £1, 1s. to each of two doctors for each of two reports made (1) prior to the raising of the action, and (2) immediately before the trial, and also fees of £2, 2s. to each of two other doctors called into consultation for the purposes of the trial, *disallowed in toto* sums charged as fees for three medical men as witnesses, and also the sums charged for drawing precognitions of medical witnesses.

1ST DIVISION.

ANDREW WATSON, mining engineer, Glasgow, raised an action against the Caledonian Railway Company to recover damages for personal injuries sustained by him in an accident on the defenders' railway on 23d December 1899.

An issue was adjusted, and the trial was fixed for 23d March 1901, but on 22d March the action was settled, on condition, *inter alia*, of the defenders paying the pursuer's expenses as taxed.

After the accident the pursuer had been attended throughout his illness by Dr Nicoll and Dr Grant, and shortly before the date fixed for the trial, Professor Glaister and Dr Knox were called in, the former, who was a specialist, paying one visit and the latter two visits.

The Auditor having made his report on the pursuer's account of expenses, the defenders objected thereto in so far as the Auditor had allowed the following charges:—

"1900.

(1)	Dec.	Paid fees to Dr Nicoll and Dr Grant for report as to injuries and condition of pursuer,		£2	2	0
	1901.					
(2)	Mar. 12.	Drawing Precognitions—				
		Dr Grant, . .	10 sh.	3	10	0
		Dr Nicoll, . .	5 sh.	1	10	0
	„ 20.	Professor Glaister, .	5 sh.	1	10	0
		Dr Knox, . .	4 sh.	1	4	0
(3)	„ 22.	Paid witnesses as follows:—				
		Dr Glaister, . . .		15	15	0
		Dr Knox, . . .		21	0	0
		Dr Nicoll, . . .		21	0	0
				£67	11	0"

Argued for the defenders;—The charges both for a report in December, and for drawing precognitions in March should not be

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allowed. A doctor's report was his precognition. There was no warrant for charging the fees for medical men as witnesses. Even if the case had gone to trial only two witnesses would have been certified, and in any event the fees charged were excessive.

Argued for the pursuer;—The Court would not interfere with the exercise of this discretion by the Auditor. The pursuer required the reports in December to enable him to raise his action. The precognitions in March were only taken after a long lapse of time, when the pursuer's condition might have altered. The doctors for whom fees were charged as witnesses had had to prepare for the trial. The fees charged were in the circumstances fair and reasonable, but in no event should they be altogether disallowed.

The LORD PRESIDENT intimated that under head (1) the Court were of opinion that a fee should be allowed of one guinea each to Dr Nicoll and Dr Grant for their first visit to the pursuer and the report thereon in December; and that under head (2) one guinea each should be allowed to Dr Nicoll and Dr Grant as for a second report in March, and a fee of two guineas each to Professor Glaister and Dr Knox, and that the charges under head (3) should be disallowed.

THE COURT pronounced an interlocutor sustaining the objections of the defenders "to the extent of the sum of £58, 13s.,"* &c.

CAMPBELL & SMITH, S.S.C.—HOPE, TODD, & KIRK, W.S.—Agents.

No. 157.
June 25, 1901.
Reid v. P. R. Fleming & Co.

ANDREW REID, Appellant.—*T. B. Morison.*
P. R. FLEMING & COMPANY, Respondents.—*Campbell, K.C.—Chisholm.*

Master and Servant—Workmen's Compensation Act, 1897 (60 *and* 61 *Vict. c.* 37), *sec.* 7—*Engineering Work.*—The Workmen's Compensation Act, 1897, sec. 7, subsec. (1), enacts,—"This Act shall apply only to employment by the undertakers, as hereinafter defined, on or in or about," *inter alia*, an "engineering work." As defined in subsec. (2), an "engineering work means any work of construction, or alteration, or repair of a railroad, harbour, dock, canal, or sewer, and includes any other work for the construction, alteration, or repair of which machinery driven by steam, water, or other mechanical power is used," and "undertaker," "in the case of an engineering work, means the person undertaking the construction, alteration, or repair."

A firm of engineers sold a hay-cutting machine to a customer, and undertook to fit it up in the customer's premises, and test its working before delivery.

In the process of fitting up the hay-cutter one of the engineers' workmen, for the purpose of testing its working, connected it with a revolving shaft driven by electricity forming part of the customer's plant already in the premises, and while doing so was injured.

Held (1) that the hay-cutter was an engineering work in the sense of the Act, (2) that the workman's employers were the undertakers for its construction, and (3) that the workman was entitled to compensation under the Act.

1ST DIVISION. Sheriff of Lanarkshire.

A CLAIM for compensation under the Workmen's Compensation Act, 1897, by Andrew Reid against his employers, P. R. Fleming & Company, engineers, Glasgow, was submitted to the determination of the Sheriff-substitute of Lanarkshire (Boyd) as arbitrator.

* This was an *error calculi*. The exact amount, after deducting the sums allowed by the Court from the total amount objected to, was £59, 3s.

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In an appeal upon a case stated at the instance of Reid against the arbitrator's decision, the following facts were set forth as proved :—

" 1. That the appellant is an engineer and was in the service of the respondents, and for three months prior to 5th October 1900 he earned wages at the rate of 38s. per week.

" 2. That the respondents' business includes the making of machines in their own premises, and fitting them up in the premises of their customers, where the machines must be shewn to work satisfactorily before delivery is accepted.

" 3. That the respondents sold certain machines, including a hay-cutter, to the St George's Co-operative Society, Port-Dundas, Glasgow, and undertook to fit these machines and leave them in working order in their customers' premises at Port-Dundas.

" 4. That the appellant was engaged, on 5th October 1900, in fitting up the hay-cutter in the premises of the respondents' customers.

" 5. That in erecting the machine the appellant only used manual labour, assisted by blocks and tackle for raising the heavier parts to their position.

" 6. That from time to time, as the appellant built the machine, it was necessary for him to test it by applying mechanical power in order to ascertain whether the machine was so far properly fitted and ran smoothly.

" 7. That the machine was partially constructed, and the appellant was engaged in so testing it with mechanical power derived from a shaft which ran in the apartment in which the machine was being erected, and which was driven by electrical power belonging to the said St George's Co-operative Society, when his left hand was caught in the hay-cutting machine, and so injured that he lost two and a half fingers of that hand. When the machine was ultimately completed it was driven by motive power derived from the shaft mentioned above."

The arbitrator found in law that at the time of the accident the hay-cutting machine was still the property of the respondents; that the said premises of the St George's Co-operative Society were at that time a factory within the meaning of the said Workmen's Compensation Act; that the respondents were not at the date of the accident occupiers of the said factory within the meaning of the said Act, and therefore that they were not liable in compensation to the appellant. He therefore assoilzied the respondents, and found the appellant liable in expenses.

The questions of law for the opinion of the Court were :—" (1) Whether the respondents were undertakers in the sense of the Workmen's Compensation Act, 1897 ? and (2) Whether the employment at which the appellant was injured was an employment within the meaning of the said Act ? "

Argued for the appellant ;—The Sheriff had found in law that the respondents were not liable in compensation to the appellant. The appellant did not contest the previous findings in law upon which the Sheriff had based that conclusion, but he maintained that that conclusion was erroneous on a ground not adverted to in the Sheriff's findings, namely, on the ground that the work at which the appellant was employed at the time of the accident was an engineering work in the sense of section 7 of the Act of which the respondents were the undertakers.* The question so raised was plainly covered by the

* The section is quoted in the rubric.

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questions of law put to the Court. On this question it was submitted that whether the words "any other work," &c. in the definition of engineering work meant a process or a product of labour, they applied in this case either to the process of fitting up or to the hay-cutter when fitted up. In the fitting up mechanical power was used, namely, the revolving shaft driven by electricity, which was separate from the hay-cutter, and was on the customers' premises before the hay-cutter was brought there. The facts were thus different from those dealt with by the arbitrator in the case of *Purves* v. *Sterne & Company*,[1] founded on by the respondents. Besides, in that case no decision was given on the question by the Court of Appeal. The testing of the machine from time to time to see if it was properly fitted up was just as much a part of its construction as the fitting up itself. The decisions upon the meaning of engineering work were in the appellant's favour.[2]

Argued for the respondents;—The question now raised was not before the Sheriff. He had given no decision upon it, and it was therefore not competent for the Court to deal with it. The respondents had no notice that it was to be raised. But if the question were competently before the Court the appellant's argument was unsound. The meaning which he sought to attach to the term engineering work was inconsistent with the other provisions of the Act, and if followed out logically would lead to extravagant results. For instance, if the words "any other work, &c." were to be construed generally, and without reference to the previous part of the definition, they would include any building in the erection of which a steam-crane was used, but the Act specially dealt with buildings, and excluded buildings not exceeding 30 feet in height from its operation. Again, the meaning given by the appellant to the words would cover the separate products of labour in a factory where mechanical power was used. This could not be intended, because work in factories was specially dealt with in the Act, and because, if logically followed out, it would lead to the result that such articles as a match-box or a toy would have to be treated as engineering works. These considerations shewed that the words "any other work, &c." must be qualified by what had preceded, and limited to works *ejusdem generis* with railroads, canals, &c., which were all of an extensive character, carried on out of doors, and distinct from work carried on in a factory. If this was the correct theory of construction it was clear that the hay-cutter was not an engineering work, nor was the operation of setting it up in the customers' premises an engineering work. The hay-cutter was completed in the respondents' factory, and it was merely for convenience of transit that it was taken to pieces and refitted in the customers' premises. Again, it was not a sound view that the testing of a machine was part of its construction. If so, then a steam-engine or other mechanical contrivance for the production of power, including a mechanical toy, if started to see if it would work, would also satisfy the criterion that steam or other mechanical power had been used in its construction. In the case of *Purves* v. *Sterne & Company*[1] Lord Young had expressed his concurrence with the finding of the arbitrator that such a contention was not tenable.

[1] May 22, 1900, 2 F. 887.

[2] Middlemiss v. Berwickshire District Committee, Jan. 17, 1900, 2 F. 392; Hoddinott v. Newton, Chambers, & Co., L. R. [1901], A. C. 49, *per* Lord Macnaghten, 53 and 54.

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LORD PRESIDENT.—The appellant is a mechanical engineer, and he was for three months prior to 5th October 1900 in the employment of the respondents, whose business includes the making of machines in their own premises and fitting them up in the premises of their customers, where the machines must be proved to work satisfactorily before delivery is accepted.

The respondents had sold a hay-cutter to the St George's Co-operative Society, Port-Dundas, Glasgow, and had undertaken to fit it up and leave it in working order in the Society's premises there. The appellant was on 5th October 1900 engaged in fitting up the hay-cutter in the Society's premises. In doing so the appellant only used manual labour, assisted by blocks and tackle for raising the heavier parts to their position, but from time to time, as the erection of the hay-cutter proceeded, it was necessary for him to test it, and he did test it, by employing mechanical power, in order to ascertain whether it was so far properly fitted and ran smoothly.

When the hay-cutter was partially erected and the appellant was engaged in so testing it by mechanical power derived from a shaft which ran in the apartment in which it was being erected, and which was driven by electrical power belonging to the Society, his left hand was caught in it, and so injured that he lost two and a-half fingers of that hand. When the erection of the hay-cutter was completed, it was driven by motive power derived from the shaft just mentioned.

Upon these facts the Sheriff-substitute has found in law that at the time of the accident the hay-cutter was still the property of the respondents; that the premises of the Society were at that time a factory within the meaning of the Workmen's Compensation Act; but that the respondents were not at the date of the accident occupiers of the factory within the meaning of that Act, and therefore that they are not liable in compensation to the appellant.

It appears to me that these findings are correct except in so far as they declare that the respondents are not liable in compensation to the appellant, and I am of opinion that the respondents are liable to make compensation to the appellant under the Act upon a ground not adverted to by the Sheriff-substitute.

By section 7, subsection 1, of the Act, it is declared that it shall apply only to employment by the "undertakers," as thereinafter defined, on, in, or about, *inter alia*, an "engineering work," and by subsection 2 it is declared that "'engineering work' means any work of construction, or alteration, or repair of a railroad, harbour, dock, canal, or sewer, and includes any other work for the construction, alteration, or repair of which machinery driven by steam, water, or other mechanical power is used." By the same subsection it is provided that "undertakers," in the case of an engineering work, means the person undertaking the construction, alteration, or repair. The respondents maintain that the erection of the hay-cutter was not an "engineering work" within the meaning of section 7, but I am unable to concur in this view. Even if it were held that an "engineering work" means exclusively a physical product as distinguished from an operation, I would be of opinion that the erection of the hay-

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cutter satisfied the definition. The "construction" of a "railroad," or of any of the other works mentioned in the subsection consists in putting together *in situ* the materials of which it is composed, and in like manner the putting together *in situ* of the different pieces of the hay-cutter seems to me to have constituted the "construction" of it in the sense of the Act. While the erection of the hay-cutter thus seems to me to satisfy the definition in section 7, subsection 2, upon its most restricted interpretation, I may add there seem to me to be strong grounds for holding that the words "engineering work" include an engineering operation in which machinery driven by steam, water, or other mechanical power is used. In the case of *Middlemiss* v. *Middle District Committee of the County Council of Berwick*,[1] we held that the operation of road repair, in which a steam-roller was employed, was an engineering work in the sense of subsection 2 of section 7 of the Act. In either view, what the appellant was doing when he sustained the injury seems to me to have been a work for the "construction" of which machinery driven by mechanical power was used in the sense of section 7, subsection 2, of the Act. The respondents were the "undertakers" of that work when the accident happened, and I am therefore of opinion that they are liable to make compensation to him under the Act.

LORD ADAM.—There are two questions in this stated case. The first question is, whether the respondents were undertakers in the sense of the Workmen's Compensation Act, 1897, and on that question I understand that there is no serious dispute in the sense in which the Sheriff considered the question, viz., that they were not at the time the occupiers of the factory in which the accident occurred. The second question is, whether the employment at which the appellant was injured was an employment within the meaning of the said Act. Now, the question whether an employment is an employment to which the Act applies means whether it is an employment in respect of which compensation will be given under the Act. The Sheriff-substitute has not given his reasons for holding that the employment was not an employment within the meaning of the Act, but he must clearly have been of that opinion, for otherwise he would not have refused compensation. Accordingly, the question before us now is, whether the employment is one in respect to which this right to compensation is given. Now, these employments are specified by section 7, subsection 1, as follows:—"A railway, factory, mine, quarry, or engineering work," and the second subsection gives the meaning which each of these words is to bear in the construction of the Act. The meaning of "engineering work" is there defined as "any work of construction, or alteration, or repair of a railroad, harbour, dock, canal, or sewer, and includes any other work for the construction, alteration, or repair of which machinery driven by steam, water, or other mechanical power is used." Now, of course the work on which the appellant was employed does not fall under the employments enumerated in the first head of this subsection, for he was employed in the construction of a hay-cutting machine, but the question appears to be whether the construction of such a

[1] 2 F. 392.

machine does not fall within the phrase "other work," which becomes an engineering work when in the construction of it machinery driven by mechanical power is used. Now, I think "work" is a word of most comprehensive meaning; in ordinary language we talk of a book or a picture, as well as of a railway, or a bridge, or a steam-engine, as a work, and I think a "hay-cutter" falls under it; nor do I think that the construction of a machine is completed, although all the parts of which it is composed may be completed. If so, there is no doubt, from the facts set forth by the Sheriff-substitute, that the appellant was engaged in the construction—that is, the building up or erecting of that "work" when he met with the accident; and the only remaining question is, whether mechanical power was used in the construction of that work. Now, as to that, the Sheriff leaves us in no doubt, because he states not only that mechanical power was necessary and was being used, but that it was being used at the time of the accident, and was the cause of the accident. Accordingly, it appears to me that the appellant was engaged in a work to which the Act applies, and I therefore agree with your Lordship.

LORD M'LAREN.—I concur.

LORD KINNEAR.—I agree. I think this hay-cutting machine was a work in the sense of *opus manufactum*; that in its construction machinery was used driven by electricity, and that therefore it falls within the definition of engineering work in the Workmen's Compensation Act. I am not surprised, however, that the attention of the Sheriff-substitute was not directed to this view of the case, because in ordinary language an engineering work might probably be supposed to mean a more extensive structure than a hay-cutting machine. But that is not a sufficient reason for excluding from such a comprehensive term as "work" one very legitimate signification, nor for refusing effect to the statutory definition of the specific kinds of work which it means to describe as an "engineering" work. I am not moved by the argument that if this is the meaning to be attached to the term "work," it is different from its meaning in the earlier part of the clause, where it seems to mean an operation rather than a product of labour. But the use of one word in two different senses in the same passage is a method which is not confined to Acts of Parliament. It would be easy to find illustrations both in modern and classical writers. It seems to me, therefore, a mistake in the interpretation of written language to insist on a perfectly uniform and unvarying consistency in the use of particular words, because that is to fail to take account of the transition from one aspect of a complex idea to another. But however that may be, we ought, in my opinion, to construe this statute in a liberal spirit, and we must not sacrifice the substantial intention of this clause to an over-minute analysis of specific words.

THE COURT pronounced this interlocutor:—"Find that the respondents were the persons undertaking the construction of the hay-cutter in question: Find that the hay-cutter was an engineering work in the sense of the Workmen's Compensation Act, 1897, and that the appellant having been injured by

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accident while employed by the respondents in the course of the construction of the said hay-cutter, the respondents are liable to him under said Act; and remit to the arbitrator to make an award of compensation accordingly."

SIBBALD & MACKENZIE, W.S.—ANDERSON & CHISHOLM, Solicitors—Agents.

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June 26, 1901.
Logue v. Fullerton, Hodgart, & Barclay.

THOMAS LOGUE, Claimant (Respondent).—*Baxter*—*A. M. Anderson.*
FULLERTON, HODGART, & BARCLAY, Appellants.—*Campbell, K.C.*—*Younger.*

Master and Servant—Workmen's Compensation Act, 1897 (60 *and* 61 *Vict. c.* 37), *sec.* 1 (1) *and* (2) (*c*)—"*Course of Employment*"—*Serious and wilful misconduct.*—In a claim for compensation under the Workmen's Compensation Act, 1897, by a father for the death of his son, the following facts were set forth in a case stated by the arbitrator:—The deceased, who was engaged as a workman in the process of filling scrap-iron into barrows, was killed owing to the defective condition of a hoist in which he was ascending to a furnace platform, in order to procure handleathers, which were necessary to his work. The furnace platform could be reached either by a fixed iron ladder or by the hoist in question. Workmen were forbidden to ascend by the hoist, a notice to that effect being posted on a wall close by, and at the time of the accident the hoist had been rendered especially dangerous by recent alterations. There was no finding that the deceased knew of the notice, and it was stated that there was no proof that his attention was directed to the changed condition of the hoist. It was further stated that some of the workmen knew of the notice and that some did not, but that all of them used the hoist.

Held (1) that the deceased had been killed in the course of his employment; and (2) that the arbitrator was right in holding that the deceased had not been guilty of serious and wilful misconduct in the sense of the Workmen's Compensation Act, 1897.

2D DIVISION. Sheriff of Renfrew and Bute.

IN an arbitration under the Workmen's Compensation Act, 1897, on a claim by Thomas Logue, Cashilinny, Donegal, in respect of the death of his son, Thomas Logue junior, against Messrs Fullerton, Hodgart, & Barclay, Vulcan Foundry and Engine Works, Paisley, the employers of the deceased, the Sheriff-substitute (Lyell) awarded compensation.

The employers obtained a case, which stated;—"The facts proved are as follows:—On the 16th of November 1900 the deceased Thomas Logue junior was, and had been for about a fortnight, a labourer in the employment of the appellants at their foundry and engine works in Paisley. On the evening of the 15th of November he had received instructions from a fellow-labourer, who had authority to issue such instructions, to be at the works at four o'clock on the following morning, for the purpose of filling scrap-iron into the barrows. This was not an unusually early hour for the performance of the work of so filling scrap-iron, which work may be done either with the naked hands, or by means of shovels, or with the hands covered with shields called hand-leathers. The deceased accordingly went to his work as ordered, and was heard asking first whether the scrap was too hot to be handled with hand-leathers, and second, where hand-leathers were to be obtained. In answer to this latter question, one of a group of his fellow-workmen replied 'in the store,' but could not say whether the deceased heard. It was proved that these hand-leathers are kept in the store, and that there is also a supply of them on the furnace platform for the use of the furnace-

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men. The store is not open till six o'clock A.M.; but up to that time the key is in the possession of the night watchman. It was not proved that the deceased knew or had means of knowing this latter fact. The furnace platform referred to is a considerable height above the floor of the moulding shop, and can be reached either by a fixed iron ladder or by means of a hydraulic hoist, which may be set in motion either from the level of the floor or from the furnace platform. About 4.30 A.M., and shortly after the deceased was heard asking where hand-leathers were to be obtained, he was discovered standing on the hoist, in which he had obviously ascended from the floor, with his neck jammed between the beam of the hoist and the girder of a new furnace platform then in course of erection; and he was brought down dead. On a wall close to the hoist a notice was displayed bearing the inscription 'No allowance for any man to go up upon hoist.' It was also proved that, shortly before the accident, the hoist had become specially dangerous on account of the fact that its beam had been lowered some two feet in order to allow of the floor of the hoist being brought up to a level with the old furnace platform. The previous height of the beam of the hoist from its floor had been about six feet; but, as the girder of the new furnace platform was only about four feet above the old furnace platform, the beam of the hoist had been lowered. The result was that, if a man was standing erect upon the hoist, he would be in danger of being crushed between the girder and the beam before the floor of the hoist reached the level of the old furnace platform. Strict injunctions had been given to the foremen to warn the men not to use the hoist, and the notice above referred to had been repainted. On the other hand, as I have said, the deceased had been only a fortnight in the employment at the time of the accident, although he had worked there on previous occasions when the hoist was comparatively safe. There was no proof that his attention had been specially directed to the changed condition of the thing; and the hoist, before and after the lowering of the beam, was regularly used by workmen whose business took them up to the old furnace platform. Some of the men never knew of the existence of the warning notice; some had never read it; and of those even who had read it, all used the hoist in spite of it. It was proved to my satisfaction that when the deceased thus attempted to ascend by the hoist to the furnace platform, he was in quest of hand-leathers for the purpose of equipping himself to go on with his allotted task of filling scrap. I was therefore of opinion that although he may have disobeyed orders in taking the easier way of ascending to the platform, and may have been negligent and even reckless in so doing, his endeavour to reach it was in pursuance of his proper work. I therefore held that the fatal accident arose out of, and in the course of, the deceased's employment; and that the fatal injury he sustained was not attributable to his own serious and wilful misconduct.

"The questions of law for the opinion of the Court are:—(1) Was the fatal injury to the deceased caused by an accident arising out of, and in the course of, his employment, within the meaning of section 1 (1) of the Workmen's Compensation Act, 1897? (2) Was the Sheriff-substitute right in holding that the fatal injury was not attributable to the serious and wilful misconduct of the deceased, in the sense of section 1 (2) (*c*) of the said Act?"

Argued for the appellants;—Where a workman, with good intentions, and in his master's interest, did what he had no business to do,

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and was injured, it was not in the course of his employment.[1] Further, the deceased had been guilty of serious and wilful misconduct. Assuming that hand-leathers were necessary to the work of the deceased, he was not justified in taking leathers which were not provided for him, and in doing so by using a forbidden hoist. The Sheriff, although he stated certain facts, did not say what inference he drew therefrom, and therefore, in the absence of a finding that the deceased did not know, it must be taken that he knew that the hoist was forbidden. The presumption was that he knew. The question of serious and wilful misconduct was treated by the Scotch Courts as one of law, and if the Sheriff had drawn an erroneous legal conclusion from the facts, it could be reviewed.[2] The English cases on serious and wilful misconduct were nothing to the point, as the English Courts treated the question simply as one of fact.

Argued for the respondent;—The findings left no room for doubt that the accident was in the course of the deceased's employment. As to serious and wilful misconduct, the *onus* was on the appellants to shew this, and there was nothing in the findings to shew that they had satisfied the *onus*. There was here no warning on the hoist itself. There was no finding that the danger was obvious, or that the deceased knew of the rule he was breaking, and a mere breach of a rule, in the absence of such findings, or the mere adoption by the deceased of a dangerous method of doing his work, did not amount to serious and wilful misconduct.[3]

LORD JUSTICE-CLERK.—We must deal with this case upon the statement of facts as the Sheriff has found them. The question—assuming there may be a question of law involved in the matter of serious and wilful misconduct—is whether the facts as stated by the Sheriff so clearly point to there having been serious and wilful misconduct as to debar the pursuer from succeeding in this petition. Without going into detail, I think here the facts are such that they might lead to either inference according to the view you choose to take of them, and that being so, the Sheriff who heard the evidence, and stated what he found to be the facts upon the evidence which he heard, is undoubtedly the best judge of that matter. I see no ground for holding that he could not legally upon these facts which he found come to the conclusion which he did. There are many cases in which that would be a nice question, but in this case I think we ought not to interfere with the judgment at which the Sheriff has arrived.

LORD YOUNG.—I am of the same opinion. I do not know whether I can usefully add anything to what the Sheriff has expressed in the case, or your Lordship has expressed in explaining the conclusion to which you have come, that there is no satisfactory ground for interfering with the Sheriff's

[1] Gibson v. Wilson, March 12, 1901, 3 F. 661; Callaghan v. Maxwell, Jan. 23, 1900, 2 F. 420; Lowe v. Pearson, L. R. [1899], 1 Q. B. 261.

[2] Guthrie v. Boase Spinning Co., March 20, 1901, 3 F. 769; Dailly v. Watson, Limited, June 19, 1900, 2 F. 1044.

[3] M'Nicol v. Spiers, Gibb, & Co., Feb. 24, 1899, 1 F. 604; Rumball v. Nunnery Colliery Co., 80 L. T. (N. S.) 42; Durham v. Brown Brothers, Dec. 13, 1898, 1 F. 279; Douglas v. United Mineral Mining Co., Feb. 20, 1900, 2 Minton-Stenhouse's Compensation Cases, 15.

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judgment. The case presents two questions of law, which I think it is proper to keep quite separate, as the Sheriff has done. The first is—(His Lordship read the question). Now, the employment of this workman is stated in the case. Upon all the information given by the Sheriff, I have no hesitation in sustaining his conclusion, which is that the proof establishes to his satisfaction "that when the deceased thus attempted to ascend by the hoist to the furnace platform he was in quest of hand-leathers for the purpose of equipping himself to go on with his allotted task of filling scrap." The Sheriff states in detail that the deceased was informed that these leathers which he went for, and which were intended to enable him safely to go on with his work, were to be found in two places. One was the store, but the store was not open for two hours after he required them, and the other was the furnace platform, a considerable height above the floor of the moulding shop, and it is stated that he was ascending to that platform in order to get these leathers when the accident occurred to him. I therefore conclude, without any difficulty or hesitation, that the accident occurred in the course of his employment. That answers the first question. But then it is said that there was an obvious danger here. I think there clearly was not, upon the details which are stated by the Sheriff. The beam against which he struck had been lowered, and then there was a direction that the workmen should not ascend at that place. The Sheriff finds in point of fact that there was no proof that the workman's attention had been specially directed to the changed condition of the thing. I attach no importance to the word "specially," and I read the statement therefore that there was no proof that his attention had been directed to the changed condition of the thing, "and the hoist before and after the lowering of the beam was regularly used by workmen whose business took them up to the old furnace platform. Some of the men never knew of the existence of the warning notice; some had never read it; and of those even who had read it, all used the hoist in spite of it." Now, when this young man, who had been a fortnight in the service, used this hoist in order to get the means of doing his master's work on that occasion, I do not think he was guilty of serious and wilful misconduct by going in the face of an obvious danger. I therefore agree with the Sheriff upon the second question, that the accident was not attributable to the serious and wilful misconduct of the deceased. I think he was right in holding that it was not so attributable, although I think it is sufficient to say that we have no facts established here in the statement before us which will entitle us to say that the Sheriff was wrong in holding that the words "serious and wilful misconduct" are not applicable to his conduct on that occasion. I do not know that there is any real difference between the law of England and the law of Scotland in this matter,—whether serious and wilful misconduct is a question of fact or a question of law. *Prima facie* it is a question of fact, although in any individual case it may appear that upon the detailed incidents and facts which occurred, from which a conclusion is to be drawn, there was or was not serious or wilful misconduct. It may be that these facts do not justify the conclusion that there was, or do not justify the conclusion that there was not. But it is still a question of fact, although this Court—and I have no doubt the English Courts too—have corrected an erroneous conclusion upon the detailed facts which are

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submitted. I think we might here correct any error which the Sheriff had fallen into in holding that it amounted to serious and wilful misconduct, and which we thought an erroneous conclusion from the detailed facts of which he had informed us, and might also negative a conclusion which we thought could not be drawn from the detailed facts. Here I am of opinion that, upon the facts stated, the conclusion and judgment of the Sheriff upon this question of law submitted to us is right.

LORD TRAYNER.—I think the facts stated in this case deprive it of any difficulty. I have no doubt whatever, upon the facts stated, that this accident took place when the respondent's son was in "the course of his employment." I have equally no doubt that he was not guilty either of serious and wilful misconduct or of any misconduct whatever.

LORD MONCREIFF.—I am of the same opinion. On the first question I have no difficulty. I think it is quite plain that the accident occurred in the course of the deceased's employment. The second question raises a more difficult point. The burden is upon the employer to shew that the injury was attributable to the man's serious and wilful misconduct, and it is plain upon the findings in the Sheriff's statement that that has not been proved to his satisfaction. It may be that on the detailed facts found proved by the Sheriff he might have drawn the conclusion that the workman knew of the existence of the rule and disregarded it, and that his doing so amounted to wilful misconduct. But he has not done so. On the contrary, I infer that he drew the conclusion that the workman did not know of it, or at least that it was not proved that he knew of the rule. I therefore come to the conclusion that we cannot interfere with the judgment at which the Sheriff has arrived.

LORD JUSTICE-CLERK.—I should have said what I omitted to say, that I agree upon the first point—namely, that the accident took place in the course of the deceased's employment.

THE COURT, answering the questions of law in the affirmative, dismissed the appeal.

JOHN BAIRD, Solicitor—MORTON, SMART, & MACDONALD, W.S.—Agents.

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M'Arthur v. M'Queen.

MARGARET M'ARTHUR, Pursuer (Appellant).—*A. M. Anderson.*
JOHN M'QUEEN, Respondent.

Process—Proof—Witness—Filiation and Aliment—Defender called as first witness for Pursuer.—Observations on the practice of calling the defender as the first witness for the pursuer in actions of filiation and aliment, and as to the extent to which if she does so she must be held to present him to the Court as a witness of credit.

1ST DIVISION. Sheriff of Fife and Kinross.

THIS was an action of filiation and aliment by Margaret M'Arthur against John M'Queen, both residing at Crossgates, in the county of Fife.

Proof in the action was heard by the Sheriff-substitute at Dunfermline (Gillespie). The pursuer called the defender as her first

witness. In his examination for the pursuer the defender denied that he was the father of the pursuer's child, or that he had connection with the pursuer at or near the time of its conception. He admitted that at or about that period he had been present at a ball at which the pursuer was also present, but he denied that he had been outside the hall where the dance took place alone with the pursuer on the evening in question, or that he had accompanied her home. The pursuer's sister and an independent witness afterwards gave evidence for the pursuer, in the course of which they contradicted the defender's statements that he had not been outside the hall alone with the pursuer on the evening of the dance, and had not seen her home. The Sheriff-substitute decerned in favour of the pursuer, but on appeal the Sheriff (Chisholm) recalled the Sheriff-substitute's interlocutor, and assoilzied the defender from the conclusions of the action.

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The pursuer appealed to the First Division of the Court of Session. There was no appearance for the defender.

LORD PRESIDENT.—(After stating his opinion on the facts that the pursuer had failed to prove her case)—I should like to add a word as to the practice of a pursuer calling the defender as the first witness. For many years strong disapprobation of this practice has been expressed from the bench, not only in this Court, but in the House of Lords. It is not (unless under very exceptional circumstances) the proper mode of conducting a case. The defender is put into the witness-box in order to get him to commit himself during a hostile examination on some point or points in regard to which it is intended to bring other witnesses to contradict him. It has repeatedly been said that (unless under exceptional circumstances) where a witness is called by either party, he is presented to the Court by that party as a witness of credit, and that the party cannot be allowed afterwards to contradict or discredit him.

This case is an illustration of the injustice which may result from the practice of a pursuer calling the defender in order that he may afterwards be contradicted and treated as a witness who should not be believed.

LORD ADAM.—(After dealing with the facts)—I entirely concur with your Lordship's observations on the practice—an entirely improper practice in my opinion—of attempting to hamper the defender by producing him as a witness in order to try to get him to perjure himself on some more or less irrelevant and collateral point, and then to contradict him by independent witnesses. I think that is not a fair practice to the defender, and should be discouraged.

LORD M'LAREN.—There are cases, such as the reduction of a will, when it may be necessary for the pursuer to put his adversary in the witness-box, as a necessary witness to prove a matter of fact which cannot be proved without his testimony. In such cases the examining counsel will be allowed to examine him as an adverse witness—in fact, to examine him according to the rules of cross-examination. But the present is not a case of that sort, for the facts are not necessarily to be proved by the defender's evidence—indeed, if the pursuer's case had to be proved by the evidence of

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the defender, cases like this would never be brought. Without going so far as to say that the pursuer, if she puts the defender in the box, is bound by everything which he says—for instance, if he denied the fact of connection, I should not hold her bound by that—I think it must be assumed that the defender is put forward by the pursuer as a person of credit, not necessarily on the main issue, but on all the minor facts of the case from which light on the main issue may be obtained. In so far as he speaks to matters of fact with regard to which he must be familiar, and in so doing discredits the pursuer's averments, I think the case must be taken as if one of the pursuer's principal witnesses had failed to establish the facts for which he was adduced.

LORD KINNEAR concurred.

THE COURT dismissed the appeal.

P. R. M'LAREN, Solicitor—JOHN VEITCH, Solicitor—Agents.

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Mills v. Brown's Trustees.

WILLIAM MILLS AND OTHERS, Pursuers (Respondents).—*C. K. Mackenzie, K.C.—Findlay.*
ROBERT BROWN, Defender (Reclaimer).—*Jameson, K.C.—Scott Brown.*
ISABELLA BROWN AND OTHERS (Brown's Trustees), Defenders.

Trust—Illegal payment of salary to trustee as manager of manufacturing business—Salary received repaid to trust—Interest.—Testamentary trustees had power by the trust-deed to appoint one of their number "to be factor or cashier, and to allow him a reasonable remuneration for his trouble." The trustees, in the belief, which was supported by an opinion of counsel, that they were authorised to do so, appointed one of their number as salaried manager of a business forming part of the trust-estate. After the trustee had acted as manager and drawn his salary for five years, an action was raised against him and the trustees by a beneficiary, in which the pursuer obtained a decree finding that it was *ultra vires* of the trustees to pay the salary, and ordaining the manager to repay to the trust the sums received by him.

The pursuer having further contended that interest should be paid to the trust-estate upon the sums improperly paid, the Court *held* that, having regard to the *bona fides* of the trustees, and to the fact that the trust had got the benefit of the trustee's services as manager without payment, it was not equitable that the trustee should be called on to pay interest.

2D DIVISION. Lord Low.

(SEE previous report, 2 F. 1035.)

The late Robert Brown of Shortroods, near Paisley, by his trust-disposition and settlement, dated 18th June 1887, authorised his trustees, *inter alia*, to carry on his business of manufacturing brick and fire-clay goods, and also empowered them to appoint one of their own number "to be their factor or cashier, and to allow him a reasonable remuneration for his trouble."

By a codicil, dated 6th December 1893, the testator appointed "Robert Brown tertius, manager," to be a trustee and executor. The trustees appointed Robert Brown tertius, who had been manager of the works at the time of the testator's death, and who had accepted office as trustee, as manager of the brick and fire-clay works, at a salary of £700 per annum, and a commission. This was done after taking an opinion of counsel, which was to the effect that the proposed appointment was within the powers of the trustees. Robert Brown tertius accordingly continued to act as manager, and drew the

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alary from the time of the testator's death in 1895 till 1900, when he present action was brought against him individually, and also gainst the trustees as a body, by William Mills, a co-trustee, who ras also a beneficiary, and certain other of the beneficiaries, the deci- ion in which, on 19th June 1900,[1] was to the effect that it was *ultra ires* of the trustees to pay a salary to the defender Robert Brown; nd they were appointed to lodge a note of the sums which had been o paid, and which fell to be repaid by him.

This having been done, the defender Robert Brown lodged a note of bjections, in which he, *inter alia*, claimed that in the circumstances ie should not be called on to pay interest on the sums he had to repay, r at all events no higher interest than 3½ per cent. The pursuers, in nswer, claimed interest at 5 per cent.

By interlocutor, dated 19th March 1901, the Lord Ordinary (Low) ound that the sum falling to be repaid by the defender was £3205, 0s. 5d., "with periodical interest at 4 per cent till paid," and granted eave to reclaim.

The defender reclaimed, and argued that this was not a case for llowing interest at all. On this point the argument sufficiently ppears from the opinions of the Court. The defender also sub- mitted an argument that in any event the rate of interest allowed by the Lord Ordinary was too high, and that 3, or at most 3½ per cent, would be sufficient. The undernoted authorities were referred to by the defender.[2]

Argued for the pursuers;—The defender having appropriated with- out right money of which he was trustee must repay it with interest at the highest rate. This was the invariable rule.

LORD JUSTICE-CLERK.—This is certainly not an ordinary case. It is a very peculiar case indeed. I cannot have the slightest doubt, on looking at the his- tory of it, that this gentleman perfectly *bona fide* was appointed by the trus- tees to act as manager in the belief that they had power to appoint one of their own number as manager in respect that the truster had authorised them to appoint one of their own number to act as factor. It was held in the reclaim- ing note which was before us some time ago that that was erroneous, and that legally he could not receive a salary as manager, and at the same time be a trustee. The *bona fides* is plain, for no man would have remained a trustee in these circumstances if he had known that he risked his salary, because there were plenty of trustees, and in giving up his position as trustee it would have been open to him to take up the managership, by which he was to make his livelihood, and at the same time assist the business in which the beneficiaries were interested. Well, then, for several years he does draw his salary. If he had not drawn it, the trustees would have appointed somebody else, not one of their own number, to act as manager, and most undoubtedly they would have had to pay a considerable sum—whether as much as to this man I do not know, but, at all events, a considerable salary. It has turned out that he is legally bound to replace all this salary

[1] 2 F. 1035.

[2] Wick v. Wick, Dec. 2, 1898, 1 F. 199; Heritable Securities Invest- ment Association v. Miller's Trustees, March 18, 1893, 20 R. 675; Melville v. Nobb's Trustees, Dec. 11, 1896, 24 R. 243; Cowan (Ferrie's Curator), 1897, 5 S. L. T., No. 82.

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he had received, in respect that the position was given him and the money paid him while he was a trustee; and the questions before us are, first, not whether he shall replace the money, but whether he shall, further, pay interest on it. It is quite plain that if he has to pay interest on it, it will be to a certain extent placing money in the hands of the trustees which they never could have had under any circumstances, because they have been saved, by the decision against Mr Brown, the expense of having a manager at all during these years, and they are to get back, according to the decision, the money which he received; and therefore, to give them interest in addition would be giving them money they never could have had under the trust, under any circumstances, for any salary they would have paid any manager must have reduced the estate by the amount of it. I think it would not be equitable or just that in the special circumstances of this case this gentleman, Robert Brown, should be compelled to pay interest on the money; and I think he ought not to be compelled to pay interest on it.

Lord Young.—I assume, of course, that the judgment to the effect that the trustees were not entitled to appoint one of their own number as manager with a salary is right. I was on the Bench, and assented to that judgment as accurate, and I remain of opinion that it is accurate in point of law, and the order that he should restore to the trust all the money which he received for his services I also assume to be accurate, although attended with grave enough hardship here. Cases occur, and this is very near one of them, where an order of restoration would not have been made. If a shopkeeper, one who gives his services for just enough to maintain himself and wife and family, or to maintain himself alone, is a trustee appointed at such a salary, and he gives his services, and lives upon the salary which is given him for them for five years, I think it would not only be a hardship, but contrary to law, to order him to restore it. The plea of *bona fide percepta et consumpta* would apply, and restoration would not be ordered, although the rule of law would be carried out to this effect, that while he remained a trustee the salary should be stopped. I took an opportunity of glancing over my own previous opinion in the case, and I see I suggested that the defender's proper course for the future would be to resign his trusteeship, and, if his services were approved of by the trustees, that he should continue them upon the same terms. If they also approved of this, the legal objection would be removed.

But we are concerned now only with the question of interest—whether he is not now bound to pay interest on the money which he had received, and which may have been necessary to his livelihood—to his living as he was honestly and sensibly making it, acting upon the advice of counsel, although contrary to the rule of law which we have laid down. I am very clearly of opinion that he ought not to be ordered to pay interest upon it. And I am surprised at the conduct of this beneficiary in demanding it. I am surprised at it, because every honest and reasonable consideration points to this, that Mr Brown had given his services honestly, and had received for them no more than the trust-estate would have had to pay to another for these services; and to demand, not only that they should be given

gratuitously, but that he should be mulcted in interest upon the sums received, is, I think, contrary to that equity which generally rules our decisions. And I therefore entirely concur in the view that no interest ought to be allowed at all. And I repeat that I think it is hard enough—although in pursuance of a rule of law in which I acquiesced—that he should be ordered to repay the money.

LORD TRAYNER.—This is a special case, and I do not think we can apply absolutely to it the rule laid down in any of the cases which deal with the improper appropriation of trust funds by trustees. It is quite certain, and I desire to say nothing whatever to trench on the rule, that where trustees have improperly, and contrary to their duty, misapplied trust funds, the trustees must restore not only the misapplied fund but interest upon it, and for the reason that, during the misapplication, the trust-estate has lost the benefit of that part of the fund so taken away from the trust. But in this case there is no such reason for making Mr Brown liable for interest, because the illegal misapplication of the funds has not resulted in any loss to the trust at all. As your Lordship pointed out, this gentleman gave his services for five years as manager of the business, and though he is now bound to restore the salary which for these five years was paid to him it cannot be said that the payment has injured or diminished the trust fund, for if the trust had not had this gentleman's services the services of someone else would have been required; and if you take it that that other person's services had been procured at even one-half of the salary paid to Mr Brown, the sum spent in five years in that way would far have exceeded the amount of interest which is now claimed from Mr Brown. I think there is no rule which compels us to admit the claim for interest, and the special circumstances of the case point entirely in the opposite direction. I think the demand for interest made by this beneficiary, who is pursuer of the action, is an unreasonable demand.

LORD MONCREIFF.—I am of the same opinion. This case is clearly distinguishable from cases in which trustees who had lost trust funds have been made liable not only to replace the sums but to pay interest on them. In all these cases there were both *culpa* on the part of trustees and loss to the trust-estate. In this case, as has been pointed out, there was no loss to the trust-estate, and there were reasonable grounds for Mr Robert Brown thinking that he was entitled to accept, or continue in, the office of manager. The terms of the trust-deed give colour to that view. Besides, if I remember, there was this circumstance in the case, that during the lifetime of the truster Mr Robert Brown had been acting as manager, and that gave some colour to the view that the truster, when he gave his trustees power to appoint one of their number factor with a salary, had in view Mr Robert Brown continuing to act as manager. Lastly, the trustees, before they appointed Mr Robert Brown, took the opinion of counsel on the point—the question having been raised—and got an opinion to the effect that it was within the trustees' power to appoint one of their number on salary. I think that in view of the peculiar circumstances of the case it would be unfair to charge Mr Robert Brown with interest.

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THE COURT pronounced this interlocutor:—"The Lords having heard counsel for the parties on the reclaiming note for the defender Robert Brown against the interlocutor of Lord Low, dated 19th March 1901, recall the said interlocutor in so far as it finds the said Robert Brown liable in interest upon the sum of £3205, 10s. 5d., thereby found due by him, and in so far as it finds the pursuers entitled to expenses; *quoad ultra* adhere to the said interlocutor reclaimed against, and decern: Find no expenses due to or by any of the parties since the date of the interlocutor of the Second Division, dated 19th June 1900."

GILL & PRINGLE, S.S.C.—DAVIDSON & SYME, W.S.—Agents.

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June 28, 1901. Grant v. Green's Trustee.

MRS SUSAN LESLIE FINLAY AND OTHERS (Finlay's Trustees), Nominal Raisers.

JOHN GRANT, Defender and Reclaimer.—*Ure, K.C.—M'Lennan.*

JOHN FOSTER (Green's Trustee), Defender and Respondent.—*Campbell, K.C.—Hunter.*

Bankruptcy—Acquisitions of Undischarged Bankrupt after sequestration—Vesting Order—Competition between trustee and new creditors—Diligence—Bankruptcy (Scotland) Act, 1856 (19 *and* 20 *Vict. c.* 79), *sec.* 103.—In a competition relating to estate acquired by a bankrupt after the date of his sequestration, *held* that a declarator by the Lord Ordinary, in terms of section 103 of the Bankruptcy Act, 1856, was necessary to make the trustee's right to such estate effectual against the diligence of creditors of the bankrupt whose debts had been incurred after the date of the sequestration.

Bankruptcy—Business carried on by Undischarged Bankrupt—Competition between new creditors and trustee—Personal Bar.—Held that where the creditors of an undischarged bankrupt allow him to carry on business on his own account, they will be barred from claiming the proceeds of the business to the prejudice of the business creditors.

1ST DIVISION. Lord Low.

THE estates of Peter Green, tenant of the farm of Delmore, belonging to the late Mr J. R. Finlay of Aberlour, were sequestrated under the Bankruptcy Acts on 30th January 1893.

The lease of the farm expressly excluded assignees, legal or voluntary, without the consent in writing of the landlord, and declared that the lease should, "in the option of the proprietor, become *ipso facto*, void and null, without any declarator or process of law to that effect," on the tenant's bankruptcy. The landlord claimed to retain a sum due to the bankrupt as outgoing tenant to meet arrears of rent, and this claim was not disputed by the trustee. The landlord at the same time arranged that Mrs Green, the wife of the bankrupt, should succeed her husband as tenant of the farm, and in pursuance of this arrangement Mrs Green took over from the trustee, and paid for, the stock and implements (including certain wire fencing) upon the farm, which constituted the only assets of the bankrupt's estate. No dividend was paid, and the trustee was discharged in 1894. The bankrupt was not discharged.

The arrangement that Mrs Green should become the tenant was not in fact carried out, but the bankrupt himself was, by an arrangement with the landlord, to which the trustee was not a party, allowed to remain as tenant until he was warned to remove at Whitsunday 1898.

A sum, fixed by arbitration at £105, 18s. 9d., then became due by

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the landlord to Green as outgoing tenant; and on certain of the original creditors becoming aware of this they applied for the appointment of a new trustee. John Foster, solicitor, Elgin, was, on 2d December 1898, appointed trustee. He intimated a claim on behalf of the original creditors for the sum in question.

The sum was also claimed by John Grant, general merchant in Elgin, to the extent of £50, more or less, in respect of a debt incurred to him by the bankrupt after the date of the sequestration in the following circumstances:—

In the autumn of 1897 the bankrupt let to Grant the grazings upon the farm for the summer of 1898 at a rent of £88, for which Grant, on 13th October 1897, granted a bill to the bankrupt payable six months after date. The bill was met by Grant at maturity. As the bankrupt, being removed from the farm at Whitsunday 1898, was not able to give Grant the whole of the grazings for which he had stipulated, he gave to Grant, by way of rebate, a bill for £40, at six weeks, dated 16th April 1898, which was the day upon which Grant's bill became due.

The bankrupt failed to meet the bill for £40 when it became due, and Grant protested it for non-payment, and thereafter, on 8th June 1898, arrested in the hands of the landlord and his factor the sum found due to the bankrupt in the arbitration.

The present action of multiplepoinding, in which the fund *in medio* was the sum of £105, 18s. 9d. above mentioned, was accordingly raised by Grant in the name of Mr Finlay's trustees as nominal raisers.

Claims were lodged by Grant and by Foster, the trustee in Green's sequestration.

Grant claimed to be ranked and preferred upon the fund *in medio primo loco*, and preferably to all other claimants, to the extent of the principal sum of £40 contained in the said bill, with the legal interest thereon from 31st May 1898 until payment, and the expenses of protesting and doing diligence upon the said bill.

He pleaded;—(1) The present claimant having, by the arrestments condescended on, duly acquired a preference upon the fund *in medio* to the extent of his claim, is entitled to be ranked and preferred in terms thereof. (2) *Separatim*, the claimant is entitled to be ranked and preferred in terms of his claim in respect that the indebtedness of the defender Green to the present claimant was incurred in carrying on the business of the farm mentioned in the condescendence, and that the claimant's claim is preferable to any right of the trustee and creditors upon Green's sequestrated estate to receive the profits of the said farm.

Foster claimed the whole fund *in medio*, as trustee in the sequestration, alternatively on the ground that it was property belonging to the bankrupt at the date of the sequestration, being due under a lease then current, and vested in the trustee under section 102 of the Bankruptcy Act, 1856; or that it was property acquired by the bankrupt since the date of the sequestration which vested *ipso jure* in the trustee as at the date of its acquisition under section 103.*

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* The Bankruptcy Act, 1856 (19 and 20 Vict. c. 79), enacts, section 103:—"If any estate, wherever situated, shall, after the date of the sequestration, and before the bankrupt has obtained his discharge, be acquired by him . . . the same shall *ipso jure* fall under the sequestra-

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This report does not deal with the first of these grounds of claim, as, upon the facts, the Inner-House (differing from the Lord Ordinary) held that the lease current in 1893 must be treated as having been brought to an end by the sequestration, and any sum due to the bankrupt under it by the landlord as having been extinguished by the landlord's claim for arrears of rent; that the lease under which the fund *in medio* fell due was a new lease, and, accordingly, that the sum due by the landlord to the bankrupt, as a waygoing tenant, in 1898, did not vest in the trustee as property belonging to the bankrupt at the date of sequestration.

On 2d November 1900 the Lord Ordinary (Low) repelled the claim for Grant, and preferred Foster in terms of his claim.*

The claimant Grant reclaimed, and argued;—The trustee's right under section 103 was not made real until he had obtained a declarator from the Lord Ordinary under that section that the property acquired by the bankrupt had vested in him, and until such declarator was obtained the bankrupt's *acquirenda* were open to the diligence of creditors whose debts had been incurred after the date of the sequestration. Further, he had an equitable claim to the extent of his debt upon the fund preferable to that of the original creditors on the ground that his debt was incurred by the bankrupt in carrying on the farm with the acquiescence of his creditors, and while still undischarged.[1]

Argued for the respondent;—Section 103 expressly declared that the bankrupt's *acquirenda* after the date of sequestration should vest *ipso jure* in the trustee, as at the date of their acquisition. The subsequent procedure was merely declaratory.[2] Once settled that a fund was property acquired by the bankrupt after the date of the sequestration, it vested not at the date of the declarator, or by reason of it, but at the date of its acquisition, and by force of the statute itself. Such vesting had, further, the same effect as under section 102, and was good against the diligence of individual creditors.[2] As regards the reclaimer's alternative argument, it was not possible to regard his debt as having truly been incurred in carrying on the farm. His claim against the bankrupt was merely a claim for non-implement of a contract.

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tion, and the full right and interest accruing thereon to the bankrupt shall be held as transferred to and vested in the trustee, as at the date of the acquisition thereof . . . for the purposes of this Act; and the trustee shall, on coming to the knowledge of the fact, present a petition setting forth the circumstance to the Lord Ordinary, who shall appoint intimation to be made in the *Gazette*, and require all concerned to appear within a certain time for their interest; and after the expiration of such time, and no cause being shewn to the contrary, the Lord Ordinary shall declare all right and interest in such estate which belongs to the bankrupt to be vested in the trustee, as at the date of the acquisition thereof . . . to the same effect as is hereinbefore enacted in regard to the other estates."

* The Lord Ordinary's opinion is omitted, as, on the view taken by his Lordship of the facts, it was unnecessary for him to decide the question of law dealt with in this report.

[1] Abel v. Watt, Nov. 21, 1883, 11 R. 149; Taylor v. Charteris and Andrew, Nov. 1, 1879, 7 R. 128.

[2] Lord Napier's Trustee v. Lord De Saumarez, Feb. 28, 1899, 1 F. 614.

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LORD KINNEAR.—(After stating the grounds on which his Lordship held that the landlord had put an end to the lease)—It was not by virtue of the lease that the tenant occupied the farm after the bankruptcy, but by virtue of a new agreement with the landlord that he should be allowed to continue his occupancy notwithstanding the termination of the lease.

In the meantime the sequestrated estate was distributed and the trustee was discharged. But then the bankrupt was not discharged, and so long as he remained an undischarged bankrupt I do not think it doubtful that he could be required to communicate to his creditors the benefits of the lease. But that is not because the lease or any money or property which might accrue to him in carrying on his business as a tenant farmer was vested in the trustee at the date of the sequestration, but because it is estate acquired by him after the date of the sequestration to which his creditors have right under the 103d section of the Bankruptcy Act. But then the question arises, not between him and his creditors, but between the creditors at the date of the sequestration and the persons to whom he incurred liability in the course of the business he was carrying on. That question is, whether the former can deprive the latter of their just claim upon the new assets which have been created since the sequestration by his carrying on business since that date. I think the right of the later creditors is clear, both on principle and on authority. The rule is, that if creditors allow the bankrupt to embark anew in trade and to acquire funds or property in business on the footing that he is entitled to enter into the market and trade as if he were *sui juris*, then they are not entitled to prevent new creditors from ranking on the newly acquired estate. Principles of equity, as the Lord President Inglis says in *Abel* v. *Watt*,[1] come in here to qualify the rules of the statute, and the rules of the bankrupt law being themselves founded on equitable construction must yield to a stronger equity, and therefore if this formal operation of the statute had been to vest the bankrupt's earnings in his business as farmer absolutely in the creditors, there would, in my opinion, be strong ground for holding that if creditors act in the manner in which we must assume that they have acted in this case they could not exclude posterior creditors from participation in the estate earned by a common debtor in the business he had been allowed to carry on. We must assume that the business was carried on with the consent of the creditors and with their knowledge, because nothing is said to the contrary, and it is impossible to suppose, having regard to the nature of the district, that this farmer's creditors and neighbours did not know that he was still going on in the farm.

But I do not think there is any conflict between the statute and this equitable principle to which I have referred. The 103d section vests in the trustee *ipso jure* a right to the *acquirenda*, but that is only a personal right, which to be fully effectual requires to be made real by certain statutory procedure. It is the duty of the trustee when he comes to the knowledge

[1] 11 R. 149.

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of such acquisitions to apply to the Lord Ordinary to "declare all right and interest in such estate which belongs to the bankrupt to be vested in the trustee at the date of the acquisition thereof, to the same effect as is hereinbefore enacted in regard to the other estates." The estate dealt with in this section, therefore, cannot be practically brought under the sequestration without the intervention of the Court. It follows that till this is done earnings which are not vested by a declarator of the Lord Ordinary to the effect set out in the section remain open to the diligence of creditors whose debts have been incurred after the sequestration, and if any such creditor has made his right effectual by diligence before the trustee has made the right of prior creditors real by the statutory procedure, the right first made effectual must prevail. Now, the creditor John Grant used diligence to attach the fund, and his diligence was completed before any real right was vested in the trustee. I am of opinion that he is entitled to prevail in the competition.

The Lord Ordinary says that the sum in question represented capital of the bankrupt which he had put into the farm, and which the landlord was to repay him at the end of the lease, and that that capital being the creditors' money, its fruits, the sum in question, must belong to the creditors also. There is no evidence of this, and it cannot be assumed. On the contrary, we must assume, since there is no allegation of fraud, that the whole estate of the bankrupt had been honestly given up, and that when the trustee was discharged it had been divided among his creditors, and therefore that the bankrupt started with no capital of his own with which to carry on the farm, and therefore with no capital belonging to his creditors. No doubt he required money to carry on his business, but the obvious inference is that he carried on the farm with money not stolen from his creditors but supplied by his friends. His wife, who appears to have had money, and had bought from the trustee what belonged to him on the farm, may have supplied the money. At all events, we cannot assume that it was money stolen from his creditors. The case of *Abel* v. *Watt*[1] has no bearing. That was a case in which the creditors in the sequestration claimed to retain an abandoned asset. Here the question is one of competition between creditors as to priority in making their rights effectual.

I am therefore of opinion that the Lord Ordinary's interlocutor should be recalled, and the claimant Grant ranked to the extent of his claim. The trustee will be entitled to the balance, but it would be premature to give him a ranking at this stage, because he has not completed his right by the statutory procedure. It was suggested that the necessity for this is obviated by this process of multiplepoinding, because when a fund is in the hands of the Court it can be reached by the order of the Court, and that such order may be made with safety, as everyone interested was called in the multiplepoinding. But I think it would be premature to proceed on that view, because the point was not really argued to us, but was merely mentioned as tending to shew that no vesting order under section 103 was necessary, the fund having vested *ipso jure* in the trustee. The best course

[1] 11 R. 149.

will therefore be to pronounce findings, and to remit to the Lord Ordinary to consider the best way of disposing of the trustee's claim. No. 161. June 28, 1901. Grant v. Green's Trustee.

The LORD PRESIDENT, LORD ADAM, and LORD M'LAREN concurred.

THE COURT recalled the interlocutor of the Lord Ordinary, and ranked and preferred the claimant Grant *primo loco* in terms of his claim, and found *quoad ultra* that the claimant the trustee on Green's sequestrated estate was, for aught yet seen, entitled to be ranked and preferred to the balance of the fund *in medio;* and remitted to the Lord Ordinary to proceed.

DALGLEISH & DOBBIE, W.S.—ALEX. MUSTARD, S.S.C.—Agents.

ALEXANDER BUCHANAN DICK CLELAND AND OTHERS (Dick's Trustees), First Parties.—*Mackenzie, K.C.—Guy.*
CHARLOTTE SARAH JANET DICK OR ROBERTSON AND ANOTHER, Second Parties.—*Guthrie, K.C.—Orr.*
CORDELIA ANN ROBERTSON AND OTHERS, Third Parties.
JANET CLELLAND DICK OR M'LELLAN AND OTHERS, Fourth Parties.—*Rankine, K.C.—Macmillan.*

No. 162. June 28, 1901. Dick's Trustees v. Robertson.

Succession—Fee and Liferent—Mineral field let but unworked during testator's lifetime—New lease by trustees.—A testator, by his settlement, directed his trustees to hold the residue of his estate for his children in liferent and their issue in fee. The trustees had power to sell the estate, but the settlement was silent as to powers of leasing minerals.

Part of the residue consisted of a mineral field, which the testator, who died in 1871, had let in 1868 for a term of thirty years, with breaks. The minerals were never worked by the lessees, who in 1878 took advantage of a break in the lease to end it.

Held that the trustees had power to enter into a new lease of the subjects in 1900, and that the rents and lordships thereof fell to be paid to the liferenters.

ALEXANDER DICK of Lumloch, who died on 10th September 1871, by his trust-disposition and deed of settlement, dated 27th January 1870, provided, *inter alia*, as follows:—"(*Fifth*) With regard to the residue of my said estate, I direct my said trustees to hold and apply, pay and convey the same to and for behoof of my whole children, equally among them in liferent for their respective liferent alimentary uses allenarly, and to and for behoof of their respective lawful issue, equally among them, and the survivor and survivors of them, share and share alike, in fee . . . (*Sixth*) That in the event of the death of all of my said children without leaving lawful issue, or failing such issue before the period of the final division of my said estate, I hereby direct and appoint my said trustees to hold, apply, pay, and convey the same to and for behoof of Matthew Dick, my brother, in liferent, for his liferent alimentary use allenarly, and to and for behoof of his lawful children, equally among them in fee." The said trust-disposition and settlement also conferred upon the trustees "full powers, at any time when they may think it expedient, to sell and dispose of any part of the said trust-estate, . . . but they shall be bound to invest the funds to be obtained for the purposes of the trust." 2D DIVISION.

The said Alexander Dick left two daughters, Charlotte and Isabella, who married respectively the Rev. Mr Robertson and Dr Maclennan.

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Mrs Robertson had one child, Cordelia Ann Robertson, and Mrs Maclennan had three, viz., Winifred, Elsie, and William. The said Matthew Dick died in 1878, leaving two children and the issue of a deceased child.

At the date of the testator's death, on 10th September 1871, he had let the minerals in the lands of Wester Lumloch to James Dunlop & Company, iron and coal masters, Glasgow, on a lease for thirty years, from Whitsunday 1868, at certain lordships and with a fixed rent of £300 per annum. The lease was dated 4th May 1868, and there were breaks in the tenant's favour at Whitsunday 1873 and every fifth year thereafter.

The tenants intimated in November 1877 that they would take advantage of the break at Whitsunday 1878, and the trustees having accepted this notice, the lease was then brought to a close. None of the minerals in the lands of Wester Lumloch were ever wrought by the said tenants under the said lease.

In 1900 the Carron Company approached the trustees with a proposal for a lease for twenty years of the minerals in the lands of Wester Lumloch at a fixed rent and certain lordships. The trustees were satisfied that it would be advantageous and in accordance with judicious administration of the estate to enter into the proposed lease.

Questions having arisen as to whether the trustees had power to grant such a lease, and, if such a lease were entered into, whether the fixed rents and royalties would fall to be paid to the liferentrices, or whether they should be put to capital account and held for the ultimate fiars, the present special case was brought, the parties thereto being (1) the trustees, (2) the liferentrices, the testator's daughters, Mrs Robertson and Mrs Maclennan, (3) the children of the liferentrices, and (4) the surviving children and the children of a deceased child of the late Matthew Dick, the testator's brother.

The questions of law for the opinion and judgment of the Court were:—"1. Are the first parties entitled, in the circumstances before set forth, to enter into the proposed lease of the minerals in the lands of Wester Lumloch? 2. In the event of the first parties having such power, are the rents and lordships arising therefrom to be paid to the second parties, or are they to be capitalised for the benefit of the ultimate fiars, and only the interest thereon paid to the second parties?"

Argued for the first parties;—No doubt trustees had no power to grant leases which would interfere with or alter the enjoyment of the property as destined. But here leasing was what was intended by the testator. The property was conveyed to the trustees with a subsisting lease, which was dated previous to the settlement, and which was current and yielding rent at the testator's death.[1] The lease therefore should be granted, and by the trustees, there being here no question whether it should be granted by fiars or liferenters.

Argued for the second parties;—On the first question they adopted the argument for the first parties. On the second question—the subjects were rent-producing in the testator's lifetime, and he regarded the rents as income. The liferenters were therefore entitled not only

[1] Campbell's Trustees v. Campbell, March 15, 1882, 9 R. 725, 10 R. (H. L.) 65.

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to the rents under the original lease but also under the proposed lease. Their rights extended to renewals of existing leases.[1]

Argued for the third and fourth parties;—This case differed from the cases quoted by the second parties, in that there was no express power in the settlement to grant leases of minerals, and that the proposal was to grant a new lease of mines, which in point of fact had never been opened at all. It was only where minerals had actually been worked that the proceeds went to the liferenters. That was an exception to the ordinary law that the minerals as part of the *solum* belonged to the fiars, and the exception should not be extended. As to the testator's intention, all that could be said was that he had intended a lease for thirty years, which would now have expired. Further, the trustees had a power of sale, and if they exercised it, all that the liferentrices could get would be the income of the invested proceeds of the sale.

LORD JUSTICE-CLERK.—I think the case as presented is ruled by previous decisions. The testator had himself granted a lease of the minerals in his property, and although the minerals had not been actually worked by the lessees, yet at his death they were in the position of having been made profit-producing subjects, and therefore in the position to which the decisions apply. It is said that the trustees could not enter into a lease, but they had power to continue the estate in the condition in which it was at the testator's death. I put the question to Mr Macmillan, whether they were not entitled to grant an agricultural lease; and he could not deny that they were, for that would only be continuing the condition of the estate as they received it.

The case of minerals is no doubt different, for it is only by a fiction of law that minerals are regarded as fruits of an estate. But it is settled that when minerals are leased they are fruits of the heritable subject. I would, therefore, answer the first question in the affirmative, and the second by declaring that the rents shall be paid to the second parties.

LORD YOUNG, LORD TRAYNER, and LORD MONCREIFF concurred.

THE COURT answered the first question in the affirmative, and in answer to the second question, declared that the rents and lordships should be paid to the second parties.

ALEX. MORISON & Co., W.S.—COWAN & DALMAHOY, W.S.—AULD & MACDONALD, W.S.—Agents.

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July 2, 1901.
M'Kenzie v. Magistrates of Musselburgh.

THOMAS M'KENZIE, Pursuer (Reclaimer).—*Watt, K.C.*—*A. M. Anderson.*

THE PROVOST, MAGISTRATES, AND COUNCILLORS OF THE BURGH OF MUSSELBURGH, Defenders.—*Hunter.*

Reparation—Negligence—Burgh—Responsibility of Magistrates for safety of foot-passengers—Obstruction of footpath—House projecting into street.—A child six years of age was run over and killed in crossing an old burgh road.

[1] Campbell's Trustees v. Campbell, *supra;* Wardlaw v. Wardlaw's Trustees, Jan. 23, 1875, 2 R. 368; *In re* Kerneys-Tynte, L. R. [1892], 2 Ch. 215.

No. 163.

July 2, 1901. M'Kenzie v. Magistrates of Musselburgh.

In an action of damages raised by the child's father against the Magistrates of the burgh, on the ground that the accident was caused by their fault in allowing the road to be in a dangerous condition, the pursuer averred that at the place where the accident happened the footpath on one side of the road was obstructed by a projecting house, which compelled passengers on that side of the road to cross the road, and at the same time prevented them from seeing approaching vehicles, and prevented drivers of such vehicles from seeing the foot-passengers; that the defenders were aware of the danger, but had done nothing to remove it.

Held (*aff.* judgment of Lord Low) that the action was irrelevant.

2D DIVISION. Lord Low.

THIS was an action of damages at the instance of Thomas M'Kenzie, miner, Musselburgh, directed against the Provost, Magistrates, and Councillors of that burgh in respect of the death of the pursuer's son, James M'Kenzie.

The pursuer averred;—(Cond. 2) "On 11th December 1900 the pursuer's wife sent her son, the said James M'Kenzie, who was six years of age, to the Co-operative Store, Musselburgh, to make certain purchases. The said James M'Kenzie left the pursuer's house in Hercus Loan aforesaid, and proceeded northwards through the road or street known as Eskside, Musselburgh, on the footpath, which is at the west side of the road or street, until he came to the part of the said road or street where its width is decreased to about one-half by a house occupied by James Owenson. When he reached this house, he required to turn and walk in an easterly direction along it and across the said road or street on the crossing till he came to the opposite side of the said road or street, when he would again walk eastwards on the footpath. There is only one footpath on the said road or street. When the said James M'Kenzie emerged from the side of the said house and was in the act of crossing the said road or street to get to the footpath on the other side, he was knocked down and run over by a horse and van which was travelling up or southwards through said Eskside road or street. The said James M'Kenzie was so severely injured by said horse and van that he died within a few minutes after being run over."

(Cond. 3) "The said Eskside road or street is under the control, management, superintendence, and charge of the defenders. It is the duty of the defenders to keep the said road or street free from obstructions and safe for the passage of members of the public. In allowing the said house to remain on its present site, the defenders have failed to discharge said duty, the said house being a dangerous obstruction and an obstacle to safe passage. The said road or street is dangerous to people when walking down and crossing same at the said house, because the said house obstructs the view of persons walking down on the footpath, and prevents vehicles when driving in an opposite direction being visible. Neither can the drivers of vehicles, on account of the formation of the said road or street, and particularly at the said house, see passengers who may be walking in the opposite direction and meeting the vehicles. The part of said Eskside road from Bridge Street to the said house where the accident occurred is too narrow to be used with safety by vehicles. All the said road or street, both at its wide and narrow parts, except the footpath and crossing, is soft and muddy. The said James M'Kenzie was following the footpath and crossing made by the defenders for the use of foot-passengers when he was killed as aforesaid. There is no continuation of the footpath on the west side of Eskside road or street further

northwards than the said house, and the crossing at the corner of the said house leads to the footpath which is at the other or east side of Eskside road or street from that point northwards."

(Cond. 4) "The defenders and their predecessors in office were aware that the part of Eskside road or street where said accident occurred was dangerous for foot-passengers being run over by vehicles, and that it was locally known as the 'Death Trap.' Accidents have occurred at the same place, and under the same circumstances, previously. The defenders and their predecessors knew this, and though they gave the matter some consideration, and discussed it at their meetings and otherwise, and proposed remedies, they neither removed the danger, nor shut up the road or street."

(Cond. 5) "The accident to the said James M'Kenzie condescended on was the direct result of the carelessness and negligence of the defenders, or those for whom they are responsible, in allowing the said road or street of Eskside to be obstructed, and to be in a dangerous and unsafe condition for foot-passengers. It was the duty of the defenders to keep the said road or street free from obstruction, and in a safe condition, but they wrongously, culpably, and in neglect of their duties, failed to do so, and the said James M'Kenzie lost his life in consequence. It was the duty of the defenders, in view of their knowledge of the dangerous character of said crossing, and in order to make said road or street safe for foot-passengers, either—(1) to have excluded vehicular traffic from said road or street; or (2) to have removed said house; or (3) to have constructed a footpath adjacent to said house and so done away with said crossing."

The pursuer pleaded, *inter alia*;—(1) The pursuer, having sustained loss, injury, and damage through the fault of the defenders, is entitled to reparation therefor.

The defenders pleaded, *inter alia*;—(1) No relevant case.

On 20th March 1901, the Lord Ordinary (Low) dismissed the action as irrelevant.*

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* "OPINION.—(After stating the averments)—. . . As I read the record, the only danger which is founded on is that caused by the projecting house. It is said that persons walking along the footpath towards and upon the same side of the road as the house are prevented by the house from seeing vehicles which are coming the other way, and that the drivers of these vehicles cannot see persons approaching them on the footpath. It is not said, however, that there is anything except the projecting house which would prevent a person seeing an approaching vehicle by looking along the road before crossing it, and the photographs which were produced shew that that was not the case. On the contrary, they seem to me to shew that no one would run any risk in using the road who took the trouble to look along it to see whether any vehicle was approaching before he left the shelter of the house and stepped into the roadway. When risk of an accident can be avoided by so simple a precaution, I do not think that the road can be regarded as dangerous.

"Further, the road appears to be a very old road, and I think that in such a case the same criterion as to what is due regard for the safety of the public on the part of the local authority cannot be applied as in the case of a new road. If the Magistrates made a new road or street with a house projecting for a considerable distance into the roadway, it might be held that they had not taken such precautions to secure the public safety as they were bound to do. But the case is different as regards an old burgh road or street. Even in such a case, if the condition of matters was such that members of the public were likely to be injured even if they used reason-

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The pursuer reclaimed, and, in arguing that the case was relevant, quoted the undernoted authorities.[1]

The defenders were not called upon.

LORD YOUNG.—I do not think it necessary to call for any answer. The question before us is whether the facts stated by the pursuer—assuming them to be true—relevantly shew actionable *culpa*. If they do, then the plea of irrelevancy ought to be repelled. But I am clearly of opinion that they do not—that the pursuer's averments do not disclose actionable *culpa* on the part of the defenders. I therefore think that the judgment of the Lord Ordinary is well founded, and ought to be affirmed.

LORD TRAYNER and LORD MONCREIFF concurred.

The LORD JUSTICE-CLERK was absent.

THE COURT adhered.

WILLIAM BALFOUR, S.S.C.—JOHN RICHARDSON, Solicitor—Agents.

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able precautions, I think that the Magistrates would be bound to put an end to such a state of things, but I do not think that they are bound to shut up a road or street, or acquire land at great expense to the ratepayers for the purpose of widening it, if all that is required to avoid danger is that people should look where they are going.

"The pursuer avers, however, that the place was well known to be dangerous, and that 'accidents have occurred at the same place, and under the same circumstances, previously.' I suppose that by the words 'under the same circumstances' it is meant that persons have been run over while crossing from footpath to footpath at the old house. The averment, however, is very general and indefinite, especially considering that the road appears to have been in existence for a very long time. The fact that at one part of an old street or road a house projects into the roadway is not, I imagine, an uncommon thing in old burghs, and if the pursuer's case is that it has been proved by experience to be a greater source of danger than *prima facie* one would expect it to be, I think that he should have given some specification as to the time when, and the persons to whom, the alleged accidents happened; and indeed to do so would only have been to give reasonable notice to the defenders of the case which they are called upon to meet.

"The fact that the accident happened to a child of tender years was also pressed. I do not suggest that the local authority, having the charge of roads and streets, are not bound to consider the safety of children as well as of adults, but it is very remarkable that, if the danger of the place is so obvious and well known as the pursuer avers—he says that it is known in the locality as the 'death trap'—the mother of the child should have sent him alone upon an errand which apparently necessitated his taking the road in question.

"It therefore seems to me that the pursuer has not stated a relevant case, and that the action must be dismissed."

[1] M'Fee v. Police Commissioners of Broughty-Ferry, May 16, 1890, 17 R. 764; Dargie v. Magistrates of Forfar, March 10, 1855, 17 D. 739, 27 Scot. Jur. 311; Gibson v. Glasgow Police Commissioners, March 3, 1893, 20 R. 466.

MRS CATHERINE JANE BARNES OR SIM, Petitioner.—*Younger.* No. 164.
MRS MARGARET ANN SIM OR ROBERTSON, Respondent.—*M'Lennan.*

July 3, 1901.

Sim v. Robertson.

Minor and Pupil—Appointment of a domiciled Englishman as Tutor—Guardianship of Infants Act, 1886 (49 *and* 50 *Vict. c.* 27), *sec.* 2.—Circumstances in which the Court, on a petition by a widow, the mother of three pupil children, for the appointment of a tutor to act jointly with her, *appointed* a domiciled Englishman, on condition of his lodging a bond prorogating the jurisdiction of the Court.

1ST DIVISION.

PATRICK SIM died in 1900, domiciled in Scotland, leaving a widow and three children, all of whom were in pupillarity. His widow presented a petition under section 2 of the Guardianship of Infants Act, 1886,* for the appointment of a tutor to her children to act jointly with her.

Patrick Sim died intestate leaving estate to the value of upwards of £60,000. His widow was entitled to an annuity of £250 under his antenuptial contract, and in the petition she stated that she had been advised that she might be entitled to claim over and above her marriage-contract provision one-third of her husband's moveable estate *jure relictæ*. There was no provision in the marriage-contract for the children. After her husband's death the petitioner removed with her family to London.

The sole next of kin upon the father's side was a sister, Mrs Robertson, residing in Huntly, who, as a married woman, was ineligible for the office of tutor.

The petitioner stated that she had no relatives in Scotland suitable for the office, and suggested that the Court should appoint as co-tutor her cousin, Mr John Barnes, a domiciled Englishman, who was manager of the London and Brazilian Bank at Walthamstow, near London.

Mrs Robertson lodged answers, in which, while agreeing that it was desirable that a co-tutor should be appointed, she objected to the appointment of Mr Barnes, on the ground—first, that he was not subject to the jurisdiction of the Scotch Courts; and secondly, looking to the possible conflict of interests between the petitioner and her children, that he was a near relative of the petitioner's.

Argued for the petitioner;—The objection that Mr Barnes would not be subject to the jurisdiction of the Court was obviated by his willingness to lodge a bond prorogating the jurisdiction of the Court, and naming an address in Scotland where he could be cited. In such circumstances the Court had appointed Englishmen as guardians to Scotch pupils.[1] Effect should be given to the wishes of the mother.[2]

Argued for the respondent;—The petitioner had indicated an intention to claim her legal rights in addition to her provisions under the

* The Guardianship of Infants Act, 1886 (49 and 50 Vict. c. 27), enacts, section 2,—"On the death of the father of an infant . . . the mother, if surviving, shall be the guardian of such infant, either alone where no guardian has been appointed by the father, or jointly with any guardian appointed by the father. When no guardian has been appointed by the father . . . . the Court may, if it shall think fit, from time to time, appoint a guardian or guardians to act jointly with the mother."

[1] Earl of Dalhousie (choosing curators), Feb. 22, 1698, 4 Br. Sup. 405; Lord Macdonald v. His Next of Kin, June 11, 1864, 2 Macph. 1194, 36 Scot. Jur. 600.

[2] Martin v. Stewart, Dec. 1, 1888, 16 R. 185.

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marriage-contract, and in such a claim her interests were adverse to the interest of her children. It was undesirable, therefore, that her co-tutor should be a relative of her own. The Court should nominate an independent man of business as co-tutor. No case of necessity had been made out to justify the Court in naming a person outwith their jurisdiction as tutor.[1] The rule against such a nomination was fixed in the case of factors, and in the circumstances of this case the tutor's duties would be similar to those of a judicial factor.[2]

LORD PRESIDENT.—The proposal made in this petition that a person who is out of the jurisdiction of this Court should be appointed as co-tutor with the petitioner is somewhat unusual. But the circumstances are unusual, and in dealing with such a case our duty is to have regard primarily to the benefit of the pupil. The Guardianship of Infants Act, 1886, provides that in a not very different matter the wishes of the mother should be considered.

The statement made by the petitioner is, that there are no relatives in Scotland suitable for the office, the only relative of the father in Scotland being a married woman resident in Huntly. Under these circumstances the petitioner suggests that her cousin, a banker in England, should be appointed as tutor. The position which this gentleman holds is evidently one of trust and responsibility, and it is reasonable to suppose that his advice would be valuable as a tutor. Further, it is desirable to have someone who will act harmoniously with the petitioner, who seems to think that her cousin would do so, and there is no reason to suppose that he would not. Under these circumstances it seems to me that the proposed appointment would be the best in the interest of the child. Although such an appointment is unusual, the cases quoted by Mr Younger prove that it is not without precedent, the difficulty as to jurisdiction being got over by the person appointed lodging a bond prorogating the jurisdiction of the Court. It appears to me that if the gentleman named is prepared to do this, that we should appoint him in the special circumstances of the case.

LORD ADAM.—I concur.

LORD M'LAREN.—I agree. The case of *Lord Macdonald*[3] appears to me very much in point. In that case the Court did not consider they were exceeding their powers in appointing a domiciled Englishman as curator to a minor, although it did not appear that no Scotsman could have been found suitable for the office. There was therefore no question of necessity, but only of suitability. Nor do I think that in regard to this question there is any distinction between the case of a tutor and of a curator. The objections to appointing anyone outside the jurisdiction to either office would be the same. Here the gentleman proposed as tutor is suitable for the office. He is a man of business, and able to give the petitioner valuable advice as to the management of the ward's financial affairs.

LORD KINNEAR concurred.

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[1] Fergusson v. Dormer, Jan. 25, 1870, 8 Macph. 426, 42 Scot. Jur. 204.
[2] Robertson, Dec. 3, 1846, 9 D. 210; Thoms on Judicial Factors, p. 43.
[3] 2 Macph. 1194.

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THE COURT pronounced this interlocutor:—"Appoint John Barnes, residing at 278 Hoe Street, Walthamstow, manager of the London and Brazilian Bank, Limited, Walthamstow, to act as tutor to Patrick Wood Sim, Catherine Sim, and Edward William Boyd Sim, jointly with Mrs Catherine Jane Barnes or Sim, the petitioner, and decern, the said John Barnes always granting a bond of prorogation in the usual form to the satisfaction of the Clerk of Court, before extract."

WADDELL & M'INTOSH, W.S.—MACPHERSON & MACKAY, S.S.C.—Agents.

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CALEDONIAN RAILWAY COMPANY, Complainers (Reclaimers).—*Dundas, K.C.—Deas.*
PERTH DISTRICT COMMITTEE, Respondents.—*Campbell, K.C.—Sandeman.*

Public Health—Public Health (Scotland) Act, 1897 (60 *and* 61 *Vict.* c. 38), *secs.* 103, 107, 144, 145, 164—*Power to make sewer under railway—Railway.*—The Public Health Act, 1897, enacts, *inter alia*, as follows:—Section 103. "The Local Authority shall have power to construct within their district . . . such sewers as they may think necessary for keeping their district properly cleansed and drained, through, across, or under any public or other road, . . . and after reasonable notice in writing (if upon the report of a surveyor it should appear to be necessary), into, through, or under any lands whatsoever. . . ."

Section 144. "A Local Authority may for any of the purposes" of certain parts of the Act, including section 103, "in terms of the Lands Clauses Acts, and whether by agreement or otherwise, purchase any lands within or without their district."

Section 164. "Full compensation shall be made . . . to all persons sustaining any damage by reason of the exercise of any of the powers of this Act, except when otherwise specially provided."

Held (*aff.* judgment of Lord Low) that section 144 did not imply any obligation upon the Local Authority to purchase lands occupied for the purposes indicated, and accordingly that they were entitled under section 103 to carry a sewer under a railway upon paying compensation under section 164.

Observed that the same rule would apply wherever a power is conferred by the Act and it is not made a condition of the exercise of that power that the lands occupied shall be purchased by the Local Authority.

1ST DIVISION. Lord Low.

THIS was a note of suspension and interdict at the instance of the Caledonian Railway Company against the Perth District Committee of the County Council of the county of Perth.

The circumstances in which the note was presented are stated by the Lord Ordinary in his opinion as follows:—"The respondents are the Local Authority within their district. For the purposes of a special drainage district which has been formed, the respondents propose to lay a sewer under the complainers' railway between Perth and Crieff, and the question which is raised by the note is, whether the respondents are bound to purchase from the complainers the land which is required for constructing the sewer under the powers of compulsory purchase given to them by the 144th section of the Public Health (Scotland) Act, 1897, or whether they are entitled to construct the sewer upon condition only of making compensation to the complainers for any damage which they may sustain thereby, in terms of the 164th section of the Act.

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"The respondents have proceeded under the 103d and 107th sections of the Act.

"By the former section it is provided that 'The Local Authority shall have power to construct within their district' (and in certain cases without their district) 'such sewers as they may think necessary for keeping their district properly cleansed and drained, and may carry such sewers through, across, or under any public or other road, or any street or place, . . . and after reasonable notice in writing (if upon the report of a surveyor it should appear to be necessary), into, through, or under any lands whatsoever.'

"I may say here that it seems to me that the words in brackets—'if upon the report of a surveyor it should appear to be necessary'—refer to the necessity of constructing a sewer through the lands, and not to the necessity of giving written notice.

"The 107th section is for the protection of railways and canals, and provides that where any sewer shall pass under or across, or in any way affect, *inter alia*, any railway, (1) the works shall be executed to the satisfaction of the engineer of the railway, and according to plans approved by him; (2) the work may be executed either by the railway company or the Local Authority at the option of the engineer of the railway company; and (3) in the event of the Local Authority and the engineer of the railway company differing in opinion in regard to the works, or the mode of carrying them out, 'such difference shall, on the application of the Local Authority or of the railway company, be referred to an engineer to be appointed by the Sheriff, and shall be decided by the Sheriff upon the report of such engineer, and such decision shall be final.'

"In this case the complainers, on the ground that the respondents were bound to purchase the land required for the sewer under the 144th and 145th sections of the Act, refused to come to any arrangement with the respondents in regard to the manner in which the work should be carried out, and accordingly the respondents applied to the Sheriff, under the 107th section, and the Sheriff,* after receiving a report from an engineer, authorised the respondents to commence operations, and to carry them out in a particular way.

"The present note prays that the respondents should be interdicted from following out and acting upon the Sheriff's interlocutor, upon the ground that they are not entitled to lay a sewer under the railway unless they acquire the land necessary for that purpose under the purchase clauses.

"The 144th section provides that 'a Local Authority may, for any of the purposes of Part II., Part III., and Part VI. of the Act, in terms of the Lands Clauses Acts, and whether by agreement or otherwise, purchase any lands within or without their district.'

"Part VI. of the Act deals with sewers, drains, and water supply, and begins with section 101 and ends with section 132. It therefore includes section 103.

"The 145th section contains the regulations to be observed with respect to the purchase of land otherwise than by agreement. The Local Authority must in the first place publish advertisements describing the purpose for which they propose to acquire lands, lodge plans, and give notice to the owners of the lands proposed to be taken.

* The Sheriff-substitute at Perth (Sym).

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They must then present a petition to the Board of Trade praying for authority to put in force the Lands Clauses Act, and if, after inquiry, the Board of Trade consider that the powers asked should be given, they confer these powers by Provisional Order. If no objection is taken in the manner and within the time provided, the Order becomes final, and has the effect of an Act of Parliament. There is also provision made for the appointment of an arbiter in cases of disputed compensation, and it is declared that the arbiter so appointed shall be deemed to be sole arbiter within the meaning of the Lands Clauses Act.*

"The complainers also founded upon the meaning given to the word 'land' in the 3d section. It is there defined as including 'water, and any right or servitude to or over land or water.' The complainers founded upon that definition as shewing that in such a case as the present the Local Authority did not require to purchase the lands out and out, but only such a servitude as might enable them to lay the sewer."

On 15th March 1901 the Lord Ordinary (Low) refused the prayer of the note.†

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* Section 164 enacts,—"Full compensation shall be made, out of any fund or assessment applicable to the purposes of this Act, to all persons sustaining any damage by reason of the exercise of any of the powers of this Act, except when otherwise specially provided."

† "OPINION.— . . . The complainers' argument is that, seeing that in section 103, which is included in Part VI. of the Act, power is given to the Local Authority to construct sewers in or through any lands whatsoever, and that by section 144 they are given powers of compulsory purchase for any of the purposes of Part VI., the necessary conclusion is that in order to construct the sewer they must purchase the lands or the necessary servitude.

"Now in looking through Part VI. of the Act, I find that there are some cases in which the Local Authority are empowered to do certain things which involve the taking possession of land, where nothing is said in regard to their acquiring the land; while in other cases the authority to do something involving the taking possession of land is coupled with express power to acquire the land compulsorily.

"The 103d section is an example of the first of these classes, and by section 126 (4) the Local Authority are given the same powers for carrying water mains within their district as they have for carrying sewers within their district; that is to say (according to my understanding of the enactment), the powers conferred upon the Local Authority by the 103d section, of constructing sewers within their districts, are made applicable to water mains.

"As examples of the second class of case, I may refer to the 108th section, which refers to the disposal of sewage, and the 126th section, subsection 1, which refers to water supply.

"By the 108th section it is provided that the Local Authority may, 'in terms of section 144 and 145 of this Act, contract for, purchase, or take on lease, any lands . . . for the purpose of receiving, storing, or disposing of, or treating sewage.'

"By section 126 (1) the Local Authority is empowered, for the purpose of providing a supply of water for domestic use, to acquire and conduct water from any lake, river, or spring, to make and maintain reservoirs, and to purchase premises, 'and for the purposes foresaid the Local Authority shall be held to have all the powers and rights given to . . . promoters of undertakings by the Lands Clauses Acts, as amended by this Act.'

"Corresponding to these two different classes of powers which are given

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The Caledonian Railway Company reclaimed.

Argued for the reclaimers;—The judgment of the Lord Ordinary proceeded on the improbable hypothesis that the Legislature had in section 144 conferred a power to purchase which was unnecessary and superfluous. There was no reason why the Local Authority should ever purchase land occupied for the purpose of section 103 unless under obligation to do so. The word "land" was used in a wide sense in the Act—see definition in section 3—and included a servitude such as the Local Authority here sought to create in their favour. It was not proposed that the sewer should be carried under the railway below formation level, and above that the land belonged to the railway company. It was true they could not sell land required for the purposes of the railway, but they could sell a servitude over the land. Section 164 applied only to cases where damage was done to land adjoining that actually occupied in carrying out the purposes of the Act.

Counsel for the respondents were not called upon.

At advising,—

LORD PRESIDENT.—The question in this case is whether the respondents are bound to purchase from the complainers the land required for the construction of a sewer which the respondents propose to lay under the complainers' line of railway, by exercising the powers of compulsory purchase conferred upon them by section 144 of the Public Health (Scotland) Act, 1897, or whether they are entitled to lay the sewer without purchasing any land from the complainers, upon making compensation

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to the Local Authority, there are two separate provisions in regard to compensation. In the first place, in the 145th section provision is made for compensation in the event of lands being acquired compulsorily; and in the second place, it is provided by the 164th section that" (his Lordship read the section).

"I therefore come to the conclusion that it is impossible to read the 103d section as meaning anything else than that the Local Authority are to have power to take a sewer through any lands without purchasing them. The complainers argued that that view involved the possession by the Local Authority of unprecedented powers, which might result in very great hardship to the owners of lands. If I am right in thinking that the language of the Act admits of only one interpretation, it is unnecessary to consider what the intention of the Legislature was, but I think that it may be surmised that these large powers in the way of laying down necessary sewers were given to the Local Authority, because if before they could run a sewer through their district, they required, as regarded every holding through which the sewer was to pass, to carry through the elaborate and expensive procedure provided by the 145th section, the result might be that in many cases the sewer (which *ex hypothesi* is a necessary sewer) could not be constructed at all. In regard to the owners of lands through which the sewer may run, I cannot think that they have much to complain of if they receive full compensation for any damage which they may sustain.

"I may add that I am confirmed in the view which I have taken by the interpretation which was put upon almost identical provisions in the English Public Health Act, 1875, by the Chancery Division of the High Court of Justice in the case of *Roderick* v. *Aston Local Board* (5 Ch. D. 328).

"I shall therefore refuse the prayer of the note."

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to them under section 164 of the Act for any damage which they may thereby sustain.

The proceedings of the respondents have been taken under sections 103 and 107 of the Act of 1897. By section 103 it is declared that the Local Authority shall have power to construct within their district such sewers as they may think necessary, through, across, or under any public road or any street or place, and after reasonable notice in writing (if upon the report of a surveyor it should appear to be necessary), into, through, or under any lands whatsoever. The Lord Ordinary has held that the words "if upon the report of a surveyor it should appear to be necessary" refer to the necessity of constructing a sewer through the lands, not to the necessity of giving written notice, and I think that in this he is right. It would be difficult to conceive larger language than that which is used in section 103, though it is not surprising that it was employed by the Legislature when regard is had to the importance of the public object which it was directed to accomplish. It is nowhere declared that a Local Authority shall purchase or acquire the land through which a sewer will pass as a condition of their power to construct it.

Section 107 makes provision for alternative modes of carrying out the work where any sewer passes under or across or in any way affects railways and canals, but its provisions do not appear to me to bear directly upon the present question.

The complainers maintain that the respondents are bound to purchase the land required for the construction of the sewer under sections 144 and 145 of the Act, and they therefore decline to come to any arrangement with the respondents as to the mode of executing the works.

The question whether the contention of the complainers is or is not well founded depends chiefly upon the terms of sections 144 and 145 of the Act. Section 144 declares that "a Local Authority may, for any of the purposes of Part II., Part III., and Part VI. of this Act, in terms of the Lands Clauses Acts, and whether by agreement or otherwise, purchase any lands within or without their district, and may by agreement take on lease, sell, or exchange, any lands within or without their district." Part VI. relates to, *inter alia*, sewers, and includes section 103, by which the power to construct sewers is conferred. It is to be observed that section 144 is expressed as conferring a power, not as imposing an obligation, and it may be that under it a Local Authority might be entitled to acquire land for the construction of a sewer if they considered this requisite, though not bound to do so. Section 145 contains elaborate provisions for the compulsory purchase of land, and the complainers point out that by section 3 (the interpretation clause) the term "land" is declared to include "water, and any right or servitude to or over land or water," and upon this they argue that in the present case the complainers do not require to purchase the land out and out, but only to purchase such a servitude as would enable them to lay the sewer. What kind of servitude this would be they do not explain, and it is not easy to see what servitude or minor interest in land it could be, as the construction of the sewer would involve the removal of the soil in place of which it would be laid.

In some of the cases provided for in Part VI. of the Act, the Local

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Authority is authorised to do things inferring the occupation of land without any provision that they shall be bound to acquire it, while in other cases the power to do things involving the occupation of lands is associated with an obligation—if the power is exercised—to acquire the lands compulsorily. Section 103 affords an example of the first class of powers, and sections 108 and 126, subsection (1), are examples of the second class. The exercise of such a power as that of making sewers involves no occupation of the surface after the sewers are laid, and it is not surprising that in such a case Parliament should not have required the Local Authority to acquire any proprietory right in the part of the sub-soil which required to be removed to admit of the laying of the sewers. In cases of the latter class, *e.g.*, the powers of utilizing sewage under section 108, and of making reservoirs and other provisions for a supply of water, a much fuller occupation of the land is necessary than in such a case as the present, which merely relates to the laying of a sewer under land, leaving all the surface uses of it unimpaired. It is quite reasonable that separate provisions should be made for compensation in the two cases, *i.e.*, by section 145 where the lands are taken compulsorily, and by section 164 where the lands are not taken but damage is sustained by reason of the exercise of the statutory powers.

Upon a consideration of the whole statutory provisions bearing upon the question, I concur with the Lord Ordinary in thinking that under section 103 the respondents have power to carry a sewer through the complainers' lands upon payment of damage, without purchasing the land, and I am therefore of opinion that his Lordship's interlocutor should be adhered to.

LORD ADAM.—I have difficulty in seeing what interest the Caledonian Railway have to maintain the position they take up in this case, but supposing them to have an interest, I concur with your Lordship in thinking that their position is untenable.

LORD M'LAREN.—I also concur, and have only a few words to add. It is perfectly clear that, apart from the provisions of the Public Health Act, 1897, it would not be possible for the Local Authority to construct this sewer without the consent of the railway company. They could not proceed by arrangement with the superior, or with the owner of minerals under the line for the construction of the sewer, because the title of the railway company to the land on which its line is laid is complete, except in a question with the owner of the minerals, and the owner of the minerals can use his right only for the purpose of working the subjacent minerals. For a reason, which I shall immediately state, it appears to me to be equally clear that the Local Authority could not have carried their sewer under the line even by agreement with the railway company except under the special powers conferred by the Public Health Act. In the course of the discussion I asked the counsel for the railway company whether they had any power to sell this land, which undoubtedly is a part of the railway undertaking, because it seemed to me that if there were such a sale a hiatus would be created in the railway: the Local Authority would become the proprietors of the ground, and the course of the railway would be interrupted. It is apparently thought, or at least maintained, that this

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power is conferred by the Public Health Act, but I think that is a complete misapprehension. In section 145, which contains the regulations to be observed with respect to the purchase and taking of land otherwise than by agreement by local authorities, there are provisions for obtaining an order from the Local Government Board for compulsory purchase. But I would draw attention to subsection 13 of that section, which enacts: "The Board shall not make any order for purchasing . . . any land the property of a railway company or canal company which is or may be required for the purpose of their undertaking." Now, under that subsection it is perfectly plain that the Local Government Board could not make an order to enable the Local Authority to purchase the land at present in question, because the granting of the authority required for that purpose is excluded from the powers of the Board and the Secretary for Scotland. That being so, I can understand the policy of the railway company in bringing this interdict, because they conclude for interdict against the Local Authority carrying their sewer under the line without purchase, but do not bind themselves to sell the land. What they want is that the sewer shall not be constructed at all, or rather that it shall not be constructed so as to pass under their line. But I think that in that branch of their argument, if I may so call it, they fail, because the Local Authority is entitled to make sewers crossing a railway line. Section 107 of the Public Health Act makes provisions for the case where a sewer "shall pass under or across, or in any way affect, any railway or canal." From the provisions of that section it is plain that a sewer may be constructed traversing the undertaking of a railway company, and as the railway cannot sell the land we are shut up to the conclusion that the use of the land may be taken for this limited purpose without purchase and sale, but on condition of making compensation for damage as required by section 164.

LORD KINNEAR concurred.

THE COURT adhered.

HOPE, TODD & KIRK, W.S.—A. ELLIOT KEAY, Solicitor—Agents.

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Gollan's Trustees v. Booth.

JAMES HALDANE AND ANOTHER (Gollanfield Trustees), First Parties. DUNCAN FORBES DALLAS AND OTHERS (Gollan's Trustees), Second Parties.—*Campbell, K.C.—Craigie.* HENRY IKIN (Attorney for Karl Wilhelm Booth) AND OTHERS, Third Parties.—*Jameson, K.C.—Kennedy.*

Succession—Testament—Construction—"Heir of body of A"—Implied direction to continue trust till death of A.—A testator, by his trust-disposition and settlement, directed that "after the death of" his father "the residue of the capital of my estate shall be paid and made over by my trustees to the heirs of the body of" his brother, "whom failing, to the heirs of the body of" his sister, "whom all failing, to my own heirs *in mobilibus.*"

There was no provision for the disposal of the income of the trust subsequently to the father's death.

The brother, who never was married, predeceased, and the sister survived the father.

In a special case presented on the father's death, and in the lifetime of

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the testator's sister, her children claimed immediate payment of the residue, on the ground that as there was no object of the trust requiring a postponement of vesting, the truster must be held to have intended to benefit the children of his sister who might be in existence at his father's death, and that the terms "heirs of her body" must be construed in that sense.

Held that effect must be given to the ordinary meaning of these terms, and that vesting was postponed till the death of the testator's sister, when the "heirs of her body" could be ascertained.

Observed by Lord Adam, that the more recent cases establish the rule that a woman cannot be presumed to be past childbearing at any particular age.

1st Division. Robert John Gollan, London, died on 15th October 1877, leaving a trust-disposition and settlement dated 11th October 1877. The settlement set forth, *inter alia*, the following trust purposes:—*Third*, on the death of John Gilbert Gollan, the testator's father, to pay the free income of the residue, after deducting a provision to his sister after mentioned, to Brooke Bridges Gollan, the testator's brother, during his life. "*Fourth*, on the death of both of the said John Gilbert Gollan [the testator's father], and Mrs Jane Plumb or Gollan [the testator's mother], I direct my trustees, out of the capital of my said estate, to make payment to my sister Mrs Elizabeth Margaret Jane Gollan or Booth, wife of Karl Edmund Otto Booth, . . . of the sum of £4000 sterling, . . . and in the event of the said Elizabeth Margaret Jane Gollan or Booth predeceasing her said father and mother, the said sum of £4000 shall be paid to the heirs of her body, in such way and manner as she, the said Elizabeth Margaret Jane Gollan or Booth may direct and appoint by any deed of appointment or direction executed by her, which failing, the same shall be paid to them equally, share and share alike; . . . and *Fifth*, as regards the balance or residue of the capital of my said means and estate, I do hereby specially direct and appoint that after the death of the said John Gilbert Gollan and Jane Plumb or Gollan, and of the said Brooke Bridges Gollan [the testator's brother], the said balance or residue of the capital of my estate shall be paid and made over by my trustees to the heirs of the body of the said Brooke Bridges Gollan, whom failing, to the heirs of the body of the said Elizabeth Margaret Jane Gollan or Booth, whom all failing, to my own heirs *in mobilibus*."

The testator was survived by his father John Gilbert Gollan, who died on 23d August 1899, predeceased by his wife Mrs Jane Plumb or Gollan and by Brooke Bridges Gollan, who died without having had issue.

The testator's sister, Elizabeth Margaret Jane, survived her father. She was twice married—first, to Karl Booth, by whom she had three children—Karl Wilhelm Booth, Percy Alexander Brooke Booth, and Ferdinand Robert Booth. She afterwards, in 1894, married ——— Humphreys, who still survived. There were no children of the second marriage.

In these circumstances Karl W. Booth and his two brothers claimed immediate payment of the residue.

A special case was presented by Robert John Gollan's testamentary trustees, second parties; and by Henry Ikin (attorney for Karl Wilhelm Booth), and Percy A. B. Booth and Ferdinand R. Booth, third parties.

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The first parties to the case were merely holders of part of the fund carried by Robert John Gollan's settlement.

The question was,—"Are the third parties now entitled to payment of the whole residue of the trust-estate of the said Robert John Gollan?"

In the case it was stated,—"Mrs Humphreys was born on the 14th June 1850, and is in the 51st year of her age, and beyond the age of child-bearing."

The contentions of the second and third parties were thus stated,—"(7) The third parties maintain . . . that as Brooke Bridges Gollan died without issue they are now entitled to payment of that residue in respect that the expression 'heirs of the body of the said Eliza Margaret Jane Gollan or Booth' occurring in said purpose means her children living at the death of John Gilbert Gollan. On the other hand, the second parties allege that the sound construction of the trust-disposition and settlement of Robert John Gollan is that they, as trustees, must retain the estate until the death of Mrs Humphreys."

Argued for the third parties;—The term "heirs of the body" was open to construction, and had been held to apply to persons ascertained during the ancestor's life.[1] Here the term was equivalent to "lawful children of the body," and indicated a class to be ascertained at the date of distribution, and not necessarily at Mrs Humphreys' death. The direction in the trust-disposition was to pay and make over the residue after the death of the longest liver of the successive liferenters, and there was no provision for a continuing trust, nor any direction as to the disposal of the income of the residue after that date. In these circumstances a direction to continue the trust until Mrs Humphreys' death would not be implied, and would be inconsistent with the scheme of the settlement. If this were so, the third parties were entitled to immediate payment of the residue, to the exclusion of children subsequently born.[2] But even if they were wrong in the above argument, they were entitled to immediate payment of the residue on finding caution to secure the interest of possible *nascituri*.[3] In this case no question arose, because it was admitted by the parties that Mrs Humphreys was past the age of childbearing, and the Court were entitled to proceed on such an admission.[4] If the possibility of other children coming into existence was excluded the three sons now living could acquiesce in disregarding the possibility of any one or more of them dying before their mother.

Argued for the second parties;—It was a fixed rule that the "heirs of the body" of a person could not be ascertained till the death of that person.[5] The term was not ambiguous or open to construction.[6]

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[1] Darbison v. Beaumont, 1 Peere William's Reps. 229; Winter v. Perratt, 1843, 9 Cl. and F. 606.

[2] Biggar's Trustees v. Biggar, Nov. 17, 1858, 21 D. 4, 31 Scot. Jur. 4; Wood v. Wood, Jan. 18, 1861, 23 D. 338, 33 Scot. Jur. 177; Ross v. Dunlop, May 31, 1878, 5 R. 833; Hayward's Executors v. Young, June 21, 1895, 22 R. 757.

[3] Gordon v. Young, Feb. 8, 1873, 45 Scot. Jur. 272.

[4] Beattie's Trustees v. Meffan, March 11, 1898, 25 R. 765, *per* Lord M'Laren, p. 768.

[5] Maule, June 14, 1876, 3 R. 831.

[6] Ferguson v. Ferguson, March 19, 1875, 2 R. 627, *per* Lord President Inglis, 635.

No. 166.
July 5, 1901.
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In *Winter* v. *Perratt*[1] the phrase "first male heir of the branch of R. C.'s family" was ambiguous, and had to be construed. The cases where the persons instituted were called as "lawful children of the body" had no bearing. The destination over to the heirs *in mobilibus* of the testator was adverse to the construction contended for by the third parties, because his sister, Mrs Humphreys, would herself be his next of kin if failure of the heirs of her body should occur in her own lifetime, and it was unlikely that the testator intended this. The trustees were not bound or entitled to proceed upon any arrangement among the third parties as to the waiver of rights, because in the event of their all predeceasing their mother, their descendants would take in their own right, and would not be bound by any indemnity or acquiescence on the part of their parents.

LORD ADAM.—The question we are asked to decide is:—"Are the third parties now entitled to payment of the whole residue of the trust-estate of the said Robert John Gollan?" These parties are, as I understand, the present children in life, being the heirs of the body now in existence of Elizabeth Margaret Jane Gollan or Booth, who is herself still in existence. Mrs Elizabeth Margaret Jane Gollan or Booth is a sister of the testator.

The question is, whether these children are now entitled to payment of the whole residue of the trust-estate. Now, practically the only clause of the will of Robert John Gollan which we have to consider is the fifth. I cannot say that, so far as I have listened to the debate, much light is to be got from a consideration of the other clauses as to what really is the meaning of the fifth clause. By his will, which is in the form of a trust-disposition and settlement, Robert John Gollan conveys his whole estates, heritable and moveable, to certain trustees to carry out certain trust purposes; and the fourth purpose was referred to as throwing some light on this question. By it, on the death of John Gilbert Gollan, the father, and Jane Plumb or Gollan, the mother of the testator, he directed the trustees, out of the capital of his estate, to make payment to his sister—that is, Mrs Booth—of the sum of £4000, exclusive of her husband's *jus mariti*; and in the event of the said Mrs Booth predeceasing her father and mother, the sum of £4000 was directed to be paid to the heirs of her body. Now, there is no difficulty about the meaning of the words "heirs of her body" in that clause, and there cannot be, because you have there a direction that, on the death of certain people the £4000 was to be paid to his sister Mrs Booth, and, failing her, to the heirs of her body. Therefore the heirs of her body were ascertained in that case, because she being dead before the conditional institution could take effect, the heirs of her body were a class perfectly well known. The trustees were on the death of the father and mother, in the event of Mrs Booth predeceasing them, to pay a sum to the heirs of her body—that is the heirs of her body in the usual acceptation of the Scotch law language.

So far there is no ambiguity. But the fifth clause is different, because it says with regard to the balance of the residue of the capital of his means and estate,—"I do hereby specially direct and appoint that after the death of the said John Gilbert Gollan and Jane Plumb or Gollan"—that is, his

[1] 9 Cl. and F. 606.

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father and mother—"and of the said Brooke Bridges Gollan"—that is, his brother—"the said balance or residue of the capital of my estate shall be paid and made over by my trustees to the heirs of the body of the said Brooke Bridges Gollan, whom failing, to the heirs of the body of the said Elizabeth Margaret Jane Gollan or Booth, whom all failing, to my own heirs *in mobilibus*." That is the direction, and it is said that it is clear from that that there was to be immediate payment upon the event happening of the death of John Gilbert Gollan and his wife, and of Brooke Bridges Gollan. It is said that the period of distribution would arrive then, and no doubt if there had been no obstacle in the way that might very well have happened, but, if one takes the construction for which Mr Craigie contends, the heirs of the body could not be determined at the date which is alleged to be the date of distribution, because nobody could tell until the death of Mrs Booth who her heirs would be. And therefore the argument is, that as you cannot ascertain who her heirs are to be until the death of Mrs Booth, the period for distribution has not arrived. Now, it is said that that construction would necessitate a continuation of the trust, and that there was no power given to continue it. I do not think there is anything in that argument, because the trust-estate is vested in trustees for certain purposes, and the trust must be continued, and is authorised to be continued, until the purposes indicated by the truster are wholly carried out. Now, if Mr Craigie's construction of the words is right, there is no difficulty as far as the power of continuation of the trust is concerned, because the direction is different from that of the fourth purpose, which was to make a payment "on the death" of the testator's father and mother. "On the death" is, as soon as that event arrives. Here that is not so, but it is to be at some time "after the death." That, I think, indicates no point of time. It is to be "after" a particular death, not "on" it. I do not think anybody can doubt that the words "heirs of my body" have a perfectly well-known meaning, and, I may say, are words of art in the language of the law of Scotland, the meaning being the heirs of a particular person. But it is perfectly clear and well recognised that you cannot tell who the heirs of a person are to be until that person dies. It is perfectly obvious that until a person dies nobody can tell whether he is to be survived by heirs of the body or not. Those who are now said to be the heirs may be all dead. Who can tell whether these third parties will survive their mother or not? There is nothing to be found within the four corners of this settlement to shew that the testator did not mean to use the words in their ordinary sense, or that he did not mean that the trustees should wait until Mrs Booth was dead. Therefore, upon the whole matter I am of opinion that the question must be answered in the negative.

There was another question raised, whether Mrs Booth or Humphreys, who is said to be fifty-one, is past childbearing, so that there can be no more heirs of her body than these third parties; and it is said that that is quite enough to entitle the Court to order the money to be paid over now in the same manner as if she were naturally dead, for she is naturally dead in the sense that she cannot have more children. But I think the more recent authorities hold that a woman cannot be presumed to be past childbearing at any particular age. Therefore I think that we cannot give

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effect to that contention. I am of opinion that we should answer this question in the negative.

LORD KINNEAR.—I have come to the same conclusion, although, I confess, not without some hesitation. I think there is a great deal of force in Mr Kennedy's argument that this will does not, from all that we can see of its terms, appear to contemplate that the estate shall be held for an indefinite time in the hands of the trustees, with no trust purpose to be effected by their keeping it in their hands. The direction is to pay over to certain persons after the death of certain other persons, and then when that time arrives there are no trust purposes to be fulfilled by the trustees retaining the money in their hands, and there is no express direction to accumulate; and again, the intention to accumulate is hardly to be presumed unless it be expressed.

I think all that suggests very forcible grounds for the conclusion which Mr Kennedy maintained. But then I do not think that the absence of a direction to make an intermediate application of the money, or of any express power to the trustees to continue to hold, creates any legal difficulty in the operation of the will. The only inference which I think can be legitimately drawn from it is an inference as to the intention of the truster, because if it be clear that the truster's intention is that the estate is to be conveyed to certain persons who cannot be ascertained until after the lapse of a certain time, then there is a very clearly implied power and direction to the trustees to retain until that time. And if they can do nothing else with the money, it follows of necessity that they must accumulate the income for the benefit of the persons who may ultimately be entitled to it when they are ascertained. The only point therefore is, that the absence of any direction to accumulate or to make any use of the money indicates an intention that, in the event which has happened, the children shall take although their mother is still in life, and therefore that we must assume that by "heirs of the body" the testator meant nothing more than "children." But after giving full force to the considerations which I have mentioned, I confess I do not think that they are sufficient to displace the plain meaning of the words "heirs of the body." I entirely agree with Lord Adam as to the signification in which these words must be accepted. They are, as his Lordship has said, technical words, having only one meaning, and the persons described by them cannot possibly be ascertained during the lifetime of the ancestor whose heirs are to be benefited. That being so, it does not appear to me that it is material to decide the question whether we are to proceed upon any admission of the parties as to the probability of Mrs Humphreys having any more children than she has already. That would not enable us to know a bit better than we do now whether her existing children will be her heirs or not, because the contingency which would displace them from that position is not merely the birth of other children, but the possibility of their failing to survive their mother. We cannot hold, and I suppose that even the learned counsel who asks us to proceed upon an admission, as of fact, that there will be no more children, would hardly ask us to accept an admission that as matter of fact the existing children will not die before their mother. But if they do, they

will not be their mother's heirs. Apart altogether, therefore, from that point, I agree with Lord Adam that the question should be answered in the negative. No. 166. July 5, 1901. Gollan's Trustees v. Booth.

The LORD PRESIDENT concurred.

LORD M'LAREN was absent.

THE COURT answered the question in the negative.

FORBES DALLAS & Co., W.S.—LOCKHART THOMSON, S.S.C.—Agents.

ALEXANDER TAYLOR AND OTHERS (Mr and Mrs Coulson's Marriage-Contract Trustees), First Parties.—*Cullen.*
MRS MABEL ELLEN COULSON, Second Party.—*M'Clure.*

No. 167. July 5, 1901.* Coulson's Trustees v. Coulson.

Marriage-contract—Conveyance by wife of acquisita et acquirenda—Policy of insurance taken by a man in anticipation of marriage on his life payable to wife if living—Married Women's Policies of Assurance (Scotland) Act, 1880 (43 *and* 44 *Vict. cap.* 26), *sec.* 2.—The Married Women's Policies of Assurance (Scotland) Act, 1880, sec. 2, enacts,—"A policy of insurance effected by any married man on his own life, and expressed upon the face of it to be for the benefit of his wife . . . shall . . . be deemed a trust for the benefit of his wife for her separate use, . . . and such policy, immediately upon its being so effected, shall vest in him and his legal representatives in trust" for the purpose so expressed, " . . . and shall not otherwise be subject to his control or form part of his estate."

By antenuptial contract of marriage, C D, the intended wife, conveyed to trustees, for the purposes specified, "All and Sundry lands and heritages, goods and sums of money, and generally the whole property and estate, heritable or moveable, now belonging, or which shall pertain and belong to her during the subsistence of the marriage."

A B, in anticipation of his marriage, which took place two days afterwards, took out a policy of insurance on his own life, payable at his death to C D, his intended wife, if then alive, if not to his executors. The policy gave A B right to change the beneficiary, but this clause was deleted after the marriage at his request. A B was under no obligation to keep up the policy.

The marriage having been dissolved by the death of the husband, and the insurance company having paid the sum due under the policy to the widow, the marriage-contract trustees claimed that sum on the ground that the wife took under the destination in the policy, and by virtue of the section of the Act of 1880 above quoted, a vested right in the proceeds of the policy *stante matrimonio*, and that this right was carried to them by the above quoted clause of the marriage-contract.

Held that the sum due under the policy was not property which pertained or belonged to the wife during the subsistence of the marriage, and that the widow was entitled to it absolutely.

Held (*per* the Lord Justice-Clerk) that the Act did not apply, in respect that the policy had not been effected by a "married" man.

2D DIVISION.

HUGH NIVEN COULSON, then of the Public Works Department, Cape Colony, was married to Miss Mabel Ellen Taylor on 12th May 1898. By antenuptial contract of marriage, dated 26th March 1898, between the intended spouses, Miss Taylor, on her part, conveyed to the marriage-contract trustees, for the purposes set forth, certain moveable property specified, and also "All and Sundry lands and

* Decided July 4, 1901.

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heritages, goods and sums of money, and generally the whole property and estate, heritable or moveable, now belonging, or which shall pertain and belong to her during the subsistence of the marriage, but under the exception of" certain specified moneys, and also of legacies under £200 in amount.

The marriage was dissolved by the death of Mr Coulson on 11th January 1901. He died intestate and domiciled in Scotland. There was one child of the marriage.

On 13th March 1901 a special case was presented by the marriage-contract trustees, as first parties, and Mrs Coulson, the widow, as second party, for determination of the right to the sum in a policy of insurance taken by Mr Coulson on his own life.

The case set forth the following facts in addition to those already narrated:—

The policy of insurance in question, which was dated 10th May 1898, and was granted by the Equitable Life Assurance Society of the United States, bore that the society, on receipt of satisfactory proofs of the death of the assured (Mr Coulson), provided the policy was then in force, agreed to pay £1000 "to Mabel Ellen Taylor, if living, if not, then to the assured's executors, administrators, or assigns, subject to the right of the assured to change the beneficiary." The case stated that Mr Coulson applied for this policy "in anticipation of his intended marriage to the second party."

Mr Coulson paid the first premium due on the policy, amounting to £22.

"5. In or about the month of January 1899 the said Hugh Niven Coulson applied to the said life assurance society to change the description of the parties to whom the proceeds of the policy were payable by annulling the following part thereof, viz., 'subject to the right of the assured to change the beneficiary.' The object of this request was to make the direction to pay to his wife, the second party, in the event of her surviving him, absolute. The said assurance society agreed to comply with this request, and accordingly they made a docquet, bearing date 21st January 1899, on the said policy in the following terms:—'In compliance with the written request of the assured, duly acknowledged, it is hereby declared that the amount due at the death of the assured shall be payable, not as originally provided (other conditions and requirements remaining unchanged), but to Mabel Ellen Coulson, wife of the assured, if living, if not, then to the assured's executors, administrators, or assigns.'"

"6. The said Mrs Mabel Ellen Taylor or Coulson paid out of her own separate means, from which her husband's *jus mariti* and right of administration were excluded by said contract of marriage, two premiums, each amounting to £22, on the said policy on 22d February 1899 and 22d February 1900, but she made these payments because it was more convenient for her than for her husband to provide the money at the time, and not because of any understanding upon her part that the policy was her own. The policy was not handed over to Mrs Coulson" during her husband's lifetime.

After her husband's death payment of the proceeds of the policy was made by the assurance society to Mrs Coulson.

The first parties maintained that the sum contained in the policy fell under the *acquirenda* clause in the marriage-contract, and was therefore payable to them.

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The second party maintained that she was entitled to retain the sum received under the policy for her own absolute use and benefit.

The following question of law was, *inter alia*, stated:—"2. Is the said sum [of £1000] payable to the second party absolutely for her own use and behoof?"

Argued for the first parties;—The sum in the policy of insurance was carried to the first parties by the conveyance of *acquisita et acquirenda* granted by the second party in the marriage-contract. The destination in the policy had been made absolute *stante matrimonio*. Consequently the second party had a vested right under the policy, contingent on her surviving her husband. This right was carried by the conveyance of *acquisita et acquirenda*. The effect of the Married Women's Policies of Assurance (Scotland) Act, 1880, section 2,* was to give the second party a vested right in the policy during the subsistence of the marriage, and this right was carried by her conveyance to the trustees.

The undernoted authorities were cited for the second party.[1]

At advising,—

LORD JUSTICE-CLERK.—The real question in this case is, whether a sum of £1000, the proceeds of a policy on the life of the late Hugh Niven Coulson, which he took out with the Equitable Life Assurance Society of the United States, is payable to his widow, or whether her marriage-contract trustees are entitled to insist that it shall be handed over to them to be dealt with as part of the marriage-contract fund. The policy made the sum in it payable on his death to the lady he was about to marry, and this destination was made absolute, on the application of the insured, by a docquet dated 21st January 1899. Accordingly, on his death the proceeds were handed over to his widow. This was plainly the intention of the husband, and this was admitted at the debate by the counsel for the trustees. But they base their claim upon the marriage-contract and the Act of 43 and 44 Vict. cap. 26. That that Act does not apply to this case seems to me to be clear. The purpose of that Act was to enable a married man to make a protected provision for his wife and family. Here this policy was not effected by a married man, and he expressly provided how it

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* The Married Women's Policies of Assurance (Scotland) Act, 1880 (43 and 44 Vict. c. 26), sec. 2, enacts,—"A policy of assurance effected by any married man on his own life, and expressed upon the face of it to be for the benefit of his wife or of his children, or of his wife and children, shall, together with all benefit thereof, be deemed a trust for the benefit of his wife for her separate use or for the benefit of his children, or for the benefit of his wife and children, and such policy immediately upon its being so effected shall vest in him and his legal representatives in trust for the purpose or purposes so expressed, or in any trustee nominated in the policy or appointed by separate writing duly intimated to the assurance office, but in trust always as aforesaid, and shall not otherwise be subject to his control, or form part of his estate, or be liable to the diligence of his creditors, or be revocable as a donation, or reducible on any ground of excess or insolvency. . . ."

[1] Smith v. Kerr, June 5, 1869, 7 Macph. 863, 41 Scot. Jur. 465 Thomson's Trustees v. Thomson, July 9, 1879, 6 R. 1227.

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was to go on his death. Therefore, unless the first parties can bring this sum under the marriage-contract they cannot succeed. Under that contract the second party conveyed in trust all "lands and heritages, goods and sums of money . . . which should pertain or belong to her during the subsistence of the marriage." This £1000 was not a sum of money belonging to her during the subsistence of the marriage. I therefore think the trustees have no claim to it, and it must go, as the holder of the policy plainly intended, as a gift to her.

I therefore think the second question should be answered in the affirmative.

LORD YOUNG concurred.

LORD TRAYNER.—The money paid to the second party under the policy of insurance mentioned in the case was not, in my opinion, a sum of money which pertained or belonged to her during the subsistence of her marriage, and did not therefore fall within the conveyance by her to her marriage-contract trustees.

LORD MONCREIFF.—I am of opinion that the sum in the policy is payable absolutely to the second party. I do not regard the interest which she had in that sum during the marriage as a sum of money or property which pertained or belonged to her during the subsistence of the marriage in the sense of the marriage-contract.

The destination in the policy was to "Mabel Ellen Coulson, wife of the assured, if living; if not, then to the assured's executors, administrators, or assigns." The wife's interest was of a very peculiar description—(1) The sum assured could not be reduced to possession *stante matrimonio*; (2) it was contingent on her surviving her husband; (3) the husband was not bound to keep up the policy; it was only good against him and his creditors if he kept it up; and (4) the wife's rights under the policy were not protected by a separate trust in terms of section 2 of 43 and 44 Vict. cap. 26.

Thus the second party only obtained an indefeasible right to the sum in the policy after the dissolution of the marriage. I therefore think that it did not pass to her marriage-contract trustees, and that she is now entitled to it absolutely.

THE COURT answered the second question in the affirmative.

T. W. & A. M'LAREN, S.S.C.—BAXTER & BURNETT, Solicitors—Agents.

No. 168.
July 10, 1901.
Downie v. Fraser.

JOHN DOWNIE, Appellant.—*Younger—Cullen.*
ROBERT FRASER, Respondent.—*Cooper.*

Burgh—Dean of Guild—New Buildings—Permission to occupy—Burgh Police (Scotland) Act, 1892 (55 *and* 56 *Vict. cap.* 55), *sec.* 180.—By section 180 of the Burgh Police (Scotland) Act, 1892, it is provided that every owner of a house or building who shall "permit such house or building . . . to be occupied" before he has obtained a certificate from the burgh surveyor, shall be liable to a penalty.

The owner of certain new houses, which had not been certified by the

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urgh surveyor, gave the keys to his tenants, with permission to put their irniture in, but not to reside themselves until the surveyor's certificate ad been obtained. *Held (dub.* Lord Kincairney) that in the circumtances he had permitted the houses to be occupied in contravention of ection 180.

Process—Appeal to Court of Session—Penalty—Reduction on Appeal—Discretion of Inferior Court—Maximum penalty for technical offence.—Expenses.—On a petition under the Burgh Police (Scotland) Act, 1892, he owner of certain new buildings was found to have contravened section 80 of the Act, by having permitted his building to be occupied before ie had obtained a certificate from the burgh surveyor, and the maximum enalty of five pounds was imposed on him. In an appeal the Court, holding that there had been a contravention, but that it was merely technical, *reduced* the penalty to 2s. 6d., and found the appellant entitled to two-hirds of his expenses.

(See *Downie* v. *Fraser*, June 4, 1901, *ante*, p. 881.)

1st Division. Dean of Guild Court, Musselburgh.

Robert Fraser, burgh prosecutor for Musselburgh, presented a petition in the Dean of Guild Court there against John Downie, contractor, Fisherrow, in which he prayed the Court to find Downie liable in a penalty not exceeding £5, for having permitted certain new houses belonging to him to be occupied before a certificate applicable thereto had been obtained from the burgh surveyor, contrary to the provisions of section 180 of the Burgh Police (Scotland) Act, 1892.*

In the petition the prosecutor averred that Downie had, since 22d March 1901, permitted two houses in a new tenement belonging to him in Fisherrow to be occupied without having obtained a certificate from the burgh surveyor.

Downie lodged answers in which he averred that he had specially warned his prospective tenants not to go in until the certificate from the burgh surveyor was obtained.

A proof was allowed and led.

From the evidence of George Landals, burgh surveyor for Musselburgh, it appeared that he had visited the houses in question on the 25th March and found the drainage incomplete. He returned on the 28th March and found both houses occupied, in consequence of which he reported the matter to the burgh prosecutor. The houses were

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* The Burgh Police (Scotland) Act, 1892 (55 and 56 Vict. cap. 55), enacts (section 180):—"Within one month after any new house or building, or any alteration on the structure of any existing house or building, has been completed, or before such house or building or any portion thereof has been occupied, the owner or the builder shall give notice to the clerk of the commissioners that the house or building, or any part thereof, is ready for inspection before being occupied, and the said clerk shall thereupon transmit such notice to the surveyor of the burgh, who shall forthwith proceed to survey such house or building, or alteration; and if he is satisfied that such house or building is fit for occupation, and is in accordance with the provisions of this Act, he shall grant a certificate under his hand to that effect, and all such certificates shall be entered in the register of plans and sections; and every owner or builder who shall fail to give such notice aforesaid, or shall permit such house or building, or altered building, to be occupied before a certificate applicable thereto has been obtained, shall be liable to a penalty not exceeding five pounds sterling, with an additional penalty of forty shillings for every day during which such occupation shall continue."

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complete on the 28th March, and he would have granted a certificate had he not found them occupied.

The evidence of Mrs Riach and Mrs Macalpine, the tenants of the houses, was to the effect that they had obtained the keys of their respective houses from Downie before the 28th March, with permission to put their furniture in, but were expressly told that they could not reside there until the surveyor's certificate had been obtained, and that they had not in fact slept in the houses.

On 3d May 1901, the Dean of Guild Court pronounced the following interlocutor:—"Find that the respondent, John Downie, has, in contravention of the Burgh Police (Scotland) Act, 1892, section 180, permitted the houses or buildings described in the petition to be occupied before the certificate therein referred to had been obtained by the respondent in terms of said Act, as set forth in the petition: Therefore fine and amerciate the said John Downie in the sum of £5 sterling of penalty, payable to the procurator-fiscal of Court for the public interest."

Downie obtained a case on appeal to the Court of Session. The arguments on each side are stated in the opinions of the Judges.

LORD ADAM.—This is an appeal from a decision of the Dean of Guild Court at Musselburgh, in a petition at the instance of the Burgh Prosecutor. The prayer of the petition is in the following terms:—(His Lordship read the prayer). The question in the case is whether the present appellant, an owner of two houses, permitted these houses to be occupied before a certificate had been obtained from the Burgh Surveyor. The section of the statute which regulates the matter is in the following terms:—(His Lordship read section 180). Now, it appears that the Burgh Surveyor visited these buildings on the 25th March, and returned on the 28th, when he found that two of the houses in the tenement were occupied, and, finding people in occupation, he declined to give his certificate. But he says that the houses were perfectly ready for occupation, and that he would have granted a certificate if he had not found them occupied. The question is, whether the appellant permitted these people to occupy his houses, and it appears to me that the answer to that question turns on the true construction of the word "occupy" in this Act. If, as the appellant maintains, a house cannot be said to be occupied unless it is actually used as a human habitation, then the appellant is entitled to succeed, because the evidence shews that the people who were in these houses did not sleep in them. I think it is clear on the evidence that the appellant gave his tenants permission to put their furniture into the houses, but that he told them not to occupy them themselves,—that is, not to sleep there. (His Lordship read the evidence.) The question is, whether, on that evidence, it can be held that the appellant gave the tenants permission to occupy, in the sense of the statute, the fact being, that the tenants' whole furniture was put in, and put in not as into a warehouse, but in order that they might come and live in the houses themselves. Did the appellant permit his tenants to occupy his houses when he allowed them to put their furniture in in that way, and only told them that they must not sleep there? On that question I am of opinion that it is not necessary for occupation that a house should be a human habitation,—that is, that human beings should sleep there. I think that, in the present case, the houses

were fully occupied, although the tenants did not actually sleep in them. I am, however, far from saying, that if a tenant left his umbrella, or some other articles of his property, in the house, that would be occupation within the meaning of section 180. I should hesitate to put any such construction on the section. I think it is a question of circumstances in each case. But when the house is so far occupied that the tenant might have slept there, but did not, I think that is occupation within the meaning of the section, and if that be so, I think the appellant was rightly convicted, because I think he allowed his tenants to occupy his houses in the sense which I have explained.

But looking to the whole circumstances I think the penalty imposed was too severe for what was only a slight error on the appellant's part. I should not be inclined to interfere with the discretion of a magistrate as to the amount of a penalty, if it could be said to be reasonable. But when we find here that the maximum penalty has been imposed for a mere mistake, I think it is excessive, and should be reduced to five shillings or half-a-crown.

LORD KINNEAR.—I agree with your Lordship. I think the case must be taken on the same footing as if the surveyor had granted his certificate on the 28th March, and I think Mr Cullen conceded that it must be so taken. On the merits I agree that the appellant here allowed his tenants to occupy his houses before a certificate had been granted by giving them the keys and allowing them to put in their furniture. I cannot say that I have any doubt that if a tenant sends his furniture into a house on one day, and enters himself on the following day, his occupation begins on the day on which he sends in his furniture. I see no sufficient reason for a construction of the word "occupation" so restricted as to exclude that meaning, and have no doubt that a house is occupied when the tenant has procured the keys and sends in furniture, not as into a warehouse, to be stored, but in order to be used as the furniture of a dwelling-house.

But I also entirely agree that if the statute has been violated, it has not been a substantial violation, and has been due to a mere mistake, and not to any intention to break the law. On the evidence I think it is clear that the appellant had no intention to disobey the statute, but thought that he was within its requirements when he told his tenants that they might put in their furniture but must not occupy the houses themselves. I therefore agree that this is not a case where the maximum penalty for the greatest and most deliberate offence should have been inflicted. The offence was very slight, and the evidence shews that it was not intentional, but due to an error in law. We are told that the higher penalty imposed was due to the appellant having previously been convicted of offences under the statute. These previous convictions are not before us, and we can pay no attention to that statement; but I would observe, that whether the fact of previous offences having been committed may or may not be taken into account in fixing a penalty, the magistrate should be very careful not to allow his mind to be influenced by them when he is considering whether an offence has been committed at all, or what is the character of that offence.

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I agree that the penalty should be reduced to one or other of the sums proposed by your Lordship.

LORD KINCAIRNEY.—I agree that the breach of the statute, if there was one, was infinitesimal, and that the penalty ought to be reduced as your Lordships have proposed. But I have some doubt whether there was any breach of the statute here—that is, whether it is proved that the appellant permitted his tenants to occupy his houses. It is not proved that he permitted them to live there, but he did permit them to put in their furniture, and they did put in at least a part of it. The statute does not define occupation. It is agreed that it is not every mode of use that would amount to occupation; some may, others may not. If that is so, the question to be solved in every instance is whether, in the circumstances of the particular case, permission to put in furniture is equivalent to permission to occupy. In this case there was permission to put in furniture for the purpose of occupying it after a certificate had been granted, and the question is, whether that is permission to occupy or not. I should have been inclined to think that it was not, but as your Lordships have reduced the penalty imposed to a nominal sum, I do not dissent from the judgment.

The LORD PRESIDENT and LORD M'LAREN were absent.

THE following interlocutor was pronounced:—"Recall the interlocutor of the Dean of Guild Court dated 3d May 1901, appealed against: Of new find that the respondent John Downie has, in contravention of the Burgh Police (Scotland) Act, 1892, section 180, permitted the houses or buildings described in the petition to be occupied before the certificate by the Burgh Surveyor therein referred to had been obtained by the respondent in terms of said Act, as set forth in the petition: Fine and amerciate the said John Downie in the sum of 2s. 6d. sterling of penalty, payable to the Procurator-fiscal of Court for the public interest, and decern: Find the appellant Downie entitled to expenses in this Court and in the Dean of Guild Court, but modify the same to the amount of two-thirds thereof, and remit the accounts thereof to the Auditor to tax and to report."

BEVERIDGE, SUTHERLAND, & SMITH, S.S.C.—BUIK & HENDERSON, W.S.—Agents.

No. 169. July 11, 1901. M'Avan v. Boase Spinning Co., Limited.

PETER M'AVAN, Respondent.—*Hamilton.*
THE BOASE SPINNING COMPANY, LIMITED, Appellants.—*Munro.*

Master and Servant—Workmen's Compensation Act, 1897 (60 *and* 61 *Vict. cap.* 37), *Schedule I.* (11) *and* (12)—*Review of Weekly Payments—Certificate of Medical Practitioner appointed under the Act.*—By Schedule I. (11) of the Workmen's Compensation Act, 1897, it is enacted that when a workman receiving weekly payments under the Act submits himself for examination "to one of the medical practitioners appointed for the purposes of this Act," "the certificate of that medical practitioner as to the condition of the workman at the time of the examination . . . shall be conclusive evidence of that condition."

Held that where such a certificate bore that a workman in receipt of weekly payments under the Act had recovered from the injuries in respect

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of which the payments were made, and that, although the workman was suffering from partial disability for work, such disability was not connected with the injuries, but was "the result of deficient natural vigour of constitution, together with advancing years," it was conclusive against any further claim by the workman for compensation under the Act.

Diss. Lord Young, on the ground that, while the certificate was conclusive as to the condition of the workman, it was not conclusive as to whether that condition was or was not attributable to the injuries.

2D DIVISION. Sheriff of Forfarshire.

PETER M'AVAN having been injured in the employment of the Boase Spinning Company, Limited, Dundee, was awarded by the Sheriff-substitute at Dundee (Campbell Smith) compensation under the Workmen's Compensation Act, 1897, at the rate of 6s. 9d. weekly, beginning from the 27th April 1900, until the further orders of the Court.

The company, in May 1901, having applied to the Court, in terms of Schedule I. (12) of the Act,* to review the weekly payments, the Sheriff-substitute modified them to 5s. a week, and on the crave of the company stated a case, which bore,—

"The appellants, on 24th April 1901, in terms of section 11 of the First Schedule to the said Act, required the respondent to submit himself for examination by Dr W. S. Malcolm, a duly qualified medical practitioner. The respondent did so," but, being dissatisfied with the certificate of Dr Malcolm, he thereafter, "at the appellants' request, submitted himself, in terms of section 11, to Dr David M'Ewan" (one of the medical practitioners appointed for the purposes of the Act), who granted a certificate bearing that he had "'examined Peter M'Avan, who stated that he was suffering from injuries, viz., concussion of brain and fracture of pelvis (haunch-bone), received on the 13th day of April 1900, at 21 Jamaica Street, Dundee, while in the employment of the Boase Spinning Company, Limited,' . . ." The certificate proceeded—"'I hereby certify that his condition is as stated below. He has recovered from the above-mentioned injuries, and his condition is such that he is fit for light work. In my opinion he will probably never be able for hard manual labour, but only for light employment. This disability is not connected with his late injuries, but is the result of deficient natural vigour of constitution, together with advancing years.'"

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* The Workmen's Compensation Act, 1897 (60 and 61 Vict. cap. 37), First Schedule, (11) provides—"Any workman receiving weekly payments under this Act shall, if so required by his employer, . . . from time to time submit himself for examination by a duly qualified medical practitioner provided and paid by the employer, . . . but if the workman objects to an examination by that medical practitioner, or is dissatisfied by the certificate of such practitioner upon his condition when communicated to him, he may submit himself for examination to one of the medical practitioners appointed for the purposes of this Act, as mentioned in the Second Schedule to this Act, and the certificate of that medical practitioner as to the condition of the workman at the time of the examination shall be given to the employer and workman, and shall be conclusive evidence of that condition. . . .

(12) "Any weekly payment may be reviewed at the request either of the employer or of the workman, and on such review may be ended, diminished, or increased, subject to the maximum above provided, and the amount of payment shall, in default of agreement, be settled by arbitration under this Act."

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"On 17th May 1901 the appellants' agents lodged a minute for review of the weekly payment, along with the said certificates by Dr Malcolm and Dr M'Ewan, and moved that the appellants' liability for compensation should be reviewed by being totally ended. The Sheriff-substitute stated his opinion that the medical certificate was not by itself sufficient ground for terminating the payment and liability for compensation, and offered to fix a diet of proof. The appellants' agents stated that they did not wish a proof, as they had no evidence to adduce except the medical certificate, and that it was the prescribed and appropriate statutory evidence, and requested the Sheriff-substitute summarily to dispose of their motion for reviewing the award of compensation.

"The Sheriff-substitute having heard the statements and answers to questions by the agents, and by the respondent, who was present and stated his age to be 49, and being satisfied from the oral statements that the respondent had not worked since the accident, and that the appellants had never offered him work of any kind, and disclaimed all obligation to find work for him, or to prove where he could find work that he could properly perform, and being satisfied from the medical certificate, as also from his appearance, which was the appearance not of an old man but of a man of very small stature in poor muscular condition, that he was fit for light work and for no other kind of work, exhorted him to try to find work and reduced the compensation to 5s. a week, being of the opinion that he was not totally incapable of earning wages."

The following questions of law were submitted for the opinion of the Court:—"(1) Whether the statement of opinion in the certificate of the medical practitioner appointed by the Secretary of State, to the effect that the workman has 'recovered from his injuries' and is 'fit for light work' is conclusive as to the matter of fact, and has the legal effect of rendering it imperative upon the arbitrator, regardless of his own opinion, to decide that the appellants' liability to pay compensation has come to an end, without any proof of the workman's ability to find suitable work, and to earn his former wages should he find work? (2) Whether the fact being ascertained or admitted that, between the date of his accident and the date of the medical certificate, old age has come prematurely upon a man of forty-nine years of age, the rapid development of symptoms of age between these two dates is not to be ascribed chiefly or at all to the effects of the severe bodily injury, but solely to the natural decay of advancing years irrespective of said severe undisputed injury; and whether the arbitrator is bound to accept of the written opinion of a single doctor to this effect, whatever his own conviction regarding the matter of probability or of fact may be?"

Argued for the appellants;—A workman was entitled to compensation only so long as he suffered from incapacity resulting from the injury. The certificate of Dr M'Ewan, which was conclusive evidence of the condition of the workman, was therefore conclusive against further compensation here.

Argued for the respondent;—The certificate of the official medical man was conclusive evidence of the condition of the workman, but not of the cause of that condition. The cause of the condition involved inquiry which the medical man was not authorised to make, and depended on evidence which could not properly be before him. It was therefore open to the Sheriff to decide the point, either on

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evidence taken, or, as here, upon his own knowledge of the facts of the case. The medical man having certified partial incapacity, and the Sheriff having decided that that incapacity was due to the injury, the award was correct.

At advising,—

LORD JUSTICE-CLERK.—In this case the respondent, who was injured in the appellants' employment, received compensation up to a certain date from them, upon a medical certificate, certifying his inability to work because of his injuries. The appellants, in terms of section 11 of the first Schedule to the Act, called upon the respondent to submit himself again to medical examination, by a medical man nominated by them, and thereafter the medical man reported that he had "quite recovered from his said injuries." The respondent, being dissatisfied with the report, was examined by Dr M'Ewan, a medical practitioner officially appointed for the purposes of the Workmen's Compensation Act, who reported in these terms:—(His Lordship quoted the terms of the report). The appellants contend that, in respect of this certificate, they cannot be legally required to pay any further compensation to the respondent. I am of opinion that the contention is sound. By subsection 11 of Schedule I. of the Act, it is declared that if a person injured submits himself for examination to one of the medical practitioners appointed for the purposes of this Act, as mentioned in the second Schedule to this Act, "that the certificate of that medical practitioner as to the condition of the workman at the time of the examination. . . . shall be conclusive evidence of that condition." The purpose of this provision is plain. It is to prevent expensive and protracted litigation by submitting the medical questions in the case to the final decision of a neutral expert.

It cannot be doubted for a moment that if the certificate had stated that the workman was still affected by the accident, so as to be disabled wholly or partially from work, the appellants would have been compelled to continue to pay compensation, and would not have been allowed to lead evidence to prove that the certificate was erroneous. Here equally I hold that the certificate declaring that he has recovered from his injuries, and that any disability for hard work under which he may suffer is not connected with his late injuries, is conclusive upon the question of his right to further compensation, compensation being due only because of disability arising from the accident.

The Sheriff, with nothing before him of which he could take judicial cognisance except the certificate, has ordered further compensation to be paid. I am of opinion that he has erred in so doing.

The questions appended to the case are not satisfactory. I think the first question should be answered by stating that the certificate of the medical practitioner appointed by the Secretary of State that the respondent has recovered from his injuries, and is not suffering from any disability caused by the injuries, is conclusive against any further claim for compensation under the Workmen's Compensation Act, and that the Sheriff ought to have so decided; and find it unnecessary to answer the second question.

LORD YOUNG.—The important question here is, what is the true meaning and import of subsec. 11 of the first Schedule to the Act—a question

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not the less, but all the more important in respect that it has not heretofore arisen. I am not surprised that this is so, because the injuries for which compensation is paid, and with regard to which a workman may be required to submit himself to examination by a medical man, are, in the ordinary case, of the nature of wounds or broken bones, and a medical examination will usually shew whether the wounds have healed, or the bones knit together. I think the Act was intended to apply, and has hitherto been applied, to such cases, the medical man being required to grant a certificate setting forth the result of his examination as to the condition which he found the workman to be in. But the question which occurs in this case, and which may occur again, is as to what led to that condition, and that does not, or at least may not, appear upon a medical examination. Now the condition in which this respondent was at the date of the medical examination was that of deficient natural vigour, and premature frailty of old age. I say premature, because these signs do not usually occur at the age of forty-nine. The frailty of old age comes on at different periods of life, according to the history of the individual —according to the life he has led; and the want of vigour which disables him from employment may depend on what cannot appear to the medical man upon merely inspecting the body of the patient. I think that the condition of the man is the only thing that can be satisfactorily ascertained by such an examination, and my own judicial sympathies are in accordance with what the Sheriff-substitute says, although I do not assent to all his language. The Sheriff-substitute had tried the case, and therefore was acquainted with the circumstances of the accident. He tells us that the respondent fell a distance of 24 feet. That is an incident which may conduce to the premature frailty of old age, and want of vigour. The Sheriff says further that he suffered injuries to his head and groin; and the medical man tells us that he had sustained concussion of the brain. Now, if a man has received injuries of that kind—and there is no statement that before the accident he was suffering from the frailty of old age or deficient vigour—and the result of those injuries was so serious that at the first examination in May he was reported to be still totally unfit for work, and remained so till the end of November, I can quite appreciate that he is suffering from frailty and deficient vigour. But I am not prepared to accept the medical certificate that the concussion of the brain and the consequences of the fracture of his thigh have nothing to do with the condition in which he now is. That could not be ascertained merely by a medical examination, without information as to the man's previous history, the circumstances of the accident, and its immediate effects. I do not know what information the medical man had as to these facts, and he is *not* authorised to take evidence. I think therefore it is misleading to say that he is certifying as to the man's condition, when he certifies that the accident had nothing to do with his condition. I should have allowed the respondent to lead evidence, and we were informed that this was proposed, but opposed by the appellants, and the Sheriff thought that he might use his own judgment. The respondent was not suffering from premature old age before the accident, but was earning wages, and it is ridiculous to say that his age of itself is sufficient to account for his condition, without

evidence; nor was he previously suffering from deficient vigour. But deficient vigour may be accounted for by concussion of the brain; indeed, there are doctors who think that there is never complete recovery from concussion of the brain. I am not therefore prepared to assent to the view on which your Lordship's judgment proceeds, that this certificate is to be taken as conclusive not only as to the respondent's condition, but also that the terrible accident which occurred to him has nothing to do with that condition.

LORD TRAYNER.—The respondent in this case was injured on 13th April 1900, while in the appellants' employment. He was, in respect of the injuries he had sustained, awarded compensation by the Sheriff-substitute at the rate of 6s. 9d. weekly from 27th April until the future orders of Court. The appellants have now applied to the Sheriff-substitute to review the order formerly made by him in order that the weekly payment to the respondent may be "ended." This application is founded on the 12th section of the first Schedule appended to the Workmen's Compensation Act, 1897. The respondent has been examined (in terms of the 11th section of the same Schedule), by a medical practitioner appointed by the Secretary of State (Schedule II., section 13), and he reports that the respondent has recovered from the injuries sustained by him in April 1900, in respect of which compensation had been awarded. He reports further that the respondent is not fit for hard manual labour, but adds: "This disability is not connected with his late injuries."

The first question put to us in this special case contains really two questions. They are (1st) Is the medical practitioner's certificate conclusive evidence of the fact there stated that the respondent has recovered from his injuries? and (2nd) If that be so, are the appellants absolved from further liability for compensation to the respondent? The first of these questions, I think, only admits of one answer, and it is to be found in the Act, which provides that the certificate of the medical practitioner "as to the condition of the workman at the time of the examination . . . shall be conclusive evidence of that condition."—(Schedule I., section 11). That certificate being conclusive evidence, no other evidence is necessary, or indeed competent. Now, if it is conclusively proved that the respondent has recovered from his injuries received in the appellants' employment, are the appellants bound to go on paying compensation therefor? The second question (as I have stated it) appears to me equally clear. The Act provides (Schedule I., section 1 (6)), that where "total or partial incapacity for work results from the injury," the workman is entitled to a certain weekly payment "during the incapacity"—that is the incapacity resulting from the injury. So long as the incapacity so occasioned continues, the right to compensation continues, but, nothing in the Act suggests that when the incapacity resulting from the injury has disappeared, any right to compensation exists. The contrary is the view and purpose of the Act. An employer is to compensate his workman for injury received which results in the incapacity of the workman to labour and earn wages. But the employer is not to provide compensation for an incapacity not connected with or caused by the injury received in his employment. I think therefore that the first

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question put in the case should be answered in the affirmative, and the case remitted back to the Sheriff, with directions to him to grant the appellants' application, and to give such order as may be necessary to end the weekly payments to the respondent.

LORD MONCREIFF.—I am of opinion that the Sheriff's judgment is wrong, because under the 11th article of Schedule I. of the Workmen's Compensation Act, the certificate of the medical practitioner appointed under the Act is declared to be "conclusive evidence" of the injured workman's condition.

The manifest object and effect of that provision is to exclude all other inquiry, skilled or otherwise. The alternative (which it was desired to avoid) would be a conflict of skilled medical evidence; or, as in this case, the opinions of those who have no special medical training.

I would answer the question in the affirmative.

THE COURT pronounced this interlocutor:—"Sustain the appeal: Answer the first question by stating that the certificate by the medical practitioner appointed by the Secretary of State, that the respondent has recovered from his injuries and is not suffering from any disability caused by the injuries, is conclusive against any further claim for compensation under the Workmen's Compensation Act: Find it unnecessary to answer the second question: Remit to the arbitrator to grant an order ending the weekly payments to the respondent, and decern."

J. PEARSON WALKER, S.S.C.—CUTHBERT & MARCHBANK, S.S.C.—Agents.

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July 11, 1901.* Stillie's Trustees v. Stillie's Trustees.

JOHN HUNTER JACKSON AND ANOTHER (Thomas Logan Stillie's Trustees), First Parties.—*Cowan.*
THOMAS WALKER AND ANOTHER (Mr and Mrs Thomas Logan Stillie's Marriage-Contract Trustees), Second Parties.—*Craigie.*
MRS THOMAS LOGAN STILLIE, Third Party.—*Deas.*
AGNES STILLIE AND OTHERS, Fourth Parties.—*Craigie.*

Marriage-Contract—Alimentary Annuity to Wife—Larger Alimentary Annuity in Husband's Settlement—Power of Wife to discharge Marriage-Contract Annuity.—By antenuptial contract of marriage the husband, *inter alia*, bound himself to provide his wife, in the event of her surviving him, in an annuity of £100 during her life, but restricted to an alimentary annuity of £50 in the event of her second marriage. The husband also made certain provisions for the children of the marriage, and assigned certain moveable property to the marriage-contract trustees in security of the provisions to the wife and the children. The marriage was dissolved without issue by the death of the husband. He left a trust-disposition and settlement by which he conveyed his whole estates, heritable and moveable, to trustees, and directed them, *inter alia*, to pay an annuity of £360 to his widow, restricted in the event of a second marriage to £120, the said annuity, both original and restricted, being declared to be purely alimentary, and to be in full satisfaction of the annuity provided in the marriage-contract.

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The income of the fund in the hands of the marriage-contract trustees, together with the income of the husband's remaining estate in the hands of his testamentary trustees, was insufficient to pay the widow an annuity of £360, but from the date of the husband's death she received payment of £360 a year, in name of the testamentary annuity, by receiving the income of both funds, the balance being made up by encroachments on the capital of the testamentary fund. When, in consequence of these encroachments, the capital of the testamentary fund had been practically exhausted, the testamentary trustees, with consent of the widow, called on the marriage-contract trustees to hand over the marriage-contract fund to be applied by the testamentary trustees in payment of the testamentary annuity. The marriage-contract trustees maintained that they were bound to hold the marriage-contract fund for payment of the marriage-contract annuity.

Held (1) that the widow was entitled to surrender the marriage-contract annuity, the testamentary annuity being declared to be alimentary, and the terms of the husband's settlement shewing that he consented to the surrender; and (2) that the marriage-contract trustees were bound to hand over the marriage-contract fund to the testamentary trustees, there being no marriage-contract purpose remaining to be fulfilled.

Elliott's Trustees v. *Elliott*, 21 R. 975, *distinguished*.

2D DIVISION.

THOMAS LOGAN STILLIE, merchant in Glasgow, was married to Miss Ann Bell in July 1857. By antenuptial contract of marriage between the intended spouses, dated 30th June 1857, Mr Stillie bound and obliged himself, his heirs, executors, and successors, "to content and pay to the said Ann Bell, his promised spouse, in case she survives him, a free yearly jointure or an annuity of £100 sterling during all the days and years of her life she shall survive the said Thomas Logan Stillie, restrictable in the event after mentioned, payable half-yearly," subject to payment of a penalty and interest in the event of delay in payment: "Provided always, as it is hereby expressly provided and declared, that in the event of the said Ann Bell surviving the said Thomas Logan Stillie and entering into a second marriage, then the said jointure or annuity shall be and the same hereby is limited and restricted to a jointure or annuity of £50, payable," &c.: "Declaring that the said restricted jointure or annuity after such second marriage shall be purely alimentary to the said Ann Bell, and shall not be alienable or assignable by her or affectable by her debts and deeds or attachable by the diligence of her creditors, and shall be exclusive of the *jus mariti* and right of administration of any second or future husband she may marry, and not affectable by the debts or deeds of such husband, or attachable by the diligence of his creditors in any manner of way." Mr Stillie made certain other provisions in favour of his wife, which were payable on her survivance of him, and she accepted the provisions in her favour as in full satisfaction of her legal rights. Mr Stillie also made certain provisions in favour of the children, if any, of the marriage. In security of the provisions to his wife and the children, Mr Stillie assigned certain moveable property to the marriage-contract trustees.

The marriage was dissolved by the death of Mr Stillie on 5th June 1883. No children were born of the marriage.

Mr Stillie left a trust-disposition and settlement, dated 26th March 1864, by which he conveyed his whole estate, heritable and moveable, real and personal, to trustees, directing them, *inter alia*, in the third place, in the event of his wife Mrs Ann Bell or Stillie surviving him, "to make payment to her, during all the days of her lifetime after

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my decease (but restrictable in the event after mentioned), of a free yearly jointure or annuity of £360 sterling, exempted from all duties, taxes, and deductions whatever, payable . . . ; but declaring always, as it is hereby expressly provided and declared, that if she shall enter into a second marriage, the said annuity of £360 shall be, and the same is hereby restricted to an annuity of £120 from and after such second marriage, payable . . . as before expressed in regard to the said annuity of £360." The testator further specially provided and declared that the foresaid annuity, original and restricted, before provided to his said wife, should be purely alimentary to her, and should not be alienable or assignable by her, or affectable by her debts or deeds, or attachable by the diligence and execution of her creditors, and that the said restricted annuity in favour of his said wife should be exclusive of the *jus mariti* and right of administration of any husband she might marry, and not affectable by the debts or deeds of such husband, or attachable by the diligence and execution of his creditors. The testator further provided and declared that the provisions thereinbefore conceived in favour of his wife should be accepted by her as in full satisfaction of all her claims, legal or conventional, by or through his decease, "and in particular shall be in lieu and place of and shall be accepted as in full satisfaction to her of the whole provisions conferred on her by me by the contract of marriage entered into between her and me, dated 30th June 1857." The residuary legatees were the testator's child or children, whom failing, certain of his relations.

At the date of Mr Stillie's death the funds assigned by him to the marriage-contract trustees in security of the provisions undertaken by him in the marriage-contract, amounted to about £3848. His testamentary trustees gave up an inventory of his other estate, amounting to £2571.

The income of the whole estate, whether held by the testamentary trustees or by the marriage-contract trustees, was not sufficient to provide Mrs Stillie with the annuity of £360 per annum conferred upon her by the trust-disposition and settlement. From the date of Mr Stillie's death till the date of the proceedings now reported this annuity was paid in full, the income arising from the funds held by the two sets of trustees having been primarily applied towards meeting the annuity, and any deficiency having been provided out of the capital of the funds held by the testamentary trustees. These latter funds were at 31st December 1899 reduced, owing to this encroachment upon capital, to the sum of £119, 11s. 8d. The marriage-contract funds on the other hand had, owing to appreciation of the investments, risen in value to about £4014.

In these circumstances a special case was presented by the testamentary trustees, as first parties, the marriage-contract trustees, as second parties, Mrs Stillie, the widow, as third party, and Agnes Stillie, and others, residuary legatees under the trust-disposition and settlement, as fourth parties.

The following contentions, *inter alia*, were maintained:—

The third party maintained that she was entitled to an annuity of £360 per annum, restrictable to £120 in the event of her second marriage, payable to the extent of £100 out of the income of the remainder of the estate held by the marriage-contract trustees so far as available, thereafter out of the income of the testamentary trust-estate, thereafter out of the capital of the testamentary trust-estate,

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and upon the exhaustion of the said testamentary trust-estate, so far as necessary, out of the balance of the estate held by the marriage-contract trustees.

The first parties maintained that the second parties were bound to hand over to them the whole £4014 in their hands, to be administered by them for the purposes of the trust-disposition and settlement.

The second parties maintained that they were bound during the lifetime of the third party to retain the whole of the trust funds in their hands for payment of an annuity of £100 to the third party; or, alternatively, that they were bound during the lifetime of the third party to retain such sum as would produce an annuity of £100 to the third party.

The fourth parties concurred in the contentions of the second parties.

The following question of law, *inter alia*, was stated:—"1. Are the second parties bound to hand over to the first parties the whole or any portion of the marriage-contract funds?"[1]

At advising,—

LORD TRAYNER.—I am of opinion that the first question should be answered in the affirmative. The state of the facts is this: By his contract of marriage the late Mr Stillie bound himself to provide for his widow an annuity of £100 during all the days and years of her life. That annuity is not declared alimentary, and could therefore have been disposed of by Mrs Stillie as she pleased. There was no restriction whatever placed upon her disposal of it. But the contract provided that in the event of Mrs Stillie entering into a second marriage, the annuity should be restricted to £50, and that restricted annuity was declared to be purely alimentary, and not affectable by her debts or deeds, or the debts and deeds of her husband. By his trust-settlement Mr Stillie directed his trustees to pay his widow an annuity of £360, restrictable in the event of a second marriage to £120, but this annuity, whether restricted or not, is declared to be purely alimentary.

The funds in the hands of the testamentary trustees are insufficient to afford payment to the widow of the annuity of £360, and the funds in the hands of the marriage-contract trustees are more than sufficient to meet the annuity of £100. In these circumstances the testamentary trustees desire the marriage-contract trustees to hand over the funds in their hands, to the end that payment of the larger annuity may be made to the widow, and the widow consents to this being done. If this is done the widow surrenders an annuity of £100 which she could sell or renounce for one of a larger amount, of which she cannot dispose, and of which by her own deeds she cannot be deprived. The widow gains an advantage by the change both in the amount of the annuity and in its protected character, and her advantage or benefit was the matter which both by the marriage-contract and trust-settlement the parties thereto respectively had most in view. The only difficulty which the marriage-contract trustees suggest is, that in the event of Mrs Stillie entering into a second marriage they may be called on to pay the restricted alimentary annuity provided in that case to Mrs

[1] *Cited at the hearing*,—Elliott's Trustees v. Elliott, July 13, 1894, 21 R. 975.

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Stillie. The probability of any such event is remote, as we are informed that Mrs Stillie (who has been a widow for more than eighteen years) is now about sixty-seven years of age. But dealing with matters as they stand, Mrs Stillie is willing to surrender her right (as she competently may) to the annuity of £100 provided to her by the marriage-contract, and to accept instead the alimentary annuity provided by the trust-settlement. The consent of Mr Stillie to this arrangement may be inferred from what he has done by his settlement, in which it is provided that the annuity there given is to be accepted by Mrs Stillie in full of all her claims under the marriage-contract. In the circumstances, I think she may now elect to take the latter provision. No claim under the marriage-contract would thereafter be competent to her, especially seeing that her election is made after the marriage had come to an end.

LORD YOUNG concurred.

LORD MONCREIFF.—It seems to me that the case of *Elliott's Trustees*[1] can be distinguished on the facts. In that case, under the antenuptial contract of marriage (to which the wife's father was a party), she was secured by a trust in an alimentary liferent in the event of her surviving her husband. The husband, who predeceased, left a will by which he bequeathed his whole property absolutely to his wife. He did not in his will make any reference to the marriage-contract.

After her husband's death, Mrs Elliott called on the trustees under the marriage-contract to denude of the trust-estate, and to pay it over to her absolutely. The effect of this, had it been done, would have been to render ineffectual the provisions in the marriage-contract for the protection of the wife against the diligence of creditors.

The majority of the Court held that on a sound construction of the husband's will he did not intend to discharge the alimentary liferent in his widow's favour; and I gather further from the opinions of the majority that they were also of opinion that, even if he had expressed an intention to that effect, it was not within his power with the consent of his wife to revoke the alimentary liferent.

If the facts in the present case were identical I should feel bound by that decision; but they seem to me to be essentially different. Under the marriage-contract the second party, the widow, is provided out of her husband's funds in an annuity of £100, to be restricted to an alimentary annuity of £50 on second marriage. The only other persons named in the contract are the children of the marriage; but as there were no children of the marriage the trustees on the widow's death would hold for the husband's representatives.

Now, under the husband's will he bequeathed an annuity of £360 to his wife, restrictable to £120 in the event of a second marriage; but, unlike the case of *Elliott's Trustees*,[1] he declared that the annuity should be purely alimentary and not alienable or assignable or open to the diligence of creditors. Further—and this is another difference—he declared that the provisions in favour of his wife should "be accepted as in full satisfaction to her

[1] 21 R. 975.

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of the whole provisions conferred on her by me by the contract of marriage entered into by her and me, dated 30th June 1857," thus indicating that he intended to substitute the testamentary provisions for those in the marriage-contract. It will thus be seen that while, on the one hand, Mr Stillie gave his wife a largely increased annuity he did not free her from the restrictions. In point of fact he made the conditions more stringent, as the £100 annuity under the marriage-contract payable during viduity is not alimentary.

Now, what has happened is this: In order to make up the widow's annuity to £360 the testamentary trustees have practically used up all the trust funds in their hands. On the other hand, the marriage-contract trustees have funds amounting to about £4014. They maintain that they are bound to retain these funds for the purposes of the marriage-contract—that is, to pay to the widow an annuity of £100, reducible to £50, and any surplus income, keeping the capital intact. It is plain that if this is done the widow's total provisions will fall far short of the annuity of £360, and thus the will of the testator will be defeated, while under the marriage-contract there are no third parties for whom the trustees are bound to hold except, indeed, the husband's representatives—that is, his trustees, the first parties, who hold for the beneficiaries under the will, of whom the widow is the most favoured. The only way in which effect can be given to both deeds is for the marriage-contract trustees to hand over the funds in their hands to the testamentary trustees, who have power, which the marriage-contract trustees have not, to apply the capital to make up the annuity to £360. As this will not involve the abandonment of the restrictions in the marriage-contract, and, on the contrary, will make the widow's annuity during viduity alimentary, I fail to see what right or interest the second parties have to resist the demand made upon them by the first parties.

LORD JUSTICE-CLERK.—I concur in the opinion of Lord Trayner.

THE COURT answered the first question of law in the affirmative.

ADAM & SANG, W.S.—CAMPBELL & SMITH, S.S.C.—TRAQUAIR, DICKSON, & MACLAREN, W.S.—Agents.

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Whole Court.

MISS MARGARET H. S. HALL, Petitioner.—*Horne.*
THE INCORPORATED SOCIETY OF LAW-AGENTS IN SCOTLAND, Respondents.—*Campbell, K.C.—Macfarlane.*

Administration of Justice—Law-Agent—Woman—Law-Agents Act, 1873 (36 *and* 37 *Vict. c.* 63).—*Held*, by the whole Court, that the Court has no power to admit women as law-agents.

ON 5th November 1900 Miss Margaret Howie Strang Hall, who was born in 1882, and resided at Kirn, wrote to the Board of Examiners of Law-Agents intimating her wish to enter for the first of the two examinations which intending law-agents require to pass.

The secretary of the Examiners having declined to enrol Miss Hall for examination, Miss Hall, on 15th December 1900, presented a

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petition in which she narrated the refusal of her application, and prayed the Court, after ordering intimation and service of the petition, "to authorise and direct the said secretary of the Board of Examiners of Law-Agents to enrol the petitioner for examination in the first portion of the examination in general knowledge at the diet to be held in January 1901, or at any subsequent diet or diets, and to authorise and direct the examiners to examine her at the said or any subsequent diet in general knowledge; and further, to authorise and direct that she be enrolled and examined in respect of all subsequent examinations under the Acts relating to law-agents practising in Scotland, to which she shall apply to be admitted, and for which she shall be qualified to become a candidate, and in the event of her satisfying the examiners on the first of the two examinations in general knowledge, to authorise any qualified law-agent to enter into an indenture with her as an apprentice."

The Court ordered intimation and service on the secretary of the Examiners and also on the Incorporated Society of Law-Agents in Scotland.

The Incorporated Society lodged answers, in which they, *inter alia*, stated:—"The respondents do not feel called upon to oppose the prayer of the petition. At the same time there may be a question whether women have a legal right to be admitted to practise the profession of the law. According to inveterate usage and custom in Scotland, that practice has in all departments of the law been hitherto confined exclusively to men. . . .

"Again, while the Court has, especially in earlier times, exercised wide powers by Act of Sederunt with regard to the regulation of the profession of law-agents, the Acts of Sederunt, as well as the statutes dealing with the same subject (both prior and subsequent to the Interpretation Acts), do not appear to contemplate the case of women becoming members of the profession. . . .

"Law-agents are eligible to be appointed to public and judicial offices, *e.g.* the office of salaried Sheriff-substitute, clerkships in the Court of Session and Bill-Chamber, and the office of notary-public.

"The respondents, . . . do not conceive it to be their interest or duty to maintain that women ought not to be enrolled as law-agents."

After hearing counsel on the petition and answers, the Court, on 30th January 1901, "in respect of the novelty and importance of the question involved in the case," appointed parties to box to the whole Judges of the Court mutual minutes of debate.

The petitioner argued in her minute;—The question raised by the presentation of this petition was whether women were, by reason of their sex, debarred from being admitted to the practice of the profession of the law in Scotland.

No objection to their admission was suggested on the ground of any impropriety or inexpediency in women being law-agents. The only question was whether it was competent for the Court to admit women as law-agents.

It was submitted by the petitioner;—(1) That as the law at present stood women had an equal right with men to be admitted as law-agents; and (2) that whether or not the first proposition was sound, it was in the discretion of the Court, without any Act of Parliament, to admit women as law-agents.

1. The Act by which the admission of law-agents was now

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regulated was the Law-Agents Act of 1873 (36 and 37 Vict. cap. 63), section 2 of which provided that "from and after the passing of this Act no person shall be admitted as a law-agent in Scotland except in accordance with the provisions of this Act."

The Act neither expressly nor by implication excluded women. It contained express notice of disability of minority, but none of disability of sex. Its terms, strictly construed, included women. The substantive used throughout was the general one, "person," which was followed in accordance with English usage, even where the term applied to both genders, by the masculine pronoun "he," "his," or "him." Moreover, previous to the passing of the Act of 1873, Lord Brougham's Act of 1850 (13 and 14 Vict. cap. 21) had been passed, which provided (section 4) that after 1850 "in all Acts words importing the masculine gender shall be deemed and taken to include females, unless the contrary as to gender is expressly provided." The Act of 1873, construed in the light of Lord Brougham's Act, included women. Lord Brougham's Act was repealed and substantially re-enacted by the Interpretation Act, 1889 (52 and 53 Vict. cap. 63), section 1.

The only consideration which might be fairly urged against this construction of the statute was that which might be inferred from inveterate usage, according to which men only had hitherto been admitted as law-agents. Uniform usage over a long period, it was admitted, would go far to preclude a construction contrary to its tenor, where such usage gave evidence of a *positive* custom. In the present case, however, the inference from usage was at best purely *negative*, and afforded no ground of construction. If it were said, "No woman has ever been admitted," it might be answered with equal force, "No woman has ever been rejected."

The decisions with regard to the force of custom, in cases analogous to the present, were in no way contrary to the petitioner's claim.

In the case of *Jex-Blake*[1] the decision proceeded upon the footing that the charters of the University shewed that the foundation was instituted for men only, and that this view received positive confirmation from contemporaneous usage.

The case of *Chorlton* v. *Lings*[2] was so different from the present, in essential circumstances, that no analogy could be drawn from it to exclude the present petitioner's claim.

Beresford Hope v. *Lady Sandhurst*[3] was decided upon a special clause (the 63d) in the Municipal Corporations Act of 1882. But for that section it would seem from Lord Coleridge's judgment that, in spite of the interpretation to be inferred from prior usage in construing the Act, he would have come to the contrary decision.

2. But whether or not women had a right to be admitted to the practice of law equally with men under the Law-Agents Act of 1873, it was competent for the Court, and within its discretion, to admit them. The Act of 1873 created no new duty in the Court, and gave it no new power with regard to this question. The duty of regulating the admission of persons desiring to practise as law-agents

[1] Jex-Blake v. Senatus of University of Edinburgh, June 28, 1873, 11 Macph. 784, 45 Scot. Jur. 476.
[2] 1868, L. R., 4 C. P. 374.
[3] 1889, L. R., 23 Q. B. D. 79.

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had been exercised by the Lords of Council and Session of their own motion ever since they first admitted agents to practise before the Courts, and simply as a matter of the administration of the Courts.

The first attempt at regulating the admission of law-agents to practise was an Act of Sederunt, 10th August 1754, which was the foundation of all the subsequent practice. It was passed by the Lords of Council and Session in consideration of the powers given them by law, viz., the Act 1537, c. 36-41, and the Act 1540, c. 96, for making such regulation as they should judge proper for the administration of justice before them.

In a similar way the Court supervised and controlled the admission of agents to practise in the inferior Courts of Scotland.[1] Of this the Act of Sederunt, 12th November, 1825, might be taken as an example. This Act of Sederunt was passed by the Court in consideration of powers conferred by an Act of Parliament of the same year.[2] The Court again dealt with the admission of procurators to the inferior Court in an Act of Sederunt in 1839,[3] which repeated with but little change the regulations of the Act of Sederunt of 1825. Subsequently the admission of procurators in the Sheriff Court was regulated by the Procurators Act in 1865 (28 and 29 Vict. cap. 85), now repealed by the Law-Agents Act of 1873, which put upon one uniform basis the admission of all law-agents in Scotland, and made it necessary for every person desiring to practise as a law-agent to petition the Court and to satisfy the examiners appointed by the Court of his fitness and capacity to exercise the duties of his profession.

From these considerations it was clear that the Court had, ever since they had first admitted agents to practise either in the superior or inferior Courts, regulated their admission merely as one of the incidents of the administration of the Courts of the country without any further power conferred upon them by the Legislature than that of conducting the business of the Courts. The Law-Agents Act of 1873 added nothing except in point of detail to the regulations previously made by the Court itself with regard to this question.

Seeing, then, that the admission of persons as law-agents had always been treated by the Lords of Session as one solely of administration in conducting the business of the Courts, it could not be said to be incompetent for the Court to admit women to practise law.

That the Court might not have been entirely averse to admitting women to the practice of the law, even in early times, might be gathered from the fact that the Justiciary records contained a report of a trial on 12th June 1563 in which the Lady Crawford appeared as advocate in the High Court of Justiciary for the defence of a prisoner who was ultimately acquitted.[4]

3. In regard to more general considerations affecting this question, the disabilities which previously lay upon women with regard to University education were removed; and women were now in as

[1] Begg on Law-Agents, p. 12; A. S., Nov. 12, 1825.
[2] 6 Geo. IV. c. 120, sec. 50.
[3] Secs. 157 to 160 of A. S., July 10, 1839.
[4] S. L. T., Feb. 9, 1901, at p. 126.

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good a position as men to make themselves "fit and competent," in terms of the Law-Agents Acts, for the practice of the profession of the law.

In America there were many practising women lawyers, and in France they were now admitted to the bar. In this country, too, in addition to being medical practitioners, women had been granted the right to sit in Parish Councils, and to become factory inspectors. The latter duty had a special interest in connection with the present application, because by the Factory Act of 1895 [1] inspectors might conduct complaints before Courts of summary jurisdiction, and certain of the female inspectors already did so in person.

The minute of the Incorporated Society was to the following effect:—

According to inveterate usage and custom in Scotland the practice of the law had in all departments been hitherto confined exclusively to men, and it might be doubtful therefore whether women had a legal right to be admitted.

At the date of the institution of the College of Justice the members of the College consisted of the Judges, advocates, clerks to the Signet, the clerks of Court, and the macers.[2]

At first the advocates acted also as agents, this part of their work being by them entrusted to their first clerks. Thereafter advocates' first clerks were for a considerable period the only agents who were recognised by the Court, although many other persons strove hard to be allowed to act, and the Court very soon found itself called upon from time to time [3] to exercise the power which at its institution was conferred upon it of making "sik rules statutes and ordinances as sall be thocht be them expedient to be observed and keiped in their maner and ordour of proceeding at all times," [4] and again of making "sic actes statutes and ordinances as they sall thinke expedient for ordouring of proces and haistie expeditioun of justice." [5]

But while the right of persons to practise as law-agents down to 1873 was in the main determined and regulated by Act of Sederunt, the matter was dealt with by an early Act of Parliament, viz., 1672, c. 16,—"An Act concerning the regulation of the judicatories," which, by section 31, enacted,—"In respect several persons, being neither advocats, nor advocats' servants, do take upon them, under the name of agents, to meddle and negotiat in processes, who are found to be of no use but burdensome to the lieges, that hereafter all the agents be debarred the House, and not permitted to negotiat or manage processes, and recommends to the Lords of Session to see the same punctually observed."

Clerks to the Signet were excluded until about the beginning of the eighteenth century,[6] not only by Acts of Sederunt, but by their own regulations, and persons other than advocates' first clerks and clerks to the Signet were first authorised to act as agents by Act of Sederunt, 10th August 1754, "Concerning the admission of agents

[1] 58 and 59 Vict. c. 37, sec. 51.

[2] Shand's Practice, vol. i. p. 2.

[3] A. S., July 13, 1596, July 10, 1604, Nov. 17, 1610; Begg on Law-Agents, p. 9.

[4] 1532, c. 2. Thomson's Acts, vol. ii. (erroneously given as 1537, c. 36-41, in the older editions).

[5] 1540, c. 96.

[6] Begg on Law-Agents, p. 8.

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and solicitors." This Act proceeded on the narrative of the powers given to the Lords of Council and Session by law "for making such regulations as they shall judge proper for the administration of justice before them," and was subsequently ratified by Acts of Sederunt on 10th March 1772 and 21st December 1833.

Procurators or agents in inferior Courts were under the supervision and control both of the Court of Session and of the inferior Judge in whose Court they practised. The Act of Sederunt of 10th July 1839, chapter 5, sections 157 to 160, dealt with such procurators, and it was believed that the regulations of this Act were in force from its date down to the passing of the Procurators Act, 1865 (afterwards repealed by the Law-Agents Act, 1873), which dealt with such procurators by statute.

The masculine gender was used throughout the whole of the Acts of Parliament and Acts of Sederunt both prior and subsequent to the Law-Agents Act, 1873, and there was nothing to suggest that Parliament or the Court contemplated women acting as agents. It did not appear that women at any time prior to the present application sought to be admitted as agents.

The importance of usage or custom had been dwelt on in many cases.[1] Lord Neaves, in *Jex-Blake*, 11 Macph. (p. 832), referred to the Roman law disabling women from acting as procurators, and further said that he never heard it suggested that a woman could be a member of the College of Justice. Reference to the Roman law, and to the reason for women being disabled, was made in an address of Sir Robert Spottiswoode, Lord President of the College of Justice, to the members of the Faculty of Advocates, summer session, 1633.[2]

If the Court were to hold that prior to 1873 women had no legal right to practise as law-agents, and if it were necessary to consider whether the Law-Agents Act of 1873 conferred a right on them for the first time, the terms of the Interpretation Act, 1889,[3] section 1, were of importance.

In *Beresford Hope* v. *Lady Sandhurst*[4] Lord Coleridge, Chief Justice, in considering whether the rule that the masculine gender included the feminine was excluded, said, that "the history of the matter" must be looked at. In *Chorlton* v. *Lings*[5] it was held that "man" did not include "woman," notwithstanding the provision of Lord Brougham's Act.[3]

The respondents had communicated with the societies corresponding to their own in England and Ireland, and had been informed that no woman had been admitted to practise as a law-agent in these countries. No woman, it appeared, had hitherto sought to be admitted.

The respondents, while they brought the foregoing considerations before the Court, did not, however, conceive it to be their interest or duty to maintain that women ought not to be admitted to practise the profession of the law.

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[1] Jex-Blake v. Senatus of University of Edinburgh, 11 Macph. 784; Chorlton v. Lings, 1868, L. R., 4 C. P. 374; Brown v. Ingram, Dec. 19, 1868, 7 Macph. 281, 41 Scot. Jur. 169.

[2] The Spottiswoode Miscellany, vol. i. p. 194.

[3] 52 and 53 Vict. cap. 63 (repealing Lord Brougham's Act, 13 and 14 Vict. cap. 21).

[4] 1889, L. R., 23 Q. B. D. 79.

[5] 1868, L. R., 4 C. P. 374.

The following opinion was returned by the Judges of the Second Division :— No. 171.

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We are of opinion that the Court has no power to grant the prayer of this petition.

Whatever power the Court may have had formerly of admitting persons to practise as law-agents in the Courts of Scotland, we think that the power of the Court in reference to such admissions is now limited and defined by the Act of 1873, for by that Act it is provided that "no person shall be admitted as a law-agent in Scotland except in accordance with the provisions of this Act." The Court is authorised to admit "persons," a term which, no doubt, is equally applicable to male and female. But in the case of an ambiguous term, that meaning must be assigned to it which is in accordance with inveterate usage. Accordingly we interpret the word as meaning "male persons," as no other has ever been admitted as a law-agent. If females are now to be admitted as law-agents, that must, in our view, be authorised by the Legislature.

The following opinion was returned by—

LORD KYLLACHY, LORD KINCAIRNEY, LORD STORMONTH-DARLING, LORD LOW, and LORD PEARSON.—We are of opinion that the Court has no power to grant this petition. We think that before the Act of 1873 women were not eligible to be appointed law-agents, and that they are not made eligible by that Act.

At advising,—

LORD ADAM delivered the opinion of the Court—The consulted Judges are unanimously of opinion that the Court has no power to grant the prayer of the petition. We are unanimously of the same opinion.

THE COURT pronounced the following interlocutor :—"Having resumed consideration of the cause, with the mutual minutes of debate and the opinions of the consulted Judges on the questions raised by the petition and answers, find that the Court has no power to grant the prayer of the petition: Therefore refuse the same, dismiss the petition, and decern."

ALEX. CAMPBELL & SON, S.S.C.—CARMENT, WEDDERBURN, & WATSON, W.S.—Agents.

CATHERINE M'CALL (M'Call's Trustee) First Party.—*Rankine, K.C.*—*C. D. Murray.*
THOMAS JACKSON (W. M'Call's Curator Bonis) Second Party.—*A. O. M. Mackenzie.*
HENRY THOMAS WILLIAMSON AND OTHERS (John M'Call junior's Trustees), Third Parties.—*Rankine, K.C.*—*C. D. Murray.* No. 172.

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M'Call's Trustee v. M'Call's Curator Bonis.

Succession—Judicial Factor—Curator Bonis to Lunatic—Power of election between legal and testamentary provisions.—The right of election between testamentary and legal provisions may be exercised by a curator bonis on behalf of his ward where the circumstances of the case warrant it.

Circumstances which were *held* to justify such an exercise of the right.

Succession—Legitim—Collation—Previous Sale of Heritage.—A testator, who left heritable and moveable estate, by his settlement made certain pro-

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visions for his younger son, who was insane, and for his two daughters, and gave the residue of his moveable estate and the heritage to his elder son. The elder son accepted these provisions, and subsequently sold part of the heritage. On the death of the elder son twelve years after his father the curator bonis of the younger son was held entitled to claim legitim for his ward.

In the question which then arose as to the ward's share of legitim, the curator bonis contended that the ward was entitled to one-third of the legitim. The representatives of the elder son contended that, as he would have been entitled to claim a share of legitim on collating the heritage, they were entitled to do so, and that, in this view, the legitim fund fell to be divided into four parts, and that the ward's share was one-fourth.

Held that part of the heritage having been sold by the elder son, the heir-at-law, collation was excluded, and that the ward was entitled to one-third of the legitim.

2D DIVISION.

JOHN M'CALL died at Glasgow in 1882, predeceased by his wife, and survived by four children, viz., John M'Call junior, Mrs Janet M'Call or Lawrie, William M'Call, and Catherine M'Call. Of these John was the eldest.

By his settlement, dated in 1880, John M'Call conveyed his estate, heritable and moveable, to the said John M'Call junior, Mrs Lawrie, and Catherine M'Call, as trustees and executors in trust for the following purposes:—

"*Second.* As my son William has, in consequence of an accident, become unable to manage his own affairs, it is desirable that he should be provided for in the manner following:—And I direct my trustees to hold and retain the sum of two thousand pounds sterling of my means and estate during his lifetime, and from the yearly interest and proceeds thereof to lay out in such way and apply as they may consider the most expedient the sum of one hundred pounds sterling, or such lesser sum yearly as the principal sum may amount to, after deducting the expense of management, for his maintenance and comfort, and that during all the days and years of his life after my death; and in case the said William M'Call decease leaving lawful issue, then I direct the said principal sum, and any interest accumulating thereon, to be paid to and divided among such lawful issue equally, share and share alike; but in case he shall decease without lawful issue, then the same shall form part of my estate, and be disposed of accordingly."

The third, fourth, and fifth purposes, provided for certain legacies and provisions to the testator's daughters, and nephews, and nieces, and the sixth and last purpose gave the residue of the estate to the testator's son, John M'Call junior.

The net value of the moveable estate left by John M'Call was about £21,927, and of the heritable estate about £1900. The heritage consisted of two houses, one at Strome, the other in Glasgow.

Mrs Lawrie and Catherine M'Call elected to accept their provisions under their father's settlement, which were accordingly paid to them by John M'Call junior, who assumed the management of the estate. After fulfilling the other purposes of the settlement, except in so far as hereinafter stated, John M'Call junior retained the remainder of the moveable estate, and the whole of the heritage for his own behoof. Part of the heritage, viz., the house in Glasgow, he subsequently sold to Catherine M'Call for £800.

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John M'Call junior died without issue in 1894, and Mrs Lawrie, also without issue, in 1885. Catherine M'Call was thus left sole trustee under her father's settlement.

On 20th February 1900, Thomas Jackson, C.A., Glasgow, was appointed curator bonis on the estate of William M'Call, then and still an inmate of a lunatic asylum, and the present special case was brought to determine the right of the curator bonis to elect on behalf of his ward between his ward's legal rights and his rights under his father's settlement. The parties to the case were (1) Miss M'Call as sole surviving trustee under her father's settlement; (2) the curator bonis; and (3) the testamentary trustees of John M'Call junior.

In addition to the facts as above set forth, the case bore:—"The said William M'Call has never been married, and has been for years, and still is, an inmate of the James Murray Royal Asylum, Perth. It is believed there is no hope of his recovery.

"The trustees did not set aside the sum of £2000 for the said William M'Call as directed by the trust-disposition and settlement, but appropriated for that purpose two investments in the London Tramway Company, which had been held by the truster prior to his death, and which at that time represented a value of £1870, but which have since been redeemed by the company by a payment to the trustees of £1525. The trustees, prior to the appointment of the curator bonis, administered this fund, and applied the income thence arising for behoof of the said William M'Call. The annual income of the fund appropriated, as above stated, amounts to about £46."

The party of the second part contended that on behalf of his ward he was entitled to claim legitim from the estate of his ward's father; that the legitim fund consisted of one-half of the free moveable estate of the deceased John M'Call senior, as at the date of his death; that John M'Call junior, having taken possession of and retained the heritable estate of his father as his own property, and never having offered to collate the same, his trustees were barred from claiming to share in the legitim fund, and his claim thereon must be held to have been discharged; and that accordingly the said fund was divisible into three parts, of which one belonged to the said William M'Call; and that interest thereon at the rate of 5 per cent per annum from the date of death of the said John M'Call senior was due on William M'Call's legitim, under deduction of the annual payments made for behoof of the said William M'Call.

The parties of the third part maintained that the party of the second part was not entitled, or at least was not *hoc statu* entitled, to elect on behalf of his ward to claim the latter's legitim. Alternatively, they maintained that, if legitim was claimable, the legitim fund fell to be divided into four parts; that in ascertaining the amount of the legitim fund, the value of the testator's heritage did not fall to be brought *in computo*, and that, in any event, interest was not due thereon.

The following questions of law were stated:—"(1) Is the said second party entitled to claim legitim from the estate of the late John M'Call senior, on behalf of his ward William M'Call? (2) In the event of the preceding question being answered in the affirmative, is the said William M'Call entitled to share in the legitim fund to the extent of (*a*) one-third part, or (*b*) one-fourth part thereof? (3) In the event of question 2 (*b*) being answered in the affirmative,

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does the value of the testator's heritage fall to be brought into account in computing the amount of the legitim fund? (4) In the event of the first question being answered in the affirmative, is interest payable on the said William M'Call's share of legitim from the date of death of John M'Call senior to date of payment, and, if so, at what rate?"

Argued for the second party;—A curator might elect, on behalf of his ward where, as here, it was evident that the ward would materially benefit.[1] That being so, the share of the legitim fund to which he was entitled was one-third, although there had been four children, inasmuch as the representatives of the elder son, the heir, were not entitled to participate. The elder son had taken the heritage under his father's will, but he was also heir *alioquin successurus*, and could not have claimed any part of the moveable estate without collation. He had taken possession of the heritage, sold part of it, and retained the rest for twelve years until his death, and never expressed any wish to collate, even if it had been possible after part of the heritage was sold. His representatives were not, therefore, now in a position to collate, and the fund accordingly belonged to the three younger children. The ward's share of legitim was therefore one-third, and legitim being an ordinary debt, interest thereon at five per cent was due from the testator's death.[2]

Argued for the first and third parties;—It was conceded that a curator might in certain circumstances elect on behalf of his ward, and among the circumstances to be considered were the interests of the third parties.[3] The only legitimate interest of the ward was that of maintenance, and that was not a sufficient interest to warrant election here. The curator had chosen the wrong remedy. If he found the ward in the enjoyment of less than was intended by the testator, he could have demanded to have the funds restored. If the income of £2000 was insufficient it could easily be made up to £100 per annum, which would not be charity, but only what was due under the deed or at common law. There was therefore no reason for dislocating the testator's scheme of bounty, and unless there was necessity there should be nothing done which would alter the succession to the lunatic. If, however, the curator was to be allowed to elect, the third parties, in right of the elder son, had on collating the value of the heritage a right to share in the legitim fund.[4] In any event, it was not a case where interest should be allowed, and certainly not at the rate of five per cent.

At the close of the argument counsel for the first and third parties put in a formal offer to make up the ward's income to £100 a year, in the event of the curator not being allowed to elect on his behalf.

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[1] Robertson, Pet., Jan. 14, 1841, 3 D. 345; Mitchell and Others, Pet., Nov. 25, 1847, 10 D. 148; Blaikie v. Milne, Nov. 14, 1838, 1 D. 18; Turnbull v. Cowan, March 17, 1848, 6 Bell's App. 222; Morison's Curator Bonis v. Morison's Trustees, Dec. 3, 1880, 8 R. 205.

[2] Bishop's Trustees v. Bishop, March 17, 1894, 21 R. 728; Ross v. Ross, June 16, 1896, 23 R. 802.

[3] Turnbull v. Cowan, *supra*.

[4] Fisher v. Dixon, June 16, 1840, 2 D. 1121, April 6, 1843, 2 Bell's App. 63; Panmure v. Crockett, Feb. 28, 1856, 18 D. 703, 28 Scot. Jur. 297; Newbigging's Trustees v. Steel's Trustees, Feb. 20, 1873, 11 Macph. 411, 45 Scot. Jur. 285.

At advising,— No. 172.

July 16, 1901. M'Call's Trustee v. M'Call's Curator Bonis.

LORD JUSTICE-CLERK.—The first question in this case is whether the curator of Mr William M'Call, who is insane, is entitled in the circumstances of the case to demand his share of legitim of the estate of his father Mr John M'Call. That the circumstances make it advisable in the interests of his ward that he should do so cannot, I think, be doubted. The case shews that the course proposed to be taken by the curator will not provide more than a maintenance suitable to the position in life of his ward. I am of opinion that it is within the province of the curator to make the election, and that in the circumstances set forth in the case his action cannot be legally impugned by the other parties to the case. The next question is whether the share is one-third or one-fourth. The testator's eldest son John took the heritage of his father as his residuary legatee. He did not offer to collate the heritage and claim a share of the general estate, but retained the heritage and enjoyed the proceeds of it till his death. The question is, whether his trustees are now entitled to claim to share in the legitim fund. I am of opinion that they cannot. By taking the heritage as he did, and by selling part of it, John M'Call junior must be held to have discharged any rights he might have by claim at law against the rest of his father's estate, whether he took the heritage as heir, or took it under his father's gift of residue in the settlement. The division of shares of the legitim fund must therefore be into a number exclusive of him.

I would propose, therefore, to answer the first question in the affirmative; the second question, by finding that William M'Call is entitled to share in the legitim fund to the extent of one-third; find it unnecessary to answer the third question; and answer the fourth question by finding that the second party is entitled to interest on his ward's share, but only at such rate as the estate in the hands of the trustees has been yielding.

LORD YOUNG.—I concur.

LORD TRAYNER.—The right of a curator bonis to elect, as on behalf of his ward, between the legal and conventional rights of the ward in his father's succession, cannot be regarded as an absolute right, but only one which he may exercise in certain circumstances. In judging whether that right is to be exercised at all, it appears to me that the interest of the ward is chiefly to be considered. In the present case I am of opinion that the curator bonis of William M'Call is entitled to make this election, and I come to that conclusion upon the following considerations:—(First) The ward has laboured under his mental incapacity since the date of his father's death in 1882, and the father's will indicates that the ward was even then (that is in 1880) in the same condition mentally. This lengthened period of incapacity indicates pretty clearly, what, indeed, was stated at the bar, that the ward in all probability will never recover from his present condition. He will therefore never be in a position to exercise such a right of election himself. (Second) The conventional provision, namely, £100 a year, or "such lesser sum" as might be produced by the investment of £2000, is certainly not more than sufficient for the comfortable maintenance of the ward. Much less is the sum of £46 a year, which is all that is yielded

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by that part of the trust fund which has been set aside to meet the provision for William M'Call. (Third) In any view which may be taken of the amount to which the ward has right as legitim, it exceeds £3000, the income of which at 3½ per cent would not be much more than £100 a year, and, therefore, as I have said, not more than what is a reasonable sum to expend on the ward's maintenance. (Fourth) The amount payable under the conventional provision being so much less than that which would be yielded by a share of the legitim fund, and the amount which would be yielded by a share of the legitim fund not being in excess of what is needed for the ward's comfortable maintenance, it is obviously in the interest of the ward that the curator should make the election. I am therefore of opinion, as I have said, that he may and can competently do so.

The next question is, What is the amount of the legitim fund? The truster left both heritable and moveable property, and was survived by four children. The eldest son took under the truster's direction the heritable property, but as he was heir thereto *alioquin successurus* he could not have claimed any part of the moveable estate without collation. He took possession of the heritage, and disposed of part of it by sale. He never proposed to collate, and he (or rather his representatives, for he is dead) is not in a position now to do so, having parted with a portion of the heritage. The legitim fund therefore belongs to the three other children of the truster, and the curator bonis, in right of his ward, is entitled to one-third of that fund. The fund so due to the ward, being a debt due to him by his father's estate, will bear interest, but I think the rate of interest should not exceed that which the first parties were receiving on the trust funds they were administering. In ascertaining the amount due to the curator both as principal and interest, account will, of course, be taken of the periodical payments which have already been made to or for behoof of the ward.

Lord Moncreiff.—The first question is whether the Court in its discretion should authorise the curator on behalf of his ward to claim legitim. The necessity for an increase of the ward's income is clearly made out, because it has sunk from £100 a year, the sum contemplated by the truster, to £46 a year; and there can be no doubt that if the ward were to recover his sanity he would certainly elect to claim legitim, which he would be entitled to do notwithstanding that for so many years payments have been made on his behalf under the will. The following passage in Lord Deas' opinion in *Morrison's Curator Bonis* v. *Morrison's Trustees*,[1] seems closely in point, viz.:—"Now, if this had been a case in which the means of maintenance for the lunatic could not be obtained except by claiming her legal rights, or even if by asserting those rights she were to be accommodated and maintained in a style and manner superior to what she could otherwise have been, I should not have doubted that it was competent for the curator to exercise the option in the way it was reasonable to suppose the lady herself would have exercised it had she been sane."

The most plausible objection on behalf of the third parties was that they were prepared to make up the ward's annual income to £100 a year, and

[1] 8 R., at p. 213.

that therefore there was no necessity for election. But I do not think that either the curator or the Court is bound to entertain such an alternative. If the provision under the will is insufficient for the ward's maintenance the proper alternative is that the curator should elect to claim legitim on behalf of the ward.

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The next question is whether the legitim fund falls to be divided by four or by three. The third parties, as representing the heir, maintain that they are to be considered as entitled to a share of the legitim. It might be a sufficient answer that even now the third parties have not reprobated the settlement and elected to collate. But I think it is sufficient that John M'Call junior, who was *sui juris*, and indeed managed the whole estate, sufficiently made his election to take under the will by selling part of the heritage and transacting with those of the children who accepted provisions under the will. It is true that no claim for legitim was made during his lifetime by the younger children, but the heir must be held to have known that it was still open to the ward or his curator to do so.

On the question of interest, I do not think that more should be allowed than the trust funds yielded. Probably three per cent would be sufficient.

THE COURT answered the first question in the affirmative, found in answer to the second question that William M'Call was entitled to share in the legitim fund to the extent of one-third, found it unnecessary to answer the third question, and in answer to the fourth question found that interest was payable on William M'Call's share of legitim, but only at the rate which the funds in the trustees' hands had been earning.

F. J. MARTIN, W.S.—J. & J. ROSS, W.S.—Agents.

JAMES RITCHIE, Pursuer (Respondent).—*Dundas, K.C.—D. Anderson.*
WILLIAM B. COWAN & KINGHORN, Defenders (Appellants).—*Jameson, K.C.—Guy.*

No. 173.
July 16, 1901.*
Ritchie v. Cowan & Kinghorn.

Contract—Constitution—Contract or honourable understanding—Discharge.—Cowan & Kinghorn, creditors of Ritchie, on receiving payment of 10s. in the £1 of their debts, granted a receipt for the amount, "being 10s. per £1, in full of our claim against the said Ritchie, . . . it being, however, understood that the said Ritchie will pay the balance of 10s. per £1 whenever he is able to do so."

Held that the document instructed no legal obligation on Ritchie to pay the balance of 10s. in the £1, but merely an honourable understanding that he would pay whenever he was able.

2D DIVISION. Sheriff of Lanarkshire.

ON 7th June 1899 James Ritchie, iron and commission merchant, 40 St Enoch Square, Glasgow, finding himself unable to meet his obligations to William B. Cowan & Kinghorn, iron brokers, 105 West George Street, Glasgow (who had carried through as his brokers certain transactions in iron warrants), entered into the arrangement embodied in the following document:—"105 West George Street, Glasgow, 7th June 1899.—Received from Mr James Ritchie, 40 St Enoch Square, per Messrs Strang & Weir, writers, the sum of one thousand six hundred and fifty-three pounds nine shillings (£1229, 19s. 3d. in cash, and £423, 9s. 9d. in two bills for £211, 14s. 10d. and

* Decided June 10, 1901.

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£211, 14s. 11d., payable on 31st July and 31st December respectively), being 10s. per £ in full of our claim against the said James Ritchie, amounting to £3306, 18s., it being, however, understood that the said James Ritchie will pay the balance of 10s. per £ whenever he is able to do so. WM. B. COWAN & KINGHORN."

On the same date* Ritchie wrote to Cowan & Kinghorn as follows:—"40 St Enoch Square, Glasgow, 7th June 1899.—Dear Sirs,—In respect that you have accepted 10s. per £ in full of your claim against me for £3306, 17s. 11d., I beg to assure you that I will pay up the deficiency as soon as I am able to do so.—Yours truly, JAMES RITCHIE."

Thereafter Ritchie entered into further transactions in iron warrants through Cowan & Kinghorn as his brokers.

In September 1900 Ritchie brought an action in the Sheriff Court at Glasgow against Cowan & Kinghorn for payment of £1229, 13s. 2d. as being the balance due to him by them on the last-mentioned transactions.

The defenders admitted that the sum sued for was the balance due by them on the transactions in question taken by themselves, but founding on the document of 7th June 1899 and the pursuer's letter of the same date, they maintained that the pursuer was under a legal obligation to pay the balance of 10s. in the pound whenever he was able to do so, and this, the defenders averred, the pursuer was now able to do. The defenders therefore claimed that the sum of £1653, 8s. 11d. should be set against the sum sued for, leaving £423, 15s. 8d. due to them.

The pursuer, in answer, maintained that the document of 7th June 1899 was an absolute discharge in full by the defenders of his debt to them, with only an "honourable understanding" that he would pay the balance of 10s. in the pound when he was able to do so, and this the pursuer denied that he was able to do.

A proof was led. The evidence was mainly directed to the question whether the pursuer was able to pay 10s. in the pound, and to another question not now reported.

On 19th March 1901, the Sheriff-substitute (Balfour) pronounced this interlocutor (after certain findings):—"Finds that the pursuer is only bound to pay the remainder of the composition if he is able to do so, and it has not been proved that the pursuer is able to pay the composition . . . Finds under the circumstances that the defenders

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* Letters containing passages in the following terms were sent by Ritchie's agents to Cowan & Kinghorn prior to the 7th June 1899:—

Letter dated 2d June 1899.—"We have your letter of this date. We cannot accept the form of receipt proposed by you, nor will we do so. We must ask you to sign and send us the receipt which we submitted to you, and which is strictly in accordance with the arrangement we made under which we sent you cheque. What Mr Ritchie declines to do is to give you power to come upon him when *you* may see fit—the debt must be left one of honour on the part of Mr Ritchie."

Letter dated 5th June 1899.—"You must take it once for all that Mr Ritchie will not grant an obligation on which you can take action. Your draft letter is of this nature, and is not in the terms we arranged with you per telephone. We stated that we had no objection to Mr Ritchie granting you a letter that he will pay in full when he is in a position to do so, but that it must be an obligation of honour on his part. We are still willing to get such letter signed and delivered to you."

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have no right to retain the balance sued for, and that they are bound to pay it over to the pursuer: Therefore decerns against the defenders in terms of the prayer of the petition: Finds them liable to the pursuer in expenses," &c.

The defenders appealed.[1]

LORD JUSTICE-CLERK.—The first question to be determined in this case is,—what was the effect of the arrangement made by the parties when the receipt and discharge of 7th June 1899 was given. With regard to that question I have no doubt whatever. It is not necessary to go behind the document to which I have referred, which bears to be a receipt for 10s. in the pound in full payment of the defenders' claim against the pursuer. There can be no doubt that if the receipt had stopped there it would have afforded no ground for the defenders' claim, and therefore if that claim has any foundation it must be in the subsequent words—"it being understood that the said James Ritchie will pay the balance of 10s. per £ whenever he is able to do so." I am unable to hold that these words constitute any legal obligation enforceable against the pursuer. It was an honourable understanding, but it constituted no legal claim. If there were any ambiguity in the terms of the receipt—and I think there is none—the terms of the letters make the matter still clearer; for the pursuer's agents said repeatedly that these were the only terms that their client would agree to. Although I do not agree with the grounds of the Sheriff's judgment, I think he has reached a sound conclusion, and that the pursuer is entitled to decree.

LORD YOUNG.—The pursuer sues the defenders for £1200 as due to him by them, and it is admitted that they are bound to pay that sum unless they can establish that he owes them a larger sum which they are entitled to set off. There is therefore no occasion to inquire into the validity of the pursuer's claim. The question is, whether the defenders have established a claim which they are entitled to set off. Their claim depends upon the construction and legal import of the receipt to which reference has been made. The debt to which the receipt refers is £3306, 18s., and the receipt bears to be a receipt for £1653, 9s., "being 10s. per £ in full of our claim against the said James Ritchie." But that is followed by these words—"It being, however, understood that the said James Ritchie will pay the balance of 10s. per £ whenever he is able to do so." It is maintained by the defenders that this addition changed the document from being a receipt in full payment of the debt into a receipt to account, with an obligation on the part of the pursuer to pay the rest as soon as he was able. I am unable to put that construction on the document. I think it imports nothing more than an honourable understanding that the pursuer would pay if and when he was in a position to do so. The other view is, that it is a receipt as regards half the debt,

[1] *Authorities cited by the Defenders:*—Fair v. Hunter, Nov. 5, 1861, 24 D. 1, 34 Scot. Jur. 3; Christie's Trustees v. Muirhead, Feb. 1, 1870, 8 Macph. 461, 42 Scot. Jur. 215; Broatch v. Dodds, June 11, 1892, 19 R. 855.

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and a document of debt as regards the other half in the event of the pursuer becoming a wealthy man. That is certainly a novelty. One has heard of an honourable debtor paying his debts in full after he has come to have money to enable him to pay, but the idea of a legal obligation which may be sued on in the event of the granter coming to be possessed of funds is in my opinion ridiculous. Consider the result of sustaining such an obligation. The holder of it would be entitled to harass his debtor with a succession of actions. He might fail to prove in the first action that the debtor was able to pay, and he might fail again in the second action, but he might succeed in the third. He would be entitled in each action to call upon the debtor for a statement of his affairs, and if it appeared that the debtor was then unable to pay the action would be dismissed, it being, as I have said, open to the creditor to bring another action whenever he thought he had a better chance of success. I agree in the result at which the Sheriff-substitute has arrived, but I certainly do not proceed on the ground that it has not been proved that the pursuer is able to pay the balance of 10s. in the pound. I think that there should have been no allowance of proof in this case, and that the pursuer is entitled to decree for the amount of the debt admittedly due to him, and that the defence of set-off founded on the words in the receipt to which I have referred should be repelled.

Lord Trayner.—I am of the same opinion. The defenders seek to retain a sum of £1229 which is undoubtedly the property of the pursuer, on the ground that he is under obligation to them in a larger sum. On 7th June 1899 the pursuer was indebted to the defenders in the sum of £3300 odds. He was unable then to pay more than a composition upon the debt of 10s. per pound, but the defenders agreed to take that composition, and for that to discharge their claim. Upon that point the receipt is quite explicit. It bears that the defenders had received 10s. per pound in full of their claim, so that the pursuer's debt to the defenders was discharged and extinguished on 7th June 1899. But it is for part of that debt that the defenders now claim to retain the money of the pursuer which is in their hands. I do not understand the ground on which they maintain a right to retain that money in extinction *pro tanto* of a debt which was discharged in full in 1899. The defenders' case would not be stateable but for the addition to the receipt on which they found, and which runs thus:—"It being, however, understood that the said James Ritchie will pay the balance of 10s. per £ whenever he is able to do so." The pursuer's letter (of even date with the receipt) practically repeats this, for after stating that the defenders accepted 10s. per pound in full of their claim, it goes on,—"I beg to assure you that I will pay up the deficiency as soon as I am able to do so." The defenders say that this is an obligation on the part of the pursuer to pay what they now claim, enforceable against him at law. I do not think that is an honest contention, because certainly when the receipt and letter were written it was known to both parties that it was not intended to be a legal obligation enforceable at the will of the defenders. The defenders had striven to get the receipt worded as an acceptance of 10s. per pound as an instalment of the pursuer's debt. That was refused, and

hen they were told explicitly,—"You must take it once for all that Mr Ritchie will not grant an obligation on which you can take action"; and urther, "that it must be an obligation of honour on his part." In view f these letters I think it is not an honest contention that the receipt mposed, or was intended to impose, such an obligation on the pursuer s the defenders now maintain. It is clear that the defenders knew the ontrary.

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Looking to the terms of the receipt itself, it does not, in my opinion, mport an enforceable obligation. It is merely the expression of an honourable intention on the part of the pursuer that when he is in a position to pay the remainder of his debt he will pay it. The defenders may appeal to the pursuer's sense of honour when he is able to pay, but they cannot get any decree to enforce such an appeal from a Court of law.

LORD MONCREIFF was absent.

THE COURT pronounced this interlocutor:—"Recall the interlocutor of the Sheriff-substitute dated 19th March 1900:" (After findings in fact) "Find in law that the said debt of £3306, 18s. due by the pursuer to the defenders was discharged by the receipt and discharge granted by the defenders on 7th June 1899, and that no new obligation to make payment of the balance of said sum of £3306, 18s. which remained unpaid was undertaken by the pursuer by said receipt and discharge, or by his letter to the defenders of 7th June 1899: Find in law that the defenders have no right to retain the sum sued for, and that they are bound to pay it over to the pursuer: Therefore decern against the defenders in terms of the prayer of the petition," &c.

JAMES RUSSELL, S.S.C.—JOHN DOBIE, S.S.C.—Agents.

GLASGOW CENTRAL STORES, LIMITED, Pursuers (Respondents).—*Graham Stewart—Lyon Mackenzie.*
ALFRED GOODSON, Defender (Appellant).—*Salvesen, K.C.—Irvine.*

No. 174.
July 16, 1901.*
Glasgow Central Stores, Limited, v. Goodson.

Process—Appeal—Competency—Interlocutor allowing proof by writ—Judicature Act, 1825 (6 *Geo. IV. cap.* 120), *sec.* 40—*Court of Session Act*, 1868 (31 *and* 32 *Vict. cap.* 100), *sec.* 73.—The Judicature Act, 1825, sec. 40, enacts, *inter alia*, "that in all cases originating in the inferior Courts in which the claim is in amount above £40, as soon as an order or interlocutor allowing a proof has been pronounced in the inferior Courts (unless it be an interlocutor allowing a proof to lie *in retentis* or granting diligence for the recovery and production of papers), it shall be competent to either of the parties, or who may conceive that the cause ought to be tried by jury, to remove the process into the Court of Session by bill of advocation," (now by appeal—under sec. 73 of the Court of Session Act, 1868).

Held that an interlocutor allowing a proof by writ was not an interlocutor allowing a proof within the meaning of section 40 of the Judicature Act, 1825, and accordingly that an appeal under section 40 against such an interlocutor fell to be *dismissed* as incompetent.

* Decided July 9, 1901.

No. 174.

July 16, 1901. Glasgow Central Stores, Limited, v. Goodson.

2D DIVISION. Sheriff of Lanarkshire.

IN March 1901, the Glasgow Central Stores, Limited, brought an action in the Sheriff Court at Glasgow against Alfred Goodson, mantle manufacturer, for decree ordaining the defender to remove from the premises 65 and 67 Argyle Street, Glasgow, belonging to the pursuers.

The pursuers averred that they had acquired the premises in question as the singular successors of Hugh Hutchison Gardiner, conform to disposition by him in their favour, recorded 7th February 1901, and that the defender had no title to occupy the premises which was binding on them as singular successors.

In defence the defender averred, *inter alia*:—(Ans. 10) "It was specially agreed and arranged between Mr Gardiner and the defender, in or about the month of January 1899, that the defender should be accepted as tenant of 65 and 67 Argyle Street for the period of three years from Whitsunday 1899, and possession was given to him then in accordance with this arrangement. Relying on the arrangement made with Mr Gardiner, the defender executed extensive structural alterations on the premises, and expended large sums in fitting up the same. The said expenditure, which greatly enhanced the value of the premises, amounted to not less than £320."

The pursuers denied this averment.

On 10th May 1901, the Sheriff-substitute (Guthrie) pronounced this interlocutor (after repelling certain pleas in law for the defender setting forth other grounds of defence):—"*Quoad ultra* allows the defender a proof by writ of the lease for three years averred in answer 10 of the defences, and assigns Wednesday, 22nd May current, at eleven o'clock A.M., as a diet."

On appeal the Sheriff (Berry), on 24th May 1901, adhered.

The defender appealed.

The pursuers objected to the competency of the appeal, and argued;—An appeal against an interlocutor which merely allowed a proof by writ was incompetent—under the Judicature Act, 1825, sec. 40,* because it was not an interlocutor allowing a proof within the meaning of that section, and under the Sheriff Court Act, 1853, section 24,† because it was not a final interlocutor.[1]

Argued for the defender;—The defender did not maintain that the appeal was competent under the Sheriff Court Act, 1853, sec. 24. He put his case for the competency of the appeal entirely on the Judicature Act, 1825, sec. 40. The decisions in the cases cited by the pursuers were decisions on the Sheriff Court Act, 1853, sec. 24; the *dicta* of Lord President Inglis in *Shirra* v. *Robertson*[2] were *obiter*, and were not consistent with the principles enunciated by his Lordship in *Robertson* v. *Earl of Dudley*.[3] It was competent to appeal against an interlocutor limiting the mode of proof in order to obtain a judgment on the question whether the Sheriff was right in limiting the mode of proof. If the defender acted on the limited allowance of proof it might be held that he had acquiesced in the limitation of the proof.

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* See Rubric.

† 16 and 17 Vict. cap. 80.

[1] Shirra v. Robertson, June 7, 1873, 11 Macph. 660, 45 Scot. Jur. 412; Wilson v. Brakenridge, March 15, 1888, 15 R. 587.

[2] 11 Macph. 660, *per* Lord President Inglis, at p. 661.

[3] July 13, 1875, 2 R. 935, *per* Lord President Inglis, at p. 937.

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LORD JUSTICE-CLERK.—I have no difficulty in holding that this appeal is incompetent. Mr Irvine frankly admitted that he had no case except under the provisions of section 40 of the Judicature Act. I think that this appeal is practically in the same position as the appeal in *Shirra* v. *Robertson*.[1] The only difference is that in *Shirra*[1] the proof was limited to writ or oath, while here, the pursuers being a limited company, the proof is limited to writ, but practically the two cases are identical. I can see no ground for holding that such an interlocutor is appealable for jury trial under section 40 of the Judicature Act. I agree with the Lord President in *Shirra's* case,[1] where he says that "all the authorities are against that view." I therefore move your Lordships to dismiss this appeal as incompetent.

LORD YOUNG.—It is not contended that this is a final interlocutor; the competency of the appeal is rested on this sentence in the interlocutor—"Allows the defender a proof by writ of the lease for three years averred in answer 10 of the defences." Now, I do not see why the defender appealed against that interlocutor, and I can see no competency in the appeal. If the defender has proof by writ, then he can produce it; if he has none, then he can say that he has none, and the Sheriff, if he thinks that no other mode of proof is competent, will decide the case on the footing that the defender has no proof—that is to say, he will decide the case finally, and that final decision can be appealed to this Court if the defender thinks fit to do so. I assume that the Sheriff is of opinion that the only competent proof is proof by writ, and that in the absence of such proof he will decide against the defender. By appealing against that decision the defender can raise the question whether the Sheriff was right in thus limiting the mode of proof, but I can see neither reason nor competency in raising that question now.

LORD TRAYNER.—I agree in thinking that this appeal is incompetent. I think the question is ruled by authority. I appreciate the difficulty of the appellant. On 10th May 1901 the Sheriff-substitute allowed the appellant a proof by writ of his averment of a lease for three years. Now, I quite see that the appellant, if he proceeded to act on that allowance, might be held to have acquiesced in that restriction of the mode of proof, but if he felt the danger of that, and doubted his ability to support his defence by writ, his proper course was to decline to proceed in terms of the Sheriff-substitute's interlocutor, and the Sheriff-substitute would then decide the case against him. That would be a final interlocutor, which if appealed to this Court would bring up all prior interlocutors, including, of course, the interlocutor against which this appeal is brought.

LORD MONCREIFF was absent.

THE COURT dismissed the appeal as incompetent.

M'NEILL & SYME, S.S.C.—DOVE, LOCKHART, & SMART, S.S.C.—Agents.

[1] 11 Macph. 660.

No. 175.

July 16, 1901.*
M'Manus v. Armour.

MRS CATHERINE M'MANUS, Pursuer (Appellant).—*Crabb Watt.*
WILLIAM ARMOUR, Defender (Respondent).—*D. Anderson.*

Reparation—Negligence—Lease—Known Danger—Hole in floor—Relevancy.—In an action by a tenant of a house against her landlord for damages on account of personal injuries, the pursuer averred that she had occupied the house since May 1898; that, in common with others of the defender's tenants, she had the use of a wash-house attached to the house; that on 16th August 1900, while she was cleaning up the wash-house after using it, her right foot was caught in an opening in the floor, "which floor was in a very dilapidated condition, and much in want of repair"; that in consequence of her foot being so caught she fell, and sustained the injuries on account of which she sued; that the defender and his mother had been "repeatedly warned of the dangerous state of the said wash-house floor"; that the defender's mother had informed the pursuer that the defender's factors had been instructed to put the floor in a proper and safe state of repair, but that it had not been repaired prior to the date of the accident. The defender pleaded that the action was irrelevant.

Held (diss. Lord Young) that the action was irrelevant.

Webster v. *Brown*, 19 R. 765, *followed.*

2D DIVISION. Sheriff of Lanarkshire.

IN September 1900 Mrs Catherine M'Manus, residing at 49 Main Street, Bridgeton, Glasgow, raised an action in the Sheriff Court at Glasgow against William Armour, spirit-merchant, 47 Main Street, Bridgeton, Glasgow, for £50 as damages for personal injuries.

The pursuer averred;—(Cond. 1) "The pursuer . . . has resided at No. 49 Main Street aforesaid, from 28th May 1898, and is tenant of a dwelling-house there till 28th May next 1901." (Cond. 2) "The defender . . . is the proprietor of pursuer's said house at 49 Main Street aforesaid." (Cond. 3) "The pursuer, as tenant aforesaid, had the use of the wash-house—being part of defender's property—at 49 Main Street aforesaid. The said wash-house is common to all the defender's tenants of his said property, of whom pursuer is one." (Cond. 4) "On or about the 16th day of August last (1900) the pursuer had the use of said wash-house, and while in the act of cleaning up same (after her washing was over) for the next occupant, her right foot was caught in an opening or hole in the floor of said wash-house—which floor was in a very dilapidated condition, and much in want of repair. The floor was at the time of the accident formed of a layer of bricks set in mortar, and the opening or hole in it, in which pursuer's said foot was caught, was caused by a brick and a half having been removed therefrom, leaving a large opening or hole in the floor of it. Pursuer's said foot having stuck in said opening or hole, and as she could not momentarily extricate it, she fell to the floor, thus placing the whole weight of her body on the foot so caught, and wrenching and seriously injuring and crushing it before she could get it extricated." (Cond. 6) "The defender and his mother were repeatedly warned of the dangerous state of the said wash-house floor, and defender's said mother informed pursuer before said accident occurred that the factors of the property had been instructed to have the floor of the said wash-house put into a safe and proper state of repair, but neither defender nor his factors had the said wash-house floor put into repair, although this has been done since the said accident has occurred."

* Decided July 10, 1901.

No. 175.
July 16, 1901.
M'Manus v. Armour.

The pursuer pleaded, *inter alia*;—(1) The pursuer having sustained serious injuries through the fault and gross and culpable neglect of defender, or others acting for him, as factors or otherwise of said subjects, and he and they having failed to put and keep the floor of said wash-house in proper and safe condition and state of repair, she is entitled to damages in respect of the injuries so sustained. (2) The defender being the landlord of the pursuer in regard to the said house and wash-house, rented by her from him and occupied by her, and of which said wash-house is an adjunct and part and pertinent, was bound to put and keep the said wash-house in good, safe, and tenantable condition; and he having failed to do so, though informed of the condition of said floor of said wash-house, the pursuer is entitled to compensation from him for the loss and injury she has thereby sustained as condescended on.

The defender, the nature of whose averments in answer appears from the opinion of Lord Young, pleaded, *inter alia*;—(1) The pursuer's statements are irrelevant.

On 1st November 1900 the Sheriff-substitute (Boyd) pronounced this interlocutor:—"Sustains the plea of irrelevancy stated for the defender; dismisses the action and decerns: Finds pursuer liable in expenses," &c.

On 28th February 1901 the Sheriff (Berry) on appeal adhered.*

The pursuer appealed, and argued;—The pursuer had stated a relevant case. She did not aver that she knew of the existence of this hole prior to the date of the accident. That she knew of the generally dilapidated and dangerous condition of the floor prior to that date might be inferred from her averments as to the warnings given to the defender, but nothing was said, or was to be inferred, as to this particular hole in the floor, which, so far as the averments went, might be of quite recent origin. Further, the pursuer averred that the defender's mother had informed the pursuer that the floor was to be repaired; the pursuer was entitled to go on using it in reliance on this promise.[1]

Argued for the defender;—The pursuer's averments were irrelevant. The case was ruled by *Webster* v. *Brown*.[2]

At advising,—

LORD JUSTICE-CLERK.—The pursuer in this case had been at the time of the accident of which she complains more than two years in the occupation of a house in the premises of the defender. It was part of the rights she had under her occupancy to have the use of a wash-house forming part of

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* "NOTE.—I agree with the Sheriff-substitute that this case should be dismissed. He has not stated the ground on which he has sustained the plea of irrelevancy, but probably it was on what seems to me the sufficient ground that the pursuer's averments shew that it was owing to her own want of care that she met with the accident for which she seeks to hold the defender liable. The hole in the floor of the wash-house had existed for a considerable time, she was well aware of its existence, and if she chose to use the wash-house while the defect in the floor existed, she might, with reasonable care, have avoided letting her foot get caught in the hole as she describes."

[1] Baillie v. Shearer's Judicial Factor, Feb. 1, 1894, 21 R. 498; Hall v. Hubner, May 29, 1897, 24 R. 875.

[2] May 12, 1892, 19 R. 765.

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the premises. Her averment is that her foot was caught at a part of the floor of the washing-house where a brick was wanting, and that in consequence she was injured. She alleges that the floor had long been dilapidated, which caused the defect, and that the state of the floor was well known before the time of the accident, and that this defective state had been brought to the notice of the defender repeatedly. The Sheriffs have held that she has stated no relevant case to entitle her to an issue, and I am of opinion that they have come to the right conclusion. The pursuer chose to continue her tenancy and to use the washing-house, and did so use it, in the knowledge of the fact that this defect existed in the floor. It is therefore certain that she herself, if she put her foot into the place where the brick was absent, did so without taking that reasonable care which every person must take for his own safety if he continues to use premises the condition of which is patent to him, and of which he is fully aware. I am unable to see any sound distinction between this case and a case which was quoted in the debate,[1] where a pursuer alleged that the steps going up to a house she was tenant of were so worn as to be dangerous, but who continued her tenancy and used the steps. Indeed, I think this case is *a fortiori* of that one, for in the case of the steps the tenant could not reach her house without actually using the steps, whereas in this case the washing-house could be used without there being any necessity of stepping where the defect was.

I therefore think that the appeal should be refused.

Lord Young.—The pursuer avers that the defender is proprietor of a house at 49 Main Street, Bridgeton, Glasgow, of which she became tenant under him as landlord on 28th May 1898, her tenancy continuing till 28th May 1901. In this action, brought in the Sheriff Court, Glasgow, in September 1900, she claims damages for personal injuries sustained by her on 16th August 1900 in consequence of a fall attributable, as she avers, to the dilapidated condition of the floor of a wash-house, "part of the defender's property at 49 Main Street," to the use of which she had as his tenant a right, it being "common to all the defender's tenants of his said property, of whom the defender is one." It was, she says, her turn to use the washing-house on 16th August 1900, and that when using it properly, according to her right, her "foot was caught in an opening or hole in the floor," which was in a very dilapidated condition, and much in want of repair. Hence, she avers, the fall and consequent injuries for which she asks damages are attributable to the fault of the defender, as her landlord, in "having failed to put and keep the floor of said wash-house in proper and safe condition and state of repair."

The defender admits that the pursuer was tenant of the dwelling-house and had the use of the washing-house in common with the other tenants of the property in 49 Main Street, but denies every other averment made by the pursuer on record. He denies that he is (or ever was) proprietor of the property in 49 Main Street, which he says belongs to his wife. He denies that the floor of the washing-house was out of repair, or that the pursuer

[1] Webster v. Brown, 19 R. 765.

suffered from a fall there, averring on his part (Ans. 5) that she "has been suffering from varix of the right leg, and not from any injuries received in the wash-house as alleged by her." The pursuer avers that the defender was "repeatedly warned of the dangerous state of the said wash-house floor," but the defender distinctly denies this, averring on his own part (Ans. 6) that "no notice of any kind was given or any complaint made until after the alleged accident."

The defender's first plea in law is that "the pursuer's statements are irrelevant," and this plea the Sheriff, affirming the judgment of his Substitute, has sustained, on the ground "that the pursuer's averments shew that it was owing to her own want of care that she met with the accident for which she seeks to hold the defender liable." The Sheriff states his reason for thinking so thus—"The hole in the floor of the wash-house had existed for a considerable time; she was well aware of its existence, and if she chose to use the wash-house while the defect in the floor existed, she might with reasonable care have avoided letting her foot get caught in the hole as she describes." But there is no such statement by the pursuer. I assume that the pursuer means to assert, and does so, that the hole in which her foot was caught on 16th August resulted from the dilapidated and "much-in-want-of-repair" condition of the wash-house floor, but there is certainly no statement by the pursuer that it had existed for a considerable time before 16th August, or that she was aware of its existence before her foot got caught in it. The production or occasioning of such a hole is just the danger attending the neglect to give due and proper attention to the condition of such a floor as this, and failing to keep it "in proper and safe condition and state of repair." I quote from the record. The defender denies the averment that he failed in his duty as landlord, asserting that the floor in question was sound and safe, and that no complaint was ever made to him; but I am of opinion that the pursuer has relevantly averred the contrary, and that as clearly as she has averred that the defender was her landlord, which he as clearly denies.

I am of opinion that the pursuer's averments are relevant, and that the Sheriff's judgment ought to be reversed, and the case sent to trial.

LORD TRAYNER.—I do not see how we could sustain the relevancy of this action consistently with the decision pronounced by us in the case of *Webster*.[1] But apart from that precedent I am of opinion that the present action should be dismissed as irrelevant on the grounds on which the decision in *Webster*[1] proceeded.

LORD MONCREIFF.—I agree with the Sheriffs that the pursuer's averments are not relevant, because they disclose that she continued to work in the knowledge of a seen danger, of the existence of which she had been aware for a considerable time. The case of *Webster*[1] appears to be directly in point, and even if we had not had that case to guide us I should have come to the same conclusion. In *Webster's*[1] case the Court were unanimous in recalling the interlocutor of the Sheriff, who had allowed a proof.

[1] 19 R. 765.

No. 175. Here the Sheriffs have dismissed the action as irrelevant, and I think we should affirm that judgment.

July 16, 1901. M'Manus v. Armour.

THE COURT dismissed the appeal, and affirmed the interlocutor appealed against.

W. A. FARQUHARSON, S.S.C.—MACPHERSON & MACKAY, S.S.C.—Agents.

No. 176.

July 18, 1901. Macdonald v. M'Coll.

JOSEPH MACDONALD, Pursuer (Appellant).—*J. A. Christie.*
WILLIAM M'COLL, Defender (Respondent).—*A. S. D. Thomson—A. M. Anderson.*

Reparation — Slander — Privilege — Malice — Relevancy — Master and Servant.—In an action of damages for slander the pursuer averred that he had been for four years in the service of the defender as a barman, that on leaving his service in February 1899 he received from the defender a certificate that the defender had always found him honest, sober, and trustworthy; that in February 1900, in answer to an inquiry by a publican into whose service the pursuer had been taken, the defender wrote that the pursuer was "no good," meaning thereby that the pursuer was not honest and sober; that that statement was false, and was known to the defender to be false; and that it was made maliciously.

The defender pleaded that the action was irrelevant, in respect that the occasion being privileged it was necessary for the pursuer to aver facts and circumstances inferring malice, and that he had not done so.

The Court *repelled* the plea to relevancy, holding that the unexplained contradiction between the character of 1899 and the character of 1900 was sufficient to infer malice.

1ST DIVISION. Sheriff of Lanarkshire.

THIS was an action concluding for £100 as damages for slander raised in the Sheriff Court of Lanarkshire at Glasgow, by Joseph Macdonald, barman, Partick, against William M'Coll, wine and spirit-merchant, there.

The pursuer averred that he was employed for four years as a barman by the defender. (Cond. 2) "On the pursuer leaving the employment of the defender, the defender, on 6th February 1899, gave him a certificate of character, in which he stated that the pursuer had been for four years in his employment, that he had left of his own accord, and that he (the defender) had always found him sober, honest, and trustworthy." (Cond. 3) "In the month of February 1900 the pursuer applied to Mr David Black, Queen's Hotel, Grangemouth, for a situation as bar-tender, and in view of the certificate given to him by the defender, the pursuer referred the said Mr Black to the defender as to his character and capacity. In the meantime the pursuer entered the service of the said David Black, who on the 16th February wrote a letter to the defender, stating that the pursuer had applied to him for a situation and had referred him to the defender. In the said letter Mr Black requested the defender to inform him regarding the pursuer's honesty, sobriety, and ability as bar-tender." A copy of the letter was produced and referred to. It was in these terms:—"Mr Joseph Macdonald has applied to me for a situation and has given me your name as reference. You might please let me know as to his honesty, sobriety, and his ability as bar-tender. Any information you may give me will be treated as strictly confidential." That in reply to Black's letter the defender sent a post-card addressed to Black, and dated 17th February 1900, in the following terms:—"Dear Sir, —*Re* yours of yesterday, no good.—Yours truly, Wm. M'Coll."

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"Immediately on receiving this post-card the said David Black dismissed the pursuer from his employment." (Cond. 5) "The said post-card was sent by the defender in reply to Mr Black's request to be informed whether pursuer was honest, sober, and able for the duties of bar-tender. The words 'no good' in the said post-card were of and concerning the pursuer. They represented, and were intended by the defender to represent, to the said David Black that the pursuer was not honest and sober, and that he was not able to perform the duties of a bar-tender. They represented that the pursuer was of worthless character, and was not a fit and proper person to fill the post for which he had applied. The statement by the defender in the said post-card regarding the pursuer was false and calumnious. Its falsity was well known to the defender. It was made by the defender recklessly, maliciously, and without probable or any cause." In consequence of the slander the pursuer sustained loss.

The defender denied the slander, and pleaded, *inter alia*;—(1) The pursuer's averments being irrelevant ought not to be remitted to probation.

On 10th July 1900, the Sheriff-substitute (Strachan) sustained the first plea in law for the defender and dismissed the action, and on 10th January 1901 the Sheriff (Berry) adhered.*

The pursuer appealed, and argued;—The action was relevant. There was a clear averment of slander, the innuendo averred by the pursuer being a perfectly fair and reasonable one; and there was no necessity, in the circumstances disclosed by the pursuer's case, for stating any further special facts in order to infer malice. It was sufficient to aver that the statement complained of was false within the knowledge of the defender.[1] The absolute contradiction between the two characters given by the defender was sufficient to infer malice. It was only in the case of public officials who were charged with slander that special facts and circumstances inferring malice required to be averred.[2]

Argued for the defender;—There was no relevant case of defamation. The innuendo put upon the words complained of was forced and inadmissible. If, however, the action were otherwise relevant, the occasion being privileged, malice required to be put in issue. To warrant that an averment of special facts sufficient to prove malice

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* "NOTE.—I take it not to be disputed that, as a general rule in cases of privilege like the present, it is necessary for the pursuer to aver facts and circumstances inferring malice in order to make a relevant case. It is not sufficient to aver generally that the statement complained of was made maliciously and without probable cause. Here, however, it is said that the apparent inconsistency between the favourable certificate of character given by the defender to the pursuer when he left his service and the words 'no good' in his post-card to the person proposing to employ the pursuer, should be regarded as sufficient to raise the inference of malice. It is difficult, if not impossible, to reconcile the two statements; but on consideration I have come to be of opinion that the inconsistency is not enough to support the action. The defender may well, although no doubt improperly, have been induced to give a favourable certificate out of good feeling, and from a desire to help the pursuer, but when appealed to by another person proposing to employ him, he may have thought himself bound to say what he believed to be true."

[1] Laidlaw v. Gunn, Jan. 31, 1890, 17 R. 394.

[2] Beaton v. Ivory, July 19, 1887, 14 R. 1057.

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was required, but there was only a bald statement that the defender had acted maliciously. The rule regarding a statement of facts and circumstances was not restricted to the case of public officials, but applied also to the case of anyone who had any definite or a special duty to perform, whether to the public or to an individual.[1] The defender here was bound to answer the inquiry made of him, and accordingly the pursuer required to make some averment which would rebut the presumption that the defender did what he did honestly and without malice.

LORD PRESIDENT.—It appears to me that the general rule to be derived from the decisions as to the circumstances under which the pursuer of an action of damages for defamation is bound to allege facts inferring malice, in addition to alleging that the statement complained of was made maliciously, is very well stated by Lord Kyllachy in the case of *Sheriff* v. *Denholm*,[2] in which his Lordship said that the rule which requires a statement of such facts and circumstances must now be taken to apply generally "to all cases where a defamatory statement is made in pursuance of any definite and special duty, whether to the public or to an individual, including any duty owed to the aggrieved person himself." It might be proper to add to this statement of the rule the words "or in the exercise of any right."

The question therefore comes to be, whether there is anything in the circumstances of this case to displace the general rule, that it is not enough merely to allege that the words complained of were written maliciously, in respect that the circumstances appearing in the record call for explanation on the part of the defender.

It is a very special circumstance in this case, that on the pursuer leaving the employment of the defender, the defender gave him a certificate in which he stated that the pursuer had been four years in his employment, and had left of his own accord, as also, that he had always found him sober, honest, and trustworthy. That is certainly a very absolute recommendation, and it has to be compared with what the defender wrote on 17th February 1900, a little more than a year later. This letter of that date was written in reply to a letter from Mr Black, and a copy of Mr Black's letter is produced and referred to. It is in these terms:—"Mr Joseph Macdonald has applied to me for a situation, and has given me your name as reference. You might please let me know as to his honesty, sobriety, and his ability as bar-tender. Any information you may give me will be treated as strictly confidential." Anything said in reply to such an inquiry as that would, under ordinary circumstances, have a large measure of privilege.

The defender's answer is,—"*Re* yours of yesterday, no good," which

[1] Sheriff v. Denholm, Dec. 18, 1897, 5 S. L. T. 309; Ingram v. Russell, June 8, 1893, 20 R. 771; M'Fadyen v. Spencer & Co., Jan. 7, 1892, 19 R. 350; Urquhart v. Grigor, Dec. 21, 1864, 3 Macph. 283, 37 Scot. Jur. 134; Scott v. Turnbull, July 18, 1884, 11 R. 1131; Murdison v. Scottish Football Union, Jan. 30, 1896, 23 R. 449; Farquhar v. Neish, March 19, 1890, 17 R. 716.

[2] 5 S. L. T. 309.

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plainly means that the pursuer is no good as a bar-tender. The important question seems to me to be, whether the apparent discrepancy between that reply and the certificate given a year before is not such as to call for some explanation from the defender, and I am of opinion that it is.

The apparent discrepancy seems to me to be such a special circumstance as the defender may reasonably be called upon to explain. I therefore think that the requisite exception is here made out upon averment, and that we should allow the case to go to a jury.

LORD ADAM.—The question being whether or not there is a relevant case to go to a jury, we must have regard to the averments of the pursuer.

(His Lordship narrated the material averments.) The first thing to consider is whether Mr Black's letter and the defender's reply will bear that innuendo. If not—if they are not capable of bearing that innuendo—then there is an end of the case. In my opinion, however, they are capable of bearing that innuendo. If so, then it is for the jury, and not for us, to say whether it is proved that that is their true meaning. Meanwhile we must take the case on the assumption that that is the true meaning to be drawn from the expressions used. If that is so, then we have under the hand of the defender, on the 6th February 1899, a statement that the pursuer had been for four years in his employment, that he had left of his own accord, and that he (the defender) had always found him sober, honest, and trustworthy; and then we also have, after an interval of little more than a year, a statement that the pursuer is not honest and sober, that he is a worthless character, and not a fit and proper person to fill the post for which he had applied. Accordingly, we have here two statements by the defender, within a comparatively short time of each other, entirely contradictory. That seems to me to require some explanation. The defender may, no doubt, have a very satisfactory explanation, but that is for the jury to say—not for us. So far as pleading goes, the defender, in the present question, cannot be heard to say, "The first certificate which I granted was false, and I knew it to be false, and that is why I wrote the post-card." Some explanation is required. On the face of it if no explanation was offered, then one of the inferences which a jury might be entitled to draw would be that in writing the post-card the defender was acting maliciously. If Mr Black had simply written asking what is the pursuer's character, and had got the answer which he did, "that he was no good," that would have been just an ordinary privileged case, and unless there was something stated on record to displace that, and to shew that the defender was not simply acting in the discharge of a duty, it might have been necessary to have alleged special facts and circumstances inferring malice. But that is not the present case, for here we have on the face of the proceedings an entirely unexplained contradiction, which differentiates this case from those in which particular averments instructing malice were desiderated.

LORD KINNEAR.—I am of the same opinion.

I agree with Lord Adam that the first question to consider is whether the letter will bear the innuendo which the pursuer puts upon it, and I agree with him also, but without expressing any opinion at present as to the

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precise words which should enter the issue, that it is sufficient that the letter is clearly capable of bearing that innuendo. The letter, therefore, for the purposes of this discussion must be taken to mean that the defender has alleged against the pursuer that he is not sober, not honest, and not trustworthy, and not able to perform the duties of a bar-tender. Now, I have no doubt that that statement was made on a privileged occasion, for the letter was written in answer to an inquiry made at the defender by request of the pursuer himself. It was upon his reference to the defender that Mr Black wrote to him for a character, and it was in answer to that inquiry that the alleged slander was uttered. I have no doubt, therefore, that the occasion being privileged the pursuer must undertake to prove malice. The only question remaining is whether there is a sufficiently relevant averment of malice. As to the law on this subject I entirely agree with the doctrine laid down by Lord Kyllachy, subject to the qualification proposed by your Lordship in the chair. The question is how it applies to the present case. If there was nothing alleged on record which could be said to indicate malice I should be very clearly of opinion, having regard to the privilege, that the pursuer could have had no issue; but the rule requiring specific averments of malice merely comes to this, that when a person who is privileged, and on a privileged occasion, says of another what is not true in fact, nevertheless he is to be assumed to have said it in good faith in the performance of a duty, or in the exercise of a right, unless there is some averment made on record which displaces that assumption. I agree that there are such averments in the present case.

The pursuer says he was in the defender's employment for four years till 6th February 1899, when the defender gave him the certificate which has been referred to, and that in February 1900 the defender, being asked for a character, gave the defamatory character which he complains of. The pursuer says that was not founded upon any experience the defender had of his conduct and character while in his employment, because he has it under the pursuer's hand that he found him honest, sober, and trustworthy.

Now, if the defender's first character of the pursuer contained in the certificate is taken to be true, and it is found that in the following year he says he is the reverse, the pursuer is entitled to say that that, being founded not on any experience the defender had, must be founded on ill-will. The defender may be able to explain that in the witness-box. It may be that he gave an unduly favourable character at first out of good nature; but all that it is necessary for us to say now is that the averment the pursuer makes is such as to require explanation, and we should not be at all sure of doing justice if we did not send this case to a jury, and give the pursuer an opportunity of proving his averments.

The pursuer will have to satisfy the jury not only that the letter will bear the innuendo put upon it, but that it was written maliciously.

I do not think the decision your Lordship proposes is in conflict with any previous case, and I am satisfied that it is not inconsistent with the general rule of law explained by your Lordship in the chair.

Lord M'Laren was absent.

THE COURT sustained the appeal, repelled the first plea in law for the defender, and appointed the issue or issues proposed for the trial of the cause to be lodged. No. 176. July 18, 1901. Macdonald v. M'Coll.

ST CLAIR SWANSON & MANSON, W.S.—W. C. B. CHRISTIE, W.S.—Agents.

HUGH WELSH AND OTHERS (Mrs Agnes Margaret Kennedy's Trustees), First Parties.—*Dundas, K.C.—Macphail.* No. 177.
ALDRED KENNEDY WARREN, Second Party.—*Dundas, K.C.—Macphail.* July 19, 1901. Kennedy's Trustees v. Warren.
DAVID DUNN, Third Party.—*Younger.*
MARGARET WELSH, Fourth Party.—*Younger.*

Succession—Trust—Direction to purchase annuity—Absence of provision for continuing trust—Right of annuitant to demand payment of capital.—Trustees under a trust-disposition and settlement were directed to apply one-third of the residue of the trust-estate in the purchase of an annuity for a legatee, subject to the condition that "the same is for the present support and subsistence only of the annuitant," and that it should neither be assignable nor subject to the diligence of creditors. There was no provision for a continuing trust.

Held that the legatee was entitled to payment in money of the share of residue, on the ground that if an annuity were purchased it would be at the absolute disposal of the annuitant.

Succession—Construction of Testamentary Writings—Gift over—Casus Improvisus.—A testatrix directed her trustees to apply in certain proportions the residue of her estate in purchasing annuities for certain persons, and, *inter alia*, an annuity for the servant maid who might be with her at the time of her death, and added a provision that in the event of any of the annuitants failing to accept, or dying before the purchase of the annuities, the sum so set free should be set free for behoof of the surviving annuitants in the same proportion as the original provisions in their favour.

Held that this clause applied to the share of residue set free in consequence of the testatrix having no servant at the date of her death.

MRS AGNES ELIZABETH KENNEDY died on 28th June 1889, leaving a trust-disposition and settlement dated 15th March 1886, whereby she conveyed her whole estate, heritable and moveable, to trustees for the trust purposes therein mentioned. 1ST DIVISION.

By the third purpose the testatrix directed her trustees to pay the free yearly income of all her estate to her aunt, Miss Ellen Macallister.

By the fourth purpose the testatrix directed as follows:—"So soon as convenient after my death or the death of the said Ellen Macallister, should she survive me, and in any event within the period of three years of the latter of these events, my trustees shall realise the whole of my estate and pay and divide the same as follows:—With one-third part of the free residue thereof they shall purchase an annuity during all the days of his life in a Scottish insurance or other the like company of good standing, in name and for behoof of Aldred Kennedy Warren . . .; with one-third part of the free residue thereof they shall also purchase" a similar annuity, "during all the days of his life, in name and for behoof of David Dunn . . .; with one-sixth part of the free residue thereof they shall also purchase" a similar annuity, "during all the days of her life," "in name and for behoof of the servant maid who may be in my service at the time of my death; the remaining sixth portion of my said estate my trustees shall pay to Margaret Welsh . . .; and it is hereby declared that the said annuities shall be purchased by my said trustees, subject to

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the condition that the same are for the personal support and subsistence only of the annuitants, and it shall not be in their power to assign the same, nor shall they be arrestable or affectable by their debts or deeds of any description whatsoever."

The testatrix also provided as follows:—"(Lastly) Should any of the annuitants, after the provisions conceived in their favour have been intimated to them, decline to accept, or fail to intimate their acceptance thereof, or should they die before the purchase of said annuities, then the portion or portions so set free shall be so set free for behoof of the survivors or survivor of themselves and the said Margaret Welsh proportionately, according to the above-mentioned provisions in their favour."

Ellen Macallister, the liferentrix, survived the testatrix, and died on 28th April 1900.

The testatrix had no servant maid in her service at the time of her death.

The liferentrix was survived by Aldred Kennedy Warren, David Dunn, and Margaret Welsh.

Aldred Kennedy Warren was the person who, as representing the testatrix's heir-at-law and sole next of kin at the date of her death, was entitled to succeed to any portion of the trust-estate which might be held to have fallen into intestacy. Mrs Kennedy having obtained decree of divorce against her husband in 1884, he had no interest in her estate.

Upon the death of the liferentrix the residue of the trust-estate became available for division. Questions having arisen as to the true meaning and effect of the above provisions of the deed, the present special case was presented for the opinion and judgment of the Court.

The parties to the special case were,—(1) Mrs Kennedy's trustees; (2) Aldred Kennedy Warren; (3) David Dunn; and (4) Margaret Welsh.

The second and third parties contended that the first parties were bound to pay over to them the capital of the share of residue bequeathed to them.

The second party further contended that the one-sixth part of the residue directed to be applied to the purchase of an annuity for the "servant maid" had fallen into intestacy, and ought to be paid to him as in right of the whole interest therein pertaining to the testatrix's heir-at-law and sole next of kin.

The third and fourth parties contended that the said one-sixth part of the residue was payable to them and to the second party in the following proportions, viz., two-fifths to each of the second and third parties, and one-fifth to the fourth party.

The questions of law for the opinion and judgment of the Court were as follows:—"1. Are the second and third parties entitled to receive payment each of one-third of the free residue? or, 2. Are the first parties bound to purchase therewith annuities for the second and third parties on the terms prescribed by the trust-disposition and settlement? 3. Has the one-sixth part of the said free residue directed to be applied to the purchase of an annuity for the 'servant maid' fallen into intestacy and become payable to the second party? or, 4. Are the second, third and fourth parties entitled thereto proportionately according to the above-mentioned provisions in their favour?"

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On the first question,—

Argued for the trustees;—In order to give effect to the truster's directions the trustees proposed to purchase annuities in such terms as would create a trust in the insurance company for the purpose and with the effect of securing that the annuities would be continued as an alimentary provision for these beneficiaries. The trustees could not retain the bonds of annuity in their own hands, as there was no provision for a continuance of the trust.[1]

Argued for the second and third parties;—The annuitants were entitled absolutely to the annuities. They had the sole interest. Under the settlement the trustees were not entitled to do anything but wind up the estate. If annuities were purchased and handed to the beneficiaries the truster's purpose would not be served, for the beneficiaries might immediately sell them. The Court would not order something to be done by the trustees which could be immediately undone by the beneficiaries.[2] The second and third parties were therefore entitled to payment of the capital provided for the purposes of their annuities.

On the second question,—

Argued for the second party;—The testatrix had no servant maid in her service at the time of her death. The legacy in favour of the servant maid therefore lapsed and fell into intestacy, and so passed to the second party as representing the testatrix's heir-at-law and sole next of kin. The provisions in favour of the other residuary legatees did not take effect, because the failure here had not happened in any of the ways mentioned by the testatrix. The clearest possible case of resulting intestacy was when a legacy was given to a person who did not exist. The cases quoted for the third and fourth parties were not of much assistance. *Wedderburn* v. *Scrimgeour*[3] was obscure, and the report was incomprehensible. *Countess of Cromarty* v. *The Crown*[4] did not relate to a provision in a will. *Murray* v. *Jones*[5] was a decision upon the special terms of a particular clause.

Argued for the third and fourth parties;—The clause in favour of survivors applied to the case where a share lapsed through there being no such person in existence as the person called as legatee at the time the succession opened. It would be unreasonable to suppose that there should be a gift over to survivors in the event of a legatee refusing to accept the benefits conferred by the will or dying before the annuity was purchased, while there was not to be a gift over if there was no legatee in existence.[6]

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[1] White's Trustees v. Whyte, June 1, 1877, 4 R. 786 — *per* Lord President at page 790; Dow v. Kilgour's Trustees, Jan. 31, 1877, 4 R. 403; Jamieson v. Lesslie's Trustees, June 19, 1889, 16 R. 807; Christie's Trustees v. Murray's Trustees, July 3, 1889, 16 R. 913, *per* the Lord Justice-Clerk at page 915.

[2] Dow v. Kilgour's Trustees, Jan. 31, 1877, 4 R. 403.

[3] July 18, 1666, M. 6587.

[4] Jan. 26, 1764, M. 6601.

[5] July 26, 1813, 2 Vesey and Beames, 313.

[6] Wedderburn v. Scrimgeour, July 18, 1666, M. 6587; Countess of Cromarty v. The Crown, Jan. 26, 1764, M. 6601; Murray v. Jones, July 26, 1813, 2 Vesey and Beames, *per* Sir W. Grant, M. R., at 322; Flett's Trustees v. Elphinston, Dec. 12, 1900, 38 S. L. R. 564; Theobald on Wills (4th edition) 527, (5th edition) 572, and cases there cited.

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In Lord M'Laren's absence the following opinion was read by Lord Adam:—

LORD M'LAREN.—Under this case two questions are raised with reference to the provisions of the will of Mrs Agnes Elizabeth Kennedy. By her will, a trust-disposition and settlement, Mrs Kennedy gave to her aunt, Miss Macallister, a general liferent of her estate, and directed her trustees after Miss Macallister's death to apply one-third of her estate in the purchase of an annuity for life in favour of the second party, Mr Warren, another third thereof in the purchase of an annuity in favour of the third party, Mr Dunn, and one-sixth of her estate in the purchase of an annuity in favour of "the servant maid who may be in my service at the time of my death." These annuities it was provided should be purchased by the trustees subject to the condition "that the same are for the personal support and subsistence only of the annuitants," and that they should neither be assignable nor subject to the diligence of creditors.

The first question for consideration is, whether the second and third parties are entitled to demand payment of their shares of the residue in money, or whether they must submit to take the benefits conferred on them in the shape of a purchased annuity?

It is not disputed that where a trust is constituted with a direction to the trustees to hold the estate and pay over the income to a beneficiary for life, subject to the usual conditions of an alimentary trust, the beneficiary must be content to take the income under the conditions on which it is given. In the case supposed, the capital is protected by means of the trust, and the income, being declared alimentary, is subject to the rule that alimentary creditors have a qualified preference. But Mrs Kennedy's will does not contemplate a continuing trust for the protection of her legatees. The capital is to be employed in the purchase of annuities in their favour, and the only protection which she proposes to give them is that in each case the bond of annuity is to contain a condition in the terms already referred to. Now, if we suppose the direction to be carried out, it is clear that no one but the annuitant himself has any interest in the bond, and in the event of his being unable to meet his engagements, the bond is part of his estate which may be attached by his creditors, who are in no way affected by the condition under which he receives it, that he is to treat it as an income-producing subject. It is, I think, also clear in principle that a purchaser of the annuity would not be bound by the condition, because he is not a party to the supposed contract between the testator and the legatee. That being so, the question is, whether the legatee ought to be put to the disadvantage of receiving the bequest in the form of an annuity which he can sell for something less than the sum expended in purchasing it, when he prefers to receive the bequest in money. It has been held by the other Division of the Court, in a series of cases which were cited to us, that he ought not to be put to this disadvantage, and in the principle of these decisions I entirely concur. I know of no authority in support of the proposition that an alimentary interest can be secured in any way except by a continuing trust; and in principle it is clear that when an individual is put

into possession of the full enjoyment of a fund of any kind, that fund is subject to his acts and deeds and to the diligence of his creditors. No. 177.

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The only other point in the case relates to the right of succession to the one-sixth of the residue which the testatrix had intended to give to her servant maid. From the narrative of the case it appears that the testatrix had no servant in her employment at the time of her death. By the last trust purpose it is provided, that "should any of the annuitants, after the provisions conceived in their favour have been intimated to them, decline to accept, or fail to intimate their acceptance thereof, or should they die before the purchase of said annuities," then the share of residue is to go to the survivors proportionately.

I think that the meaning of the words quoted is, that should any of the bequests fail, the share shall be divided proportionately. In point of fact, no one has claimed the bequest in favour of a maid-servant, and while it is true that there is no one in a position to make the claim, I am unable to attribute to the testatrix the intention that the gift over is to take effect in the event of there being a legatee who waives his right, but that it is not to take effect in the event of there being no one in a position to claim.

For these reasons I am of opinion that the first question in the case ought to be answered in the affirmative, and the second in the negative; and on the second head of the case I am of opinion that the fourth and fifth questions ought to be answered in the affirmative, and the third and sixth questions in the negative.

The LORD PRESIDENT, LORD ADAM, and LORD KINNEAR concurred.

THE COURT answered the first, fourth, and fifth questions in the affirmative, and the second, third, and sixth questions in the negative.

MACKENZIE & BLACK, W.S.—J. C. COUPER, W.S.—Agents.

DAVID TRAILL & SONS, Appellants.—*Watt, K.C.*—*W. Thomson.* No. 178.
DAVID COCHRANE, Respondent.—*Sandeman.*

July 19, 1901. Traill & Sons v. Cochrane.

Master and Servant—*Workmen's Compensation Act*, 1897 (60 *and* 61 *Vict. c.* 37), *Schedule II., secs.* 8 *and* 14 (*a*) *and* (*b*)—*A. S. 3d June* 1898, *sec.* 7 (*a*)—*Registration of Memorandum of Oral Agreement*—*Proof.*—*Held* that a Sheriff may entertain a petition under Schedule II., sec. 8, of the Workmen's Compensation Act, 1897, and relative Act of Sederunt, 3d June 1898, sec. 7 (*a*), for a special warrant to register a memorandum of an oral agreement, and where necessary may allow a proof.

(SEE *Cochrane* v. *Traill & Sons*, 2 F. 794, and *ante*, p. 27.) 1ST DIVISION.

On 4th January 1900 David Cochrane, lumper, Shore, Kincardine-on-Forth, sent to the Sheriff-clerk, at Falkirk, a memorandum of agreement to pay compensation for registration under Schedule II., section 8, of the Workmen's Compensation Act, 1897, and section 7 (*a*) of the Act of Sederunt, 3d June 1898.* Messrs David Traill & Sons having disputed the genuineness of this memorandum the Sheriff-clerk refused to register it without a special warrant from the Sheriff. Cochrane thereupon applied to the Sheriff-substitute (Bell)

* The sections referred to are quoted *ante*, p. 27.

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for a special warrant. He averred that "by their communications and actings" Messrs Traill & Sons "had agreed to pay the pursuer compensation at the rate of 14s. per week until he should be able to resume work." He did not aver that the agreement was embodied in any writing signed by the parties.

Messrs Traill & Sons pleaded, *inter alia*;—(1) The action is incompetent. (3) The averments are irrelevant. (5) There being no contract between the parties with regard to payment of compensation, or alternatively, there having been no agreement in the sense of the Workmen's Compensation Act, 1897, and of the relative Act of Sederunt, the prayer of the petition should be refused.

By interlocutor dated 5th April 1901 the Sheriff-substitute repelled, *inter alia*, the defenders' first plea in law, and allowed "parties a proof *habili modo* of their averments *quoad* the alleged agreement between them."

The defenders appealed to the Court of Session.

Argued for the defenders and appellants;—The application to the Sheriff was incompetent. (1) The agreement alleged was not an agreement arrived at in the course of proceedings under the Act.[1] It was therefore not an agreement under the Act, but an agreement at common law, and it was consequently not capable of being registered under the Act. (2) The only agreements which could be registered under the Act were agreements which could be registered upon simple inspection by the Sheriff without any extraneous evidence. The Sheriff acted merely in an administrative capacity.[2] Here it was not alleged that there was any written agreement, and it was proposed to prove the alleged agreement by the correspondence, communings, and actings of parties. The Act did not contemplate such procedure. The only kind of agreement contemplated by the Act was an agreement embodied by the parties in a document which was itself capable of being registered, or, in other words, the agreement must be in writing. This was implied in Lord Adam's judgment in *Cochrane v. Traill & Sons*.[3]

At advising,—

Lord Adam.—In September 1898, when in the employment of the respondents, the petitioner met with an accident.

He alleges that an agreement was entered into between him and the respondents, whereby the amount of compensation due to him, under the Workmen's Compensation Act, was ascertained.

Thereafter he sent a memorandum embodying the alleged agreement to the Sheriff-clerk, to be recorded in the Sheriff Court Books.

On receiving this memorandum the Sheriff-clerk (it not having been signed by all the parties interested), as directed by section 7 (*a*) of the Act of Sederunt, intimated to the respondents the fact of such a memorandum having been sent to him for registration. He received a reply to the effect that the respondents disputed the genuineness of the agreement.

That made it necessary for the petitioner to apply to the Sheriff for a special warrant of registration, which he accordingly did by presenting the

[1] Workmen's Compensation Act, 1897 (60 and 61 Vict. c. 37), secs. 1 (3) and 2, Second Schedule, 14 (*c*).

[2] Cochrane v. Traill & Sons, Nov. 1, 1900, *ante*, p. 27.

[3] *Ante*, p. 29.

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present petition. A record was made up in the action, and the Sheriff-substitute, on 5th April 1901, pronounced an interlocutor, by which he allowed the parties a proof *habili modo* of their averments *quoad* the alleged agreement between them. This is the interlocutor which is now appealed against.

The objection to the interlocutor maintained to us was shortly this, that an agreement as to compensation under the Workmen's Compensation Act requires to be in writing, and that as the agreement in this case was not alleged to be in writing a proof of it was incompetent.

I see nothing in the Act which requires that an agreement under the Act must be reduced into writing, and I suppose signed by the parties.

All that the Act requires—section 8 of the Second Schedule—is, that where the amount of compensation shall have been ascertained, either by a committee, or by an arbiter, or by agreement, a memorandum thereof shall be sent by the committee, or arbiter, or any party interested, to the Sheriff-clerk for registration. If the agreement itself had been required to be sent the case would have been different, because, of course, a verbal agreement could not be sent. But there is no difficulty in sending a memorandum of the terms of a verbal agreement.

The petitioner is certainly a party interested, and has a right to send a memorandum of the alleged agreement for registration. On the other hand, the respondents have a perfect right to dispute its genuineness,—that is, as I understand, either that there was no agreement at all, or, if there was, that the memorandum does not truly set forth its terms.

That appears to me to be the only relevant question raised on this record.

What the Sheriff has done is to allow a proof of the alleged agreement, and I think he is quite right. But while I do not think that the Act requires that an agreement should be reduced into writing and signed by the parties, the proceedings in this case, and in the previous case before us about the same matter, which will be in your Lordship's recollection, certainly shew the expediency of that course being followed.

I am therefore of opinion that the appeal should be dismissed and the case remitted to the Sheriff, upon whom the duty lies of granting warrant to record the memorandum if he shall be satisfied of its genuineness.

LORD KINNEAR and the LORD PRESIDENT concurred.

LORD M'LAREN was absent.

THE COURT dismissed the appeal and affirmed the interlocutor of the Sheriff-substitute dated 5th April 1901.

WILLIAM B. RAINNIE, S.S.C.—MACPHERSON & MACKAY, S.S.C.—Agents.

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THE COUNTY COUNCIL OF DUMBARTON, First Parties.—*Jameson, K.C.—Gunn.*
THE CALEDONIAN RAILWAY COMPANY, Second Parties.—*Dundas, K.C.—Deas.*

Police—Mode of Assessment—Districts other than burghs—Burgh within Special Water Supply District—Canal—Public Health (Scotland) Act, 1897 (60 *and* 61 *Vict. c.* 38), *secs.* 134, 135, 136.—Under the provisions of sections 134, 135, and 136 of the Public Health (Scotland) Act, 1897, and statutes therein referred to, the expenses incurred by the Local Authority

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for a water supply are to be met by a special rate, levied in burghs in one manner under the provisions of section 136, and in districts other than burghs in another manner under the provisions of section 135. Under these provisions certain subjects, including, *inter alia*, canals, fall to be assessed on one-fourth of their valuation in burghs, and on their full valuation in districts other than burghs.

Held that where part of an existing landward special water supply district was formed into a burgh, a canal which intersected the district and the new burgh was assessable on its full valuation, as being in a district other than a burgh.

1st Division.

THIS was a special case presented by the County Council of Dumbarton, as the Local Authority for the Duntocher and Dalmuir Special Water Supply District, first parties, and the Caledonian Railway Company, as owners and occupiers of the Forth and Clyde Canal, second parties, in which the following facts were set forth :—

"In 1874 a part of the parish of Old Kilpatrick, in the county of Dumbarton, was formed into a special water supply district, known as the Duntocher and Dalmuir Special Water Supply District, at the instance of the Parochial Board of Old Kilpatrick, the then Local Authority for said parish under the Public Health (Scotland) Act, 1867.

"In 1886 a part of the said parish was erected into a burgh in terms of the General Police and Improvement (Scotland) Act, 1862, and is known as the burgh of Clydebank.

"The burgh is situated wholly within the said special water upply district. The county of Dumbarton is, in terms of the Local Government (Scotland) Act, 1889, hereinafter referred to as the Act of 1889, divided into districts, known respectively as the Eastern and Western Districts, for the purposes of the administration of the laws relating to public health and the management and maintenance of highways. The said special water supply district is situated within the Eastern District.

"The whole powers and duties of the said Parochial Board, as Local Authority under the Public Health Acts, and the property and works acquired and constructed by said board for the purposes of the said special water supply, were by the said Act of 1889 transferred to and vested in the County Council, who alone are empowered to impose and levy assessments for the maintenance and management of the works.

"The Public Health (Scotland) Act, 1897, hereinafter referred to as the Act of 1897, superseded the Public Health Act of 1867, and special water supply assessments are annually imposed and levied by the County Council on the whole of said special water supply district, including the burgh of Clydebank, under the Act of 1889 and the Act of 1897.

"The said Eastern District Committee is for purposes of water supply the Local Authority under the Public Health Acts in lieu of the Parochial Board, and subject to the control of the County Council the management and maintenance of the works by which the special district is supplied with water are vested in the District Committee and in the subcommittee appointed in terms of the Act of 1889 and of the Local Government (Scotland) Act, 1894, and the Commissioners of Police of the burgh of Clydebank do not supply water in said special district, do not maintain and manage said water-works, do not impose assessments therefor, and are not within any portion thereof the Local Authority for the purposes of water supply.

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"The Forth and Clyde Canal, which belongs to the Company and is worked by them, intersects the said special water supply district. The annual value of the portion of the canal situate within the burgh in the special water supply district is £1081, conform to the Valuation-roll prepared by the Assessor of Railways and Canals for the year 1898-9.

"On 3d October 1898, the County Council imposed a special water supply assessment upon all lands and heritages within said special water supply district of Duntocher and Dalmuir, including the burgh of Clydebank, according to the yearly value thereof as appearing in the Valuation-roll of the county for the year from 15th May 1898 to 15th May 1899, and that at the rate of 2d. per £ on owners and 2d. per £ on occupiers for water supply under the Act of 1897. During said year the water supply within the whole of said special district was furnished by the Eastern District Committee as Local Authority.

"The amount assessed upon the company in respect of their said canal in the burgh of Clydebank within said special district is £18, 0s. 4d., being at the rate of 2d. per £ as owners and 2d. per £ as occupiers on the gross valuation, amounting to £1081, of the canal within the burgh of Clydebank."

The first parties maintained that on a sound construction of sections 134, 135, and 136 of the Public Health (Scotland) Act, 1897,* the

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* The Public Health (Scotland) Act, 1897 (60 and 61 Vict. cap. 38), enacts, section 134,—"In any burgh, or where any special water supply district has been formed under this Act or any of the Acts hereby repealed, the expense incurred by the Local Authority for water supply within the same, or for the purposes thereof, and the sums necessary for payment of any money borrowed therefor, either before or after the passing of this Act, together with the interest thereof, shall be paid out of a special water assessment which the Local Authority shall raise and levy on and within such burgh or special district in the same manner and with the same remedies and modes of recovery as are hereinafter provided for the public health general assessment."

Section 135—"With respect to districts other than burghs, all charges or expenses incurred by or devolving on the Local Authority in executing this Act, or any of the Acts hereby repealed, and not recovered as hereinbefore provided, may be defrayed out of an assessment (in this Act referred to as the public health general assessment) to be levied by the Local Authority upon all lands and heritages within the district, or in the case of counties not divided into districts within the county in the like manner as, but as a separate assessment from, the assessment hereinafter mentioned in this section—that is to say, the said assessment shall be assessed, levied, and recovered in like manner and under like powers as:—

"The assessment for the maintenance of roads under the provisions of the Roads and Bridges (Scotland) Act, 1878."

Section 136—"With respect to burghs subject to the provisions of the Burgh Police (Scotland) Act, 1892, or having a local Act for police purposes:—All charges and expenses incurred by or devolving on the Local Authority in executing this Act, or any of the Acts hereby repealed, and not recovered as herein before provided, may be defrayed out of an assessment (in this Act referred to as the public health general assessment) to be levied by the Local Authority along with but as a separate assessment from the assessment hereinafter mentioned—that is to say, the said assessment shall be assessed, levied, and recovered in like manner and under the like powers, but without any limit except as in the immediately succeeding section provided as:—

"The general improvement rate under the Burgh Police (Scotland) Act,

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whole of the canal situated within the said water supply district, whether within or without the boundaries of the burgh of Clydebank, was assessable for the special water supply assessment on its gross valuation as appearing on the Valuation-roll.

The second parties maintained that the part of the canal situated within the boundaries of the burgh of Clydebank was assessable only on one-fourth of the valuation appearing in the Valuation-roll.

The following question of law was stated (together with another question, which, in the view taken by the Court, it was found unnecessary to answer):—"Are the special water supply assessments imposed by the County Council on the portion of the company's canal situated within the burgh of Clydebank leviable on only one-fourth of the valuation thereof as appearing in the Valuation-roll, or on the gross valuation thereof as appearing in the said roll?"

The undernoted authorities were referred to at the debate.[1]

At advising,—

LORD PEARSON.—The burgh of Clydebank lies within the special water supply district of Duntocher and Dalmuir; and that special water supply district lies within the Eastern District of the county of Dumbarton.

The Forth and Clyde Canal, which belongs to the Caledonian Railway Company, and is worked by them, intersects the special water supply district, and in its course passes through the burgh of Clydebank. The question in dispute relates to the principle of assessment for special water-rate, which is to be applied to so much of the canal as lies within the burgh. The railway company maintain that that portion of the canal is assessable only on one-fourth of its annual value, while the County Council maintain that it must be assessed at its full value. The question depends ultimately on the construction of certain clauses of the Public Health Act of 1897; but it is necessary to attend to the facts.

The special water supply district was formed in 1874, under the powers of the Public Health Act of 1867. For the first twelve years of its existence it was wholly landward, and was under the control and management of the then Public Health Local Authority, namely, the Parochial Board of the parish. In 1886 part of it was erected into the burgh of Clydebank, in terms of the General Police Act of 1862. But this made no change in the administration of the water supply district, which in fact remained with the Parochial Board as before. Then followed the Local Government Act of 1889, which had the effect of substituting for the

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1892, or when there is no such rate, by a rate levied in like manner as the general improvement rate under the last mentioned Act."

Section 347 of the Burgh Police (Scotland) Act, 1892 (55 and 56 Vict. cap. 55), provides:—"The annual value of the following lands or premises shall, for the assessments under this Act, be held to be one-fourth of the annual value thereof entered in the said Valuation-roll, viz., (1) all lands and premises used exclusively as a canal or basin of a coal or towing-path for the same. . . ."

[1] *For the First Parties*:—Police Commissioners of Kirkintilloch v. Macdonald, Oct. 31, 1890, 18 R. 67; Wordie's Trustees v. County Council of Lanarkshire, Nov. 22, 1895, 23 R. 168.

For the Second Parties:—County Council of Dumbartonshire v. Police Commissioners of Clydebank, Nov. 16, 1894, 22 R. 64; Kirkcaldy District Committee v. Police Commissioners of Buckhaven, Nov. 16, 1895, 23 R. 107.

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'arochial Board the Eastern District Committee of the Dumbarton County 'ouncil, as the Local Authority in charge of this water supply district.

In 1894 a question arose between the County Council and the Clyde-ank Police Commissioners as to the right of levying the district water supply assessment within the burgh. It was decided (22 R. 64) that in so far as water supply was concerned, the Local Authority for the whole special water supply district, including the burgh, was the District Committee of the County Council, and that the County Council was alone entitled to impose and levy assessments for water supply purposes throughout the whole water supply district, including the burgh. The only recognition of the burgh authorities in the matter is that they are represented on the subcommittee of the County Authority, which is charged with the management and maintenance of the water supply works. The case of a special water supply district containing within it a police burgh thus furnishes an exception to the rule that Police Commissioners are the Public Health Local Authority within their burgh, and are alone entitled to impose and levy assessments therein.

This was the position of matters when the Public Health Act of 1897 was passed. It repeals the Act of 1867; and by section 134 it makes special provision for raising and levying a special water assessment (1) in any burgh; or (2) "where any special water supply district has been formed under this Act, or any of the Acts hereby repealed." In each of these two cases the expense "incurred by the Local Authority for water supply within the same, or for the purposes thereof" is to be "paid out of a special water assessment which the Local Authority shall raise and levy on and within such burgh or special district," in the same manner as is provided for the public health general assessment. Taking the two cases separately, the provisions of section 134 are these:—(1) In any burgh, the expense incurred by the Local Authority for water supply within the same or for the purposes thereof shall be paid out of a special water assessment, which the Local Authority shall raise and levy on and within such burgh, in the same manner as the public health general assessment. (2) In the case of a special water supply district the expenses incurred by the Local Authority within the same, or for the purposes thereof, shall be paid out of a special water assessment, which the Local Authority shall raise and levy on and within such special district in the same manner as the public health general assessment.

Now, the general assessment clauses, to which we are thus referred, are the two which immediately follow,—sections 135 and 136. It is of course not to be expected that their language will precisely fit the case of a special water supply district, for they do not in themselves deal with the assessing of any such district. A special water supply district has in itself no relation to the public health general assessments. The only connection between them is, that sec. 134 points us forward to the two general assessment clauses as furnishing the rule for the special water assessment in the two cases with which sec. 134 deals. But there can, I think, be no doubt as to the application of the two clauses. Section 136 is a clause "with respect to burghs," and furnishes the rule for the first case. Section 135 is a clause "with respect to districts other than burghs," and fur-

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nishes the rule for the second case, that is, for the special water supply district.

It is maintained by the railway company that the question here arises "with respect to a burgh," and that there is nothing in the sections which should prevent a special water supply district which includes a burgh from being assessed in terms of sec. 136 as to the burgh, and in terms of sec. 135 as to the landward part. The form in which the case is stated rather aids this contention; for the ground of the dispute lies wholly within the burgh of Clydebank. But the unit with which we are dealing is not the burgh, but the special water supply district; and the question, I take it, is really this—It being admitted that this canal in all the rest of its course through that district is to be assessed according to the rule of sec. 135, has any cause been shewn for assessing it in terms of sec. 136 so far as it passes through the burgh? This depends upon the construction of the three sections already referred to, and chiefly of sec. 134. That section deals, as I have said, with two cases—burghs and special water supply districts—and it requires the Local Authority to levy the special water assessment on and within "such burgh or special district," in the same manner and with the same remedies and modes of recovery as are provided for the public health general assessment. Now I think it clear that the reference to burghs both in sec. 134 and in sec. 136 applies only to the case where the unit for assessment is the burgh or some area wholly within the burgh, and where the Police Commissioners are the assessing authority. That this is so under sec. 136 is plain from the fact that the general public health assessment thereby authorised is "to be levied by the Local Authority along with, but as a separate assessment from," the burgh general improvement rate—a mode of recovery which is impossible where (as here) the assessing authority is the County Council. And under sec. 134 the contention of the railway company can only be made good on the supposition (which is contrary, as I think, to the sound construction of the clause) that the expression "any special water supply district" is to be read as meaning "any special water supply district exclusive of the burghs, if any, situated therein."

It is true that if sections 135 and 136 be compared together, the normal case for the application of sec. 135 is a landward district; and so far as the general assessment itself is concerned, the division into burghs and landward districts is probably an exhaustive division. But none the less, the distinction made in sec. 134 between burghs and special water supply districts corresponds to the distinction between the two modes of levying the general assessment set forth in the two succeeding clauses; and that distinction is founded, not upon the mere situation of the particular subject, as being within or beyond a burgh, but upon the more radical difference between a burgh and a district other than a burgh. The normal case of a "district other than a burgh" may, so far as the general assessment is concerned, be wholly landward. But the case of a special water supply district is in this, as in other respects, quite exceptional; and in my opinion such district is treated as a whole in sec. 134, whether it contains a burgh or not, and is to be assessed as a whole according to the rule laid down in sec. 135.

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The portion of the canal within burgh will therefore be assessed according to its valuation, and not merely upon one-fourth thereof, and the first question will be answered accordingly.

The second question deals with a state of matters which has not yet arisen, and it would be premature to express any opinion on the subject.

LORD ADAM and LORD KINNEAR concurred.

The LORD PRESIDENT and LORD M'LAREN were absent.

THE following interlocutor was pronounced:—"Answer the second alternative in the first question in the case in the affirmative: Find that the special water supply assessment imposed by the County Council on the portion of the company's canal situated within the burgh of Clydebank is leviable on the gross valuation thereof as appearing on the Valuation-roll; and find it unnecessary to answer the second question in the case, and decern."

A. S. DOUGLAS, W.S.—HOPE, TODD, & KIRK, W.S.—Agents.

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THE PUMPHERSTON OIL COMPANY, LIMITED, Complainers (Respondents).—*Salvesen, K.C.—Younger.*

R. STRATON WILSON (Collector of Rates for Parish Council of Mid-Calder), Respondent (Reclaimer).—*Campbell, K.C.—Munro.*

Poor—Poor-rates—Valuation of lands—Deductions—Average annual repairs—Landlord's and tenant's repairs—Poor-Law Amendment (Scotland) Act, 1845 (8 *and* 9 *Vict. cap.* 83), *sec.* 37—*Valuation of Lands (Scotland) Act*, 1854 (17 *and* 18 *Vict. cap.* 91), *sections* 6 *and* 41.—*Held* (*aff.* judgment of Lord Kyllachy) that a Parish Council in assessing for poor-rate subjects occupied by the owner are bound by the Lands Valuation Act, 1854, to take the annual value of the subjects as entered in the Valuation-roll, and by section 37 of the Poor-Law Amendment Act, 1845, to deduct therefrom, *inter alia*, the probable annual average cost of repairs necessary to maintain the subjects in their actual state.

Circumstances in which the owner and occupier of chemical works was held entitled to a deduction of, *inter alia*, 80 per cent for repairs from the annual value appearing in the Valuation-roll.

1ST DIVISION. Ld. Kyllachy.

THE PUMPHERSTON OIL COMPANY, LIMITED, Glasgow, were the owners and occupiers of certain chemical works in the parish of Mid-Calder, which were entered in the Valuation-roll for the county of Midlothian as of the annual value of £5400. In respect of these works, the Parish Council of the parish of Mid-Calder assessed the company for poor-rates on the said annual value of £5400, under deduction of 20 per cent. The company having refused payment of this assessment, R. Straton Wilson, collector of rates for the parish of Mid-Calder, upon a certificate under section 97 of the Taxes Management Act, 1880, obtained a warrant for collecting the said assessment by poinding and sale. Against this poinding the company brought a note of suspension and interdict, and consigned the amount of the rate in bank to await the orders of Court.

In their condescendence, the company averred that the average annual cost of the repairs necessary to maintain their works in their actual state was greatly in excess of 20 per cent of the annual value. They pleaded, *inter alia*;—(2) In estimating the annual value of lands and heritages for assessment, the Parish Council are bound to

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take into consideration the actual and average cost of maintaining the lands, and the actual and average amount of the other deductions to be made from the annual value as fixed by the Valuation-roll, and are not entitled, without investigation, to make an arbitary deduction which has no reference to the circumstances of the lands in question.* (3) The deduction made from the said annual value being greatly less than the actual average amount of said repairs and others, the amount of said assessment is oppressive and unjust.

The collector of rates lodged answers, in which he pleaded;—(3) The Parish Council having, after due consideration, allowed an adequate deduction in terms of the statute, the assessment should be upheld and the note dismissed. (4) In ascertaining the annual value of lands and heritages for assessment, the Parish Council are bound only to allow deduction for such repairs, taxes, and insurance as landlords expend in maintaining and insuring the said lands and heritages, including all capital charges for the permanent repair or renewal thereof, together with landlords' taxes and insurance; and the complainers are not entitled to require the Parish Council to give deduction for the cost of such works or temporary repairs as they, in their character of tenant of the said lands and heritages, have executed in the conduct of their business for the acquisition of tenants' profits, or for tenants' taxes or insurance.

On 9th December 1899 the Lord Ordinary (Kyllachy) pronounced the following interlocutor:—"Before answer, remits to Mr W. J. Armstrong, estate agent, 57 Manor Place, Edinburgh, to consider and report to the Lord Ordinary, with special reference to the statements and pleas of parties, as to the probable annual average cost of the repairs, insurance, and other expenses, if any, necessary to maintain the complainers' subjects assessed in their actual state, and the rates, taxes, and public charges payable in respect of the same, it being the object of this remit to ascertain the deductions to be made in terms of the 37th section of the Poor-Law (Scotland) Act, 1845; and to report upon any other matter which either party may consider material to the question at issue."

Extracts from Mr Armstrong's report are given below.†

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* The Poor-Law Amendment (Scotland) Act, 1845 (8 and 9 Vict. c. 83), enacts, section 37,—"In estimating the annual value of lands and heritages the same shall be taken to be the rent at which, one year with another, such lands and heritages might in their actual state be reasonably expected to let from year to year, under deduction of the probable annual average cost of the repairs, insurance, and other expenses, if any, necessary to maintain such lands and heritages in their actual state, and all rates, taxes, and public charges payable in respect of the same."

The Valuation of Lands (Scotland) Act, 1854 (17 and 18 Vict. c. 91), enacts, section 6,—"In estimating the yearly value of land and heritages under this Act the same shall be taken to be the rent at which, one year with another, such lands and heritages might in their actual state be reasonably expected to let from year to year." Section 41—"Nothing contained in this Act shall alter or affect any classification or power of classification, or any deductions or allowances, or power of making deductions or allowances from gross rental made or imposed by any body, persons, or person entitled to impose or levy assessments, but the same shall not affect the value to be inserted in the Valuation-roll in terms of this Act."

† "II.—That having made a careful examination of the books of the Pumpherston Oil Company, and the relative vouchers with regard to

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Objections to the report were lodged by Mr Wilson.*

After hearing parties on the objections to Mr Armstrong's report,

outlays for repairs, insurance, rates, taxes, and public charges, during the last five years from 1894 to 1899 inclusive, finds that the average annual outlay has been as follows, viz. :—

"1. *Repairs.*—The whole of the repairs of every kind (which are exceptionally heavy, particularly in the chemical works) are executed by and at the expense of the Pumpherston Oil Company, and the average outlay has been as follows, viz. :—

"*On Works.*—After deducting the sales of scrap iron, old lead and brass, the average annual outlay on repairs has been no less than £4336, 11s., or 80 per cent on the annual value per Valuation-roll; that is exclusive of the cost of new retorts and other new works, which are not included in this report.

"Amongst the heaviest items for repairs are iron stills, which last from one to two years only, and lead-lined tanks or receptacles in the sulphate of ammonia works.

"On the 27th of January 1900 the reporter received a letter from Mr J. Thom, agent for the defenders, requesting him to differentiate between such expenditure as would have been made by the Pumpherston Oil Company if they had been proprietors only (of the chemical works), and such expenditure as would have been made by them if they had been tenants only. The reporter is not able to comply with this respect, and he cannot for a moment suppose that any sane proprietor 'only' would undertake or become responsible for the repairs and upkeep of chemical works of the nature referred to.

"No part of the expenditure reported upon forms part of the capital charges for the renewal of works that a landlord would be legally bound to defray, or for renewal of the company's new system of retorts; new works of this description are charged to capital account, not to repairs.

"The reporter has rejected all subjects about which he had any doubt as to whether they came under the head of 'repairs,' and he has, as before stated, excluded all underground pumps and machinery, and also the cost of upkeep of shafts and roadways into and in mines. The expenditure on these underground works amounts to upwards of £2000 per annum on average."

The reporter then proceeded to deal with the expenses of insurance and taxes, and submitted the following schedule of deductions :—

"Works—

Repairs, . .	£4336	11	0	or 80	per cent on	£5400	0 0
Insurance, . .	247	16	10	„ 4½	do.		
Rates and taxes, .	535	8	1	„ 10	do.		
	£5119	15	11	„ 94½	do."		

* The objections, *inter alia*, set forth,—"The annual value of the works *quoad* the complainers, *as landlords*, is not ascertainable from the report. The reporter states that the outlays for repairs reported on by him are not such as would be disbursed by the complainers as landlords, and are wholly tenants' outlays. The respondent therefore contends that these outlays were made by the complainers for the purpose of securing tenants' profits, and are not such as were necessary to the upholding of the subjects in a fit state *for yielding rent*. As tenants' outlays they were already allowed for by the assessor in fixing the valuation of the works, and they do not form legitimate deductions from that valuation in the ascertainment of the annual value of the works for the purpose of poor-law assessment. The deductions reported upon when made from that valuation would not disclose the annual value of the works to the complainers as landlords, the annual value to them as landlords being the rent which is hypothetically receivable by them, less what they as landlords expend for repairs, insurance, and taxes."

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the Lord Ordinary, on 21st February 1901, pronounced an interlocutor in which, after dealing with certain subsidiary questions on which parties had come to an agreement, he made, *inter alia*, the following findings:—"(3) That with regard to the chemical works it is admitted by the complainers that only the landlord's and not the occupier's taxes fall to be deducted from the valuation, and to that effect the respondent's objections to the report by Mr Armstrong fall to be sustained: *Quoad ultra* repels the said objections and approves of said report: Finds in terms of said report that a sum amounting to 90 per cent on the valuation of the said chemical works represents the legal and proper deduction to be made from said valuation, in terms of section 37 of the Poor-Law (Scotland) Act, 1845 (8 and 9 Victoria, caput 83), and that the amount of the assessment in respect thereof is £36, 11s. 3d.: . . . Further, in respect of the foregoing findings, sustains the reasons of suspension," &c.*

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* "OPINION.—In this case the complainers have now accepted the respondent's offer to make a reduction of 15 per cent in respect of repairs, insurance, and taxes on the mines and minerals of which the complainers are the tenants and occupiers. The parties are further agreed that with respect to the chemical works only landlord's taxes should be deducted. They are also, it appears, agreed as to the amount to be deducted in respect of insurance. This being so, the only question for decision is as to the deduction to be allowed for repairs on the chemical works—that is to say, the repairs on the heritable subjects, consisting of buildings, fixed plant, and machinery, which form these works, and of which the complainers are both owners and occupiers.

"The reporter has fixed this deduction at the sum of £4366, 11s. He finds that the sum in question represents the average sum expended during the five years from 1894 to 1899, and he explains that this average is exclusive of the cost of new retorts and other new works which are not included in his report. He also explains that the heaviest repairs are those on the iron stills, which last from one to two years only, and lead-lined tanks or receptacles in the sulphate of ammonia works, of all which it would appear that the cost of upkeep is very heavy.

"The respondent does not dispute the accuracy of the reporter's figures—that is to say, he does not dispute that for the upkeep of the heritable subjects which are entered in the Valuation-roll the complainers have expended on repairs, apart from renewals, the average sum which the reporter states. Neither does he dispute that the repairs were proper and necessary. But he suggests that the complainers being both owners and occupiers, the expenditure must, at least to a large extent, be held to have been made by them in the latter character, and to be really part of what he calls their working expenses.

"I am unable to find in the Poor-Law Statute any ground for the distinction suggested. If repairs are made on heritable subjects which are necessary for their upkeep, it does not appear to be of importance whether they are executed by the landlord or by the tenant, or whether they are executed by the landlord *qua* owner or the landlord *qua* occupier. That circumstance may be material in the Valuation Court in fixing the valuation, but it cannot, in my opinion, affect the deduction claimable under the Poor-Law Act. The deduction falls to be made from the annual value appearing on the Valuation-roll, which value, it must be assumed, has been properly ascertained. A good deal was said in the course of the argument as to the necessity of assuming a hypothetical tenancy; but that is a topic which I need hardly say is only relevant in the Valuation Court. I see, however, no reason to doubt that in the present case the valuation was properly made. I quite agree with the reporter's observation that no

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The respondent reclaimed, and argued;—(1) It was not the duty of a Parish Council to make any deductions from the value appearing in the Valuation-roll. Under the Poor-Law Amendment Act, 1845, sec. 37, the Parochial Board were entrusted with the duty of valuing the subjects and making any necessary deductions. But that duty had been taken from the board by the provisions of the Valuation of Lands Act, 1854, and laid upon the assessor. Under sections 6 and 41 of that Act it was his duty to value the subjects at their real annual value, *i.e.*, at their rental, subject to deduction of the average annual cost of repairs. The Parish Council, as coming in place of the Parochial Board, were bound to accept the valuation appearing in the roll as conclusive. The provisions of section 41 of the Valuation Act, reserving all powers of classification and of making deductions, entitled a Parish Council to assess different classes of property under appropriate deductions, but reserved no power to make deductions in the case of individual subjects. This point was not decided in *Magistrates of Glasgow* v. *Hall*,[1] and any opinions opposed to the respondent's argument were *obiter*. (2) Assuming the Parish Council to be bound to make deductions, all that fell to be deducted was the cost of those repairs which, in the case of a landlord and tenant, would fall upon the landlord.[2] A remit should be made to the reporter to distinguish what the amount of these repairs would be in the present case.

Argued for the complainers;—(1) The Parish Council were bound to deduct the probable average annual cost of repairs. That duty was laid upon its predecessor, the Parochial Board, by section 37 of the Poor-Law Amendment Act, 1845, which was neither repealed nor rendered inoperative by the provisions of the Valuation of Lands Act. That Act imposed on the assessor the duty of valuation, and fixed as a standard the actual or probable rent, but it left the question of deduction to be dealt with by the body entitled to impose the assessment. This was the invariable practice since 1854, and was approved by the Court in *Edinburgh and Glasgow Railway Company* v. *Meek*;[3] and *Magistrates of Glasgow* v. *Hall*.[4] (2) If deductions were to be made, the whole average annual cost of repairs must be deducted. There was no authority in section 37 of the Poor-Law Amendment Act for any distinction between repairs falling to be made by the landlord and those falling to be made by the tenant. That, in the case of an actual

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tenant would be at all likely to pay a rent of anything like £5400 for the heritable part of these chemical works except upon the footing that the landlord undertook the cost of upkeep. But however that may be, it is in my opinion enough that the repairs in question have been in fact made, and that no doubt is suggested as to their being proper and necessary to maintain the heritages in their actual state.

"I propose, therefore, to pronounce an interlocutor approving of Mr Armstrong's report, with the necessary modifications, and I shall be obliged by the parties letting me know the amount of the tenant's taxes which have to be deducted, and any other particulars which they desire I should express in the interlocutor."

[1] Jan. 14, 1887, 14 R. 319.

[2] Edinburgh and Glasgow Railway Co. v. Adamson, June 28, 1855, 17 D. 1007, 27 Scot. Jur. 514; Glasgow Gas-Light Co. v. Adamson, March 23, 1863, 1 Macph. 727, 35 Scot. Jur. 410; Edinburgh and Glasgow Railway Co. v. Hall, June 29, 1866, 4 Macph. 1006, 38 Scot. Jur. 515.

[3] Dec. 10, 1864, 3 Macph. 224, 37 Scot. Jur. 109.

[4] 14 R. 319.

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lease, was a matter of private contract, and did not affect the question what was the net annual value of the subjects to the landlord.

At advising,—

LORD KINNEAR.—The Pumpherston Oil Company are the owners and occupiers of certain chemical works in the parish of Mid-Calder, and they complain of a poinding at the instance of the collector of poor's-rates for that parish, upon various grounds, which the Lord Ordinary has disposed of. It is only one of these grounds which we are required to consider. The parties are content to accept the Lord Ordinary's judgment in all other respects, but the collector reclaims against it in so far as it gives effect to the complainers' contention that in charging the lands and heritages belonging to them for poor-rates, the collector ought to have deducted from the annual value entered on the Valuation-roll the average cost of repairs, insurance, and other expenses necessary to maintain the lands and heritages in their actual state, in terms of the 37th section of the Poor-Law Amendment Act, 1845. The reclaimer objects to the judgment upon this point on two grounds, first, that the annual value of the subjects is conclusively ascertained by the Valuation-roll, and that no deduction whatever can be allowed from the amount there entered; and secondly, that if any deduction be allowed it must be confined to what he calls landlord's repairs, as distinguished from tenant's repairs, the outlay for which latter kind of repair he says is already taken into account by the assessor in making up the Valuation-roll.

The first of these two points does not appear to have been argued to the Lord Ordinary, and is not raised in the pleadings. But since it was argued with great force and ability, we have thought it right to consider it, in order that we may at least determine whether it would be proper to give the reclaimer an opportunity for amending his record, so as to raise it formally for decision. If the question were open, I should have thought there was force in Mr Campbell's argument that the 37th section of the Poor-Law Amendment Act imposed only one duty on the collector, or on the Parochial Board, viz., to ascertain the annual value of lands and heritages—enjoining upon them at the same time an ordinary and reasonable procedure for the performance of that duty by taking the rent of the subjects in their actual state, and deducting the expenditure necessary to enable them to command that rent, the result being the true annual value of the subjects to the landowner; that the Valuation Act of 1854 imposed precisely the same duty upon the assessor for the purpose of "establishing one uniform valuation of lands and heritages according to which all public assessment leviable according to real rent might be assessed and collected," that that is a duty which cannot be reasonably or justly performed without allowing for the expenditure necessary to earn the rent; and lastly, that the 41st section, which provides that nothing in the Valuation Act shall affect the power of making deductions or allowances possessed by any body entitled to impose or levy assessments, refers only to allowances which assessing bodies were authorised to make in favour of certain specific classes or persons, and not to the ordinary deductions which must necessarily be made in the normal course of valuation in order to reach the true value.

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The consequence is, according to the argument, that the duty imposed upon the Parochial Board by the Act of 1845 has been transferred in its entirety to the assessor by the Act of 1854, and that, as the Valuation-roll is conclusive, it is the duty of all assessing bodies to assess and collect these rates according to the value as ascertained without any alteration whatever. But whatever weight might otherwise have been conceded to this reasoning, the answer is that the contrary has been decided in the case of the *Magistrates of Glasgow* v. *Hall*,[1] where it was held that the Poor-Law Act imposed two separate duties upon the Parochial Board, *first*, to ascertain the rent, and, *secondly*, to make the deductions in question, that the first of these duties has been transferred to the assessor, but not the second, and that accordingly the duty of the Parochial Board and its officers, under the law introduced in 1854, is to take the estimate of the annual value of lands and heritages, as it appears in the Valuation-roll of the year, and then to make the deductions specified in the 37th section of the Poor-Law Act. This decision is in accordance with opinions of great weight and authority, delivered so far back as 1864, in the *Edinburgh and Glasgow Railway Co.* v. *Meek*.[2] It sanctions a practice which had obtained since the passing of the Valuation Act, and has been followed by a constant and unvarying practice since its date, and it cannot now be called in question. I take it to be clear, therefore, that the sum of £5400 which is entered in the Valuation-roll as the annual value of the complainer's chemical works must be taken to be the gross rent or annual value of the heritable subjects, and that the complainers are entitled to insist that the deductions allowed by the 37th section of the Poor-Law Act shall be made from that amount in order to ascertain the true annual value for the purpose of the assessment for poor's-rates.

The only question that remains is that which has been determined by the Lord Ordinary, and I am of opinion, for the reasons the Lord Ordinary has given, that his Lordship's decision of that question is right. The Lord Ordinary finds that a sum amounting to 90 per cent on the valuation of the chemical works represents the legal and proper deduction to be made in terms of the 37th section. The only objection to that finding is that the deduction for repairs, amounting to 80 per cent, or £4336, 11s., is excessive, inasmuch as it includes, or may possibly include, tenant's repairs as well as landlord's repairs. I think that the Lord Ordinary's answer is perfectly sound, when he says that he cannot find in the Poor-Law Statute any ground for that distinction. But in order to consider the objection properly we must have in view the precise character of the subject to be assessed. It is land occupied by buildings, and also by fixed plant and machinery, which are heritable only by reason of annexation to the land, which appear to be very valuable, and which are shewn to be perishable by use. All of these subjects have been included, and we must assume, rightly included, in the valuation entered on the Valuation-roll. But the amount stated in the Valuation-roll is the gross annual value or gross rent of the heritable subject; and the question is, what deduction is to be made for the probable annual cost of the repairs necessary to maintain those lands and heritages in their actual

[1] 14 R. 319.

[2] 3 Macph. 229.

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state. Now that is a question of fact, and I do not think it is disputed that the Lord Ordinary adopted the proper method for ascertaining the fact by making the remit to a man of skill—(His Lordship here quoted the interlocutor dated 9th December 1900, *ante*, p. 1100). No objection is stated to the terms of that remit, and I think the report which the Lord Ordinary received is perfectly clear and satisfactory, and that no good objection has been brought against it. The reporter says—(His Lordship read Mr Armstrong's report, quoted *supra*). All this shews that the reporter clearly understood the duty required of him, and knew that he was to ascertain the annual cost of those repairs only which are necessary to maintain the subjects in their actual state. But the most valuable part of the subjects consists of machinery which lasts only from one to two years, and therefore it is not surprising that the annual cost of repairs should be very nearly equal to the annual value of the subjects. It is open to the reclaimer to challenge the reporter's results if he can shew that he has included any factor in his estimate which he ought not to have included. But the only objection is that the outlays for "repairs are tenant's outlays," that "as such they have been already allowed by the assessor," and that "the deductions reported upon when made from his valuation would not disclose the annual value of the works to the complainers as landlords, the annual value to them as landlords being the rent which is hypothetically receivable by them, less what they as landlords expend for repairs, insurances, and taxes." Now, I confess I do not know what is meant by the distinction between landlord's and tenant's outlays as applicable to a subject of the peculiar kind we are considering, which is occupied in fact by the proprietor, and not by a tenant holding under a lease. There is no abstract rule of law for defining that distinction; and the reclaimers' counsel were perfectly unable to explain it. They have entirely failed to specify any particular repairs or class of repairs of which they can say that it ought not to have been allowed because of its involving tenant's and not landlord's expenditure, and therefore I think they have failed to make any relevant allegation that on any specific point the reporter has gone wrong. But the best answer is that the reclaimers' objection is based on an entire misconception of the true meaning and effect of the statutes. I do not say that they are easy of construction; but now that they have been construed, the direction which the two statutes, taken together, give to the valuing and assessing bodies is perfectly simple. The assessor under the Valuation Act is to ascertain the gross annual value of the lands and heritages, and the poor-law officers are to take his statement of amount as conclusive, and deduct from that amount the expenses mentioned in the 37th section. It follows that we are not called upon in this case to consider the procedure of the Assessor under the Valuation Act. We have no jurisdiction to inquire how he has arrived at his results. It is equally clear that the poor-law collector has no title to inquire as to the assessor's procedure, and no right to speculate as to what would be given as rent by a hypothetical tenant, or on what conditions it would be given. He has nothing whatever to do with the hypothetical tenant, or with any other method, artificial or otherwise, for ascertaining annual value. He must take it as fixed that the subject valued is the heritable subject alone, and that the gross annual value of that subject is the sum stated in the

Valuation-roll, and the only function that remains for him to perform is to deduct from that amount the expenses required for maintaining the subjects in their actual state. Now that is a simple question of fact, and in order to solve it he is not required to consider the respective liabilities of landlord and tenant. I see no authority in the statute to justify him in saying "Repairs are necessary for maintaining this heritable subject in its actual state, but I shall not allow a deduction for them, because I think they are repairs which should be made at the tenant's expense." I have no doubt that, as a rule, the deductions contemplated by the statute are those required by the outlays of the proprietor, because the intention is obviously to allow such deductions from the gross rent as will enable the subjects to be maintained in a position to command that rent. But if that is the effect of the statute, the poor-law officer is not called upon to enter into any elaborate calculation outside the statute for the purpose of attaining it. He must confine himself to the single task imposed upon him by the Legislature, and taking the gross annual value of lands and heritages as it is given him in the Valuation-roll, he must deduct the average cost of the repairs which are necessary to maintain such lands and heritages in their actual state. The reporter has set himself to do this, and nothing more, in the estimate which he has given, and I find no relevant averment that in doing it he has committed any error which requires to be corrected. The apparent difficulty which seems to arise from the magnitude of the deductions in proportion to the total annual value of the subjects turns out to be no difficulty at all when the nature of the subjects is considered. The greater part of the value of this complex heritage is due to the inclusion of machinery and plant which would not be considered as land, and would not be valued at all but for the operation of a somewhat artificial rule of positive law. But if it turns out that the things so included are perishable in the using, and if therefore the cost of maintaining the entire complex heritage in its actual state turns out to be so great as to bring down the annual value of the whole to its proprietor to something not much exceeding the proper rental of the lands and buildings without the machinery and plant, there is nothing anomalous in that result; and, at all events, it is the consequence of an estimate which is made in exact conformity with the statute.

It may no doubt be assumed that the annual value of the trade carried on in the complainers' work is very much greater than the sum which the Lord Ordinary finds should be taken as the basis of assessment. But it is not the complainers' trade, but their heritable property only, which is to be valued and assessed.

I am therefore for adhering to the Lord Ordinary's interlocutor.

LORD ADAM concurred.

LORD KINNEAR intimated that Lord Kincairney, who was present at the hearing, but not at the advising, had read his opinion, and concurred in it.

The LORD PRESIDENT and LORD M'LAREN were absent at the hearing.

THE COURT adhered.

CAIRNS, M'INTOSH, & MORTON, W.S.—DOUGLAS & MILLER, S.S.C.—Agents.

No. 181. JAMES BURNS, Pursuer (Appellant).—*Campbell, K.C.—W. Thomson.*
JOHN COLVILLE, Defender (Respondent).—*Dundas, K.C.—Hunter.*

July 19, 1901.*
Burns v. Colville.

Agent and Client—Remuneration—Promotion of Private Bill in Parliament—Attendance in London of Local Agent—Proof of Employment.—The promoters of a bill for making a railway from Motherwell to Bellshill employed a firm of law-agents in Glasgow as agents for the bill and also Burns, a solicitor in Motherwell, as a local agent.

When the bill was before the Committee in the House of Commons, Burns went to London and gave assistance to the promoters, without being formally instructed to do so.

Subsequently the promoters declined to pay for his services.

Held that Burns was entitled to payment of his charges for his services in London.

2D DIVISION. Sheriff of Lanarkshire.

IN December 1900 James Burns, solicitor, Motherwell, raised an action in the Sheriff Court at Hamilton, against John Colville, iron manufacturer, Motherwell, for payment of £164, 1s. 2d., being the amount of the pursuer's account for professional services in connection with the Motherwell and Bellshill Railway Bill, of which the defender was the principal promoter.

The pursuer averred;—(Cond. 4) "On 21st November 1899, the defender employed the pursuer to act as agent for the promotion of said bill, and the pursuer accepted the engagment. Thereafter on same date the pursuer wrote to the defender in the following terms":—(The pursuer then set forth the two letters quoted below.† (Cond. 5) "The pursuer, in accordance with said employment, performed the work and incurred the outlays, all as detailed in the business account annexed hereto."

The account annexed included the following items:—"Going to and attendance in London when bill before Select Committee of House

* Decided July 12, 1901.

† Letter, pursuer to defender, dated 21st November 1899:—"Dear Sir,—Motherwell and Bellshill Railway Bill.—As promised at our meeting to-day, I now write you with reference to my acting for the promoters of this bill. While it is natural that the promoters should desire to know the exact figure it will cost them for agency, owing to the nature of the work it is practically impossible to name a figure that would be fair to both parties. I am willing to undertake the work and do all I can to promote the bill on the usual professional terms, subject, if desired, to taxation of my account by the Sheriff Court Auditor at Hamilton. As requested, I am calling meeting of traders for to-morrow night.—Yours faithfully, &c."

Letter, pursuer to H. Lamond, Lang, & Company, dated 23d November 1899:—"Dear Sirs,—Motherwell and Bellshill Railway Bill.—I send you copy of letter I yesterday addressed to Mr Colville, M.P., and copy of his reply. To prevent any possible misunderstanding, it will be as well that I confirm the cancelment by 'phone last week of my letter to your Mr Lang on this subject, which I now do. Anything which I do, whether at your request, that of the Messrs Colville, or on my own initiative in the promotion or interests of the bill, will be on the terms stated in my letter of yesterday to Mr Colville.—Yours faithfully, &c."

The defender's reply referred to in this letter was dated 22d November, and was in the following terms:—"Dear Sir,—Motherwell and Bellshill Railway Bill.—I am duly in receipt of your favour of yesterday's date, which is being forwarded to Messrs H. Lamond, Lang, & Co., the law-agents for the bill, whom I have requested to take up with you as to same.—Yours faithfully, &c."

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of Commons—engaged 10 days, £63; to personal expenses, 11 days, £23, 2s.; to travelling expenses, £7, 10s.—Total, £93, 12s."

(Ans. 4 and 5) "Denied. The agents for the bill were Messrs H. Lamond, Lang, & Company, writers, Glasgow, and the pursuer was merely employed as a local agent to convene meetings of traders and others to consider and pass resolutions with regard to the bill, and to attend to other local details, under the instructions of the agents for the bill. The promoters are quite willing, and have offered, to pay his legitimate charges for these matters, but they decline to pay for his going to and attending in London when the bill was before the Select Committee in the House of Commons, as he was not requested by them or any one on their behalf to go there."

The pursuer pleaded;—(1) The pursuer having been employed by the defender to do the work and make the outlays in the account founded on, and the defender having refused payment thereof, the pursuer is entitled to decree for the sum sued for, with expenses. (2) The defender having adopted, approved of, and homologated the pursuer's actings, is bound thereby, and is liable in payment to the pursuer for the services rendered.

The defender pleaded, *inter alia*;—(2) The pursuer having received no authority or instructions from the defender or other promoters of the bill, or anyone on their behalf, to attend the committee of the House of Commons, and that attendance having been outside of his province and authority as local agent, he is not entitled to payment of the sums claimed for that attendance.

A proof was led. The evidence was to the following effect:—

The pursuer was the town-clerk of Motherwell. The agents for the bill were H. Lamond, Lang, & Company, writers, Glasgow. The bill came first before a committee of the House of Lords, in May 1900. The pursuer intimated to the defender that he would prefer not to attend that committee unless his attendance was considered necessary, as he was very busy at the time. The defender told him that he need not go. After the bill had passed the House of Lords, the local feeling in regard to it changed considerably, and several witnesses who had been favourable became adverse. Shortly before the bill came before a committee of the House of Commons the pursuer intimated to Lamond, Lang, & Company that he proposed to attend that committee. Lamond, Lang, & Company did not intimate any objection to his doing so; but neither they nor the defender expressly authorised the pursuer to go.

The pursuer deponed, *inter alia*,—"I considered it my duty to go up to the hearing before the House of Commons. I looked on it in the interest of the defender. I told Mr Lamond and Mr Lang that I was going. (Q.) Did they approve of it? (A.) They recognised I was on an equal footing with themselves. They passed no opinion, but it was quite recognised. When I was going Mr Lang walked to the station with me. . . . I went to London on the 4th July along with the promoters and several witnesses. . . . On my arrival in London I took the witnesses and one of the promoters to a private boarding-house, to which I had wired in advance, arranging for their accommodation. . . . I remained in London till the evidence for both sides was finished. I was in daily attendance in the committee-room. I was in continuous consultation with the defender and Mr Lamond. I prompted counsel, and did what an agent usually does in such circumstances. When the witnesses were

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being examined for, and against, my knowledge stood in good stead. I sat practically thoughout the whole hearing with the defender and Mr Lamond. . . . During the whole progress of the bill I was consulted. I suggested questions, and wrote slips in the usual way an agent does day after day. . . . After the evidence had been heard, the defender and his brother came to me in the committee-room when Mr Bell and I were standing together, and told us we might go home. That was on the Friday. I reached Motherwell on the Saturday morning. They said they did not see any occasion for my staying longer, as the whole evidence had been taken, and there was only the counsel's speeches and the decision to come. . . . That put an end to my professional services. I have no charge for attendance after that date. . . . If the defender at an earlier stage had told me to go home, I would equally have considered his liability to have ceased. If he had told me the day after I reached London that I had not been expected, I would have left. My whole idea was to do my duty to the promoters. . . ." Cross.—". . . . I considered that I was acting in conjunction with Messrs Lamond & Lang in the conduct of this bill. I was local agent in addition, but I was not purely a local agent. I took instructions from the promoters, especially the defender. (Q.) As an agent, should your instructions not come from the chief agent? (A.) I had no chief agent. I was not employed by Messrs Lamond & Lang in this matter. (Q.) Why did you write to them explaining what the arrangement was? (A.) In order that there might be no misunderstanding between the agents." The pursuer admitted that he was not present at the consultations with the counsel for the bill.

The defender (adduced by the pursuer) deponed, *inter alia*,—"The pursuer met me . . . shortly before the case came before the Commons, when he informed me that he intended to go up, as he would keep the Provost and Commissioners right in their evidence. I assumed he was going up at the request of the agents. I concurred in his statement that he would be able to keep the Provost and Commissioners right. I do not think that his presence was vital to the success of the bill. When he was there he unquestionably had conversations with me repeatedly in the committee-room. From the moment I saw him in London, I assumed he was there at the request of the agents. It did not occur to me to ask Mr Lamond till near the close of the case. I was surprised to be told by him that he had not asked Mr Burns to go up. . . . I understood Mr Burns was there as town-clerk, and as local agent for the bill, and he was conversant with the doings of the Commissioners. I did not personally tell the pursuer and Mr Bell that their services were no longer required. My brother Archibald did so in my presence. He said there was no necessity for the witnesses remaining. A number of witnesses were standing about, and the remark was general, that their attendance was not required, as the evidence was completed." Cross.—". . . . I admit that while he was in London he was of some use. . . . It was towards the close of the evidence that Mr Lamond remarked that Mr Burns was there without his request. His words were—'What is that fellow doing here? I did not ask him to come up.' It was an eye-opener to me, otherwise I would not have been so frequently in conversation with him. I object to these items in the account, because Mr Burns was not instructed to

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go to London. The promoters object, having regard to the fact that he should not have incurred such expense without instructions. . . . "

John S. Lang, of H. Lamond, Lang, & Co., deponed, in cross-examination, *inter alia*,—"Mr Burns had done all the work that was required of him as local agent, and he was not required for any purpose in London. I knew he was going to London, but I did not take any steps to stop him, because I knew in what capacity he was going. He told me he had such an interest in the bill that he was going up. In the beginning of July it was quite natural for him to take a holiday."

Henry Lamond, of H. Lamond, Lang, & Co., deponed, *inter alia*,—"It was quite a common thing for anyone interested in the bill, and even outsiders, to pass slips to the agent. Mr Burns did that. . . . I never decline to take a suggestion from anyone who has a head on his shoulders. Mr Burns was never consulted on the procedure. . . . I certainly spoke to him when I found him in the committee-room. I did not speak to him as an agent. I thought he was there because he wished to see the fun and was taking a holiday. He was town-clerk, and was solicitor for the Brandon Company, one of the partners of which was a promoter, and in other ways he was interested in the passing of the bill. I did not wonder much at his being there, nor sitting at the table. It is quite a common thing for witnesses and others to sit there."

On 14th March 1901 the Sheriff-substitute (Davidson) pronounced this interlocutor:—"Finds that the pursuer was employed by the defender as local agent at Motherwell in connection with the Motherwell and Bellshill Railway Bill; that the greater part of the account sued for was properly incurred and is due by the defender; that the item of £63, under date 4th July 1900, and the two following items, are not proper charges against the defender; and *quoad* the remainder of the account, before further answer, remits it to the Auditor of Court to tax and report; reserving all claims the pursuer may have against the defender for work done on behalf of the promoters of the bill, or in connection therewith, while in London in a different capacity from that of solicitor: and grants leave to appeal."

On 21st May the Sheriff (Berry) on appeal adhered.

On 28th May the Sheriff-substitute pronounced this interlocutor:—"In respect parties have dispensed with the taxation of the account, decerns against defender for the sum of £66, 1s. 8d.: Finds the pursuer liable to the defender in expenses."

The pursuer appealed, and argued;—The pursuer was entitled to charge for his attendance in London as an agent for the bill. His letter of 22d November 1899 expressly entitled him to charge professionally for work done on his "own initiative." That meant that he was entitled to charge for work done by him anywhere if in the exercise of his discretion he thought the work necessary in the interests of the promoters. At all events, the defender had homologated and adopted the work done by the pursuer in London. The defender practically admitted that in his evidence. He no doubt said that he consulted the defender because he thought that the defender had been instructed to go to London by Messrs H. Lamond, Lang, & Co., but the want of express instructions did not alter the fact that defender had consulted the pursuer and made use of his services, for which, therefore, the defender must pay.

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Argued for the defender;—The letter of 22d November 1899 did not bear out the pursuer's contention. On his "own initiative" meant on his own initiative *qua* local agent, and gave him a certain discretion as local agent, but did not entitle him to go to London at the expense of the defender[1]; for that special instructions were necessary, and admittedly the pursuer had none. He no doubt was of some use in London to the promoters, and they were willing to remunerate him for that, but not on the footing that he was a local agent whom they had instructed to go to London.

At advising,—

LORD JUSTICE-CLERK.—I have felt this to be an anxious case, and have again carefully read the evidence. That Mr Burns was employed to act as local agent by the defender, and on the terms stated by him, I have no doubt whatever. When the bill was before the House of Lords Mr Burns did not wish to go to London, being at that time busy, and it was accordingly arranged that he should not go. Apparently, subsequent to the decision in the House of Lords, the circumstances had changed, and some of the local witnesses turned round in their opinions, so that they could not be relied upon to support the bill. Accordingly the position of the bill was one of some anxiety to the promoters. Mr Burns went to London in connection with the inquiry in the House of Commons. My impression is that during the whole of the proceedings in the Commons Mr Burns was actively engaged, with the consent of the promoters of the bill and their principal agents, in doing substantial work on behalf of the promoters as their adviser and agent, and also in sitting with their counsel and solicitor in committee and giving advice. Up to a late point there was no suggestion that he acted as an amateur. That leads me to consider what was the understanding with Messrs Lamond & Lang as to the footing on which he was to go to London. Mr Lang's evidence did not impress me as being very probable. He says,—"I understood he was going on his own account and for a holiday." Mr Lang accompanied him to the station in charge of some of the witnesses, and I think the suggestion that he was in these circumstances going for a holiday is extravagant. There is one circumstance which proves that that was not the fact, viz., that when the witnesses had all been examined, and it was suggested that Mr Burns should go away, he did not remain in London, but went straight back to his business in Motherwell. Neither can I accept the evidence of Mr Lamond, who up till a late stage took all the assistance that he could get from Mr Burns, and then at the last was heard to say that he did not know what that fellow was doing there. On the whole matter, I am of opinion that the circumstances indicate plainly that Mr Burns was employed and used as an agent by the defender, and therefore that he has a reasonable claim to a fair remuneration for the services which he gave.

LORD YOUNG.—I concur with your Lordship that the judgment of the Sheriff is erroneous, and that the pursuer ought to have decree in terms of the prayer. I am strongly of opinion upon the evidence that going to

[1] *In re* Storar, 1884, L. R., 26 Ch. Div. 189; *In re* Foster, 1878, 8 Ch. Div. 598.

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London upon this occasion, and giving the services which Mr Burns undoubtedly did, was within the scope of his employment; he honestly and, I think, reasonably exercised his judgment that it was in the interests of his clients that he should do so. The only other observation which I think it proper to make is, that I quite appreciate the view which, as explained by Mr Campbell, the pursuer takes, that it is in his interest, individually and professionally, that the case should be decided by the Court rather than that there should be an agreement to abandon part of his claim and to take what was represented—I do not agree with the representation—as a generous offer on the other side.

LORD TRAYNER.—I am of opinion with your Lordship that Mr Burns went to London as the local agent for this bill, and I am also of opinion with your Lordship that he was received in London as such agent, and that his services were taken full advantage of for the whole time he was engaged before the Committee of the House of Commons.

LORD MONCREIFF was absent.

THE COURT recalled the interlocutors of 14th March and 21st and 28th May 1901; found in fact (1) that the pursuer was employed by the defender as local agent at Motherwell in connection with the Motherwell and Bellshill Railway Bill; and (2) that the account sued for was duly incurred by the defender to the pursuer, and was due by the defender; repelled the defences, and granted decree in terms of the conclusions of the action.

BRUCE, KERR, & BURNS, W.S.—W. & J. BURNESS, W.S.—Agents.

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Clippens Oil Co., Limited, v. Edinburgh and District Water Trustees.

THE CLIPPENS OIL COMPANY, LIMITED, Pursuers (Reclaimers).—*Sol.-Gen. Dickson—Clyde—T. B. Morison.*
THE EDINBURGH AND DISTRICT WATER TRUSTEES, Defenders (Respondents).—*D.-F. Asher—Cooper.*

Water Supply—Minerals under water-pipe track—Notice to abstain from working — Compensation — Arbiter—Statutory Reference — Water-Works Clauses Act, 1847 (10 *and* 11 *Vict. cap.* 17), *sec.* 22.—*Held* that where the owners of minerals under or adjacent to water-works have given notices under sec. 22 of the Water-Works Clauses Act, 1847, that they propose to work these minerals, and the undertakers have served a counter notice on the owners that they are willing to pay compensation therefor, a contract is thereby concluded under which on the one hand the mineral owners are bound immediately to refrain from working the minerals, and on the other the undertakers are bound to pay compensation for the minerals as the same—failing agreement—shall be determined by an arbiter.

Water Supply—Mines and Minerals—Minerals under water-works—Statutory notice by undertakers of willingness to pay compensation—Reservation in notice—Right of undertakers to have minerals unworked independently of statutory provisions — Liability to pay compensation — Water-Works Clauses Act, 1847 (10 *and* 11 *Vict. cap.* 17), *sec.* 22.—The owners of a mineral field through which two water pipes belonging to the Edinburgh and District Water Trustees, called the Crawley pipe and the Moorfoot pipe respectively, were carried on the same pipe track, gave notice,

* Decided February 22, 1901.

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under sec. 22 of the Water-Works Clauses Act, 1847, which was applicable only to the Moorfoot pipe, to the Water Trustees of their intention to work the minerals under the pipe-track. The Water Trustees thereupon served a counter notice on the mineral owners intimating their willingness to pay compensation for the minerals "so far as you are entitled thereto," and requiring the owners to leave them unworked, "Declaring that the foregoing notice is given without prejudice to and under reservation of . . . all objections to your working out the said minerals competent to us and of our right of support of the Crawley pipes passing through said mineral field." In consequence of this notice the owners did not work the minerals, and the amount of compensation was fixed by arbitration under the statute. Thereafter it was decided in an action raised by the Water Trustees that they had a right independently of the provisions of the Water-Works Clauses Act to prevent the mineral owners from so working the minerals under and adjacent to the pipe-track as to injure the Crawley pipe. The Water Trustees having refused to pay the compensation awarded by the arbiter, on the ground that the right of support which they had for the Crawley pipe, necessarily involved an abstention from working the minerals covered by the notice, and that there was nothing therefore to compensate the mineral owners for, *held* that having elected to put in force the remedy provided by the statute and to require the mineral owners to abstain from working, they were not entitled to avoid fulfilment of the statutory condition of paying the compensation fixed by the arbiter.

1st Division. Lord Pearson.

[Reference is made to the undernoted actions between the same parties.*]

This was an action raised by the Clippens Oil Company, Limited, against the Edinburgh and District Water Trustees, to have the defenders ordained to make payment to the pursuers of two sums of £8079 and £2250 respectively, contained in two decreets-arbitral dated 11th November 1898, pronounced by Mr Andrew Jameson, Q.C., as oversman in two references between the pursuers and defenders, with interest from the 11th November 1898, and also of the expenses incurred by the pursuers in the references.

The action was raised in the following circumstances, as appeared from the pleadings and admissions of parties:—

The Clippens Oil Company, Limited, were proprietors of the estate of Straiton in the county of Midlothian, with the minerals therein, and were also lessees, under Major Gibsone of Pentland, of the mineral field of Pentland, which immediately adjoins the estate of Straiton on the south. The Clippens Company and their predecessors had worked certain seams of shale and limestone in Straiton and Pentland on an extensive scale for many years.

The main pipe-track of the Edinburgh and District Water Trustees passed through the estates of Pentland and Straiton from south to north. The track contained two pipes (1) the Crawley pipe, laid in 1821 under an Act of Parliament passed in 1819, which contained no provisions similar to those in the Water-Works Clauses Act, 1847, in regard to mineral owners; and (2) the Moorfoot pipe, laid in 1877 under the Edinburgh and District Additional Water Supply Act of 1874, which incorporated the Water-Works Clauses Act. The two pipes were laid close together.

The minerals under and adjacent to the track had been to a considerable extent worked out by the pursuers and their predecessors,

* Dec. 17, 1897, 25 R. 370, Feb. 3, 1898, 25 R. 504, June 7, 1899, 1 F. 899, and Nov. 27, 1900, *ante*, p. 156.

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and statutory notices under the Water-Works Clauses Act had at various dates between 1877 and 1897 been served upon the Water Trustees by the Clippens Company of their intention to work these minerals. No counter notices had been served by the defenders.

It was not disputed that these notices applied only to the Moorfoot pipe.*

In March 1897 the Water Trustees presented a note of suspension and interdict in order, *inter alia*, to have the Clippens Company interdicted from working the seams of shale and limestone within forty yards of the pipe-track. On 3d February 1898 the Court refused the note.[1]

Thereafter, on 17th February 1898, the Water Trustees served a counter notice on the Clippens Company in the following terms:—"Whereas notices of intention to work minerals on the estate of Straiton, in the county of Midlothian, under or adjacent to the pipe-track or line of pipes belonging to us, the Edinburgh and District Water Trustees, incorporated under the Edinburgh and District Water-Works Act, 1869, have at various times been served upon us by or on behalf of you, the Clippens Oil Company, Limited, or your predecessors, as owners of the estate of Straiton: And whereas, more particularly by notice dated 25th November 1896, your law-agent on your behalf gave notice that you, the said Clippens Oil Company, in virtue of sections 22 to 27 inclusive of the Water-Works Clauses Act, 1847 (10 and 11 Vict. cap. 17), were now desirous of working the mines and minerals, including therein the limestone lying under and adjacent to the said pipe-track or line of pipes, including all the

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* The Water-Works Clauses Act, 1847 (10 and 11 Vict. cap. 17), enacts, sec. 22:—"Except where otherwise provided for by agreement between the undertakers and other parties, if the owner, lessee, or occupier of any mines or minerals lying under the reservoirs or buildings belonging to the undertakers, or under any of their pipes or works which shall be under ground and shall be described in the map or plan which shall be so kept and deposited as hereinbefore mentioned, or within the prescribed distance, if any, and if no distance be prescribed within forty yards therefrom, be desirous of working" the same, such owner, lessee, or occupier, shall give the undertakers notice in writing of his intention so to do thirty days before the commencement of working, and upon the receipt of such notice "it shall be lawful for the undertakers to cause such mines to be inspected by any person to be appointed by them for the purpose, and if it appear to the undertakers that the working of such mines or minerals is likely to damage the said works, and if they be willing to make compensation for such mines to such owner, lessee, or occupier thereof, then he shall not work the same; and if the undertakers and such owner do not agree as to the amount of such compensation, the same shall be settled as in other cases of disputed compensation."

Section 23 enacts that if the undertakers are unwilling to treat for payment of compensation, the owner, lessee, or occupier, may work the mines as if this Act and the special Act had not been passed, so that the mines be not worked in an unusual manner and that the undertakers are to make good damage occasioned by working the mines in an unusual manner.

Section 24 enacts that if the working of the mines under the works of the undertakers be prevented by reason of apprehended injury to such works, it shall be lawful for the owner, lessee, and occupier of such mines to make mining communications of prescribed dimensions through the strata of which the working has been prevented.

[1] 25 R. 504.

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mines and minerals within forty yards therefrom, and that at the expiry of thirty days from the date of receipt of said notice: Now, therefore, we, the said Edinburgh and District Water Trustees, in pursuance of the provisions of the said Water-Works Clauses Act, 1847, and Acts therewith incorporated, hereby give you notice that it appears to us that the working of the mines or minerals hereinafter mentioned is likely to damage our said pipe-track or line of pipes, and that we are willing to make compensation to you for the same, in so far as you are entitled thereto, and for all loss or damage occasioned to you by the non-working thereof, and to treat with you for the payment of such compensation, and we hereby require you to leave the said mines or minerals unworked, *videlicet*—[Here followed a specification of the minerals referred to]. Declaring that the foregoing notice is given without prejudice to, and under reservation of, all our answers and objections to the said notices served on us by or on behalf of you and your predecessors, and of all objections to your working out the said minerals competent to us, and of our right of support of the Crawley pipes passing through said mineral field."

In consequence of this notice the Clippens Company did not work the minerals referred to.

On 21st May and 11th June 1898, the Water Trustees served two other counter notices on the Clippens Company in terms similar to that of 17th February 1898, but referring to freestone lying under or adjacent to the pipe-track. It was agreed by the parties to treat the references under these two later notices as one.

Following on these notices, arbiters were appointed by the Clippens Company and the Water Trustees, and the arbiters appointed Mr Andrew Jameson, Q.C., oversman.

The nomination of arbiters by the Water Trustees contained reservations similar to the reservations in their counter notices.

Before proof was taken in these references an action had been raised on 27th April 1898 by the Water Trustees to have it found and declared that they had a right to have the Crawley pipe supported so that it might serve uninterruptedly as a conduit for bringing water from the Crawley Springs to their reservoir at the Castlehill in Edinburgh, and that the Clippens Company were not entitled so to work the minerals adjacent to or under it as to injure the pipe, and to have the Clippens Company interdicted from so working their minerals. The Water Trustees moved to have the proof in the references postponed until judgment in this action of declarator and interdict should be given, but the Clippens Company opposed this motion and the proof was taken.*

* In their revised answers to the claim of the Clippens Company in the reference with regard to the shale and limestone, the Water Trustees stated:—"The respondents have raised an action in the Court of Session for declarator of their right to support of their Crawley pipe passing through the claimants' mineral field, the summons in which was signeted on 27th April 1898. A copy of the open record in said action is herewith produced and referred to. If the Court decide that action in favour of the respondents, then the claimants could not work either the main shale pillars or the limestone pillars first, second, and third above referred to. The procedure in the present reference should therefore be sisted by the arbiters until the decision of the Court is obtained in the said declarator."

In their answers in the other reference, the Water Trustees also referred to the action about the Crawley pipe.

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The arbiters having disagreed, the submission devolved on the oversman, and on 11th November 1898 Mr Jameson issued two decreets-arbitral finding (1) that £8079 was payable in respect of the shale and limestone, and (2) that £2250 was payable in respect of the freestone by the Water Trustees to the Clippens Company.

The present action was brought to enforce payment of these awards.

The defenders averred, *inter alia*;—"It is estimated that, in order that adequate support be given to the said pipe or aqueduct (Crawley pipe), it is necessary that the minerals subjacent and adjacent to it should not be worked for at least forty-five yards on the south or east side of the pipe and for at least 145 yards on the north or west side thereof. The minerals, for the non-working of which the pursuers claimed compensation in the said arbitrations, were all situated within the said limits within which they cannot further work the minerals without depriving the Crawley pipe of the support which it has enjoyed since 1821. If the pursuers were to attempt to work out the said minerals, the result would be that the said pipe would subside, and be broken, and the supply of water from the Crawley Spring to the Castlehill Reservoir would be cut off.

"The said action [as regards the right of support to the Crawley pipe] is still *sub judice*. If the decision in the said action is in favour of these defenders, the result will be that the pursuers will be found to have had no right to work out the greater part of the minerals for which they claimed compensation in the said arbitrations. It is believed and averred by the defenders that, if the right of support of the Crawley pipe is established in the said action, the pursuers would only be able to work out a fractional part of the minerals for which they claimed compensation in the said arbitrations. The Moorfoot and Crawley pipes are laid close to one another, and the result is that if the Crawley pipe has a right of support from the subjacent and adjacent minerals, the greater part of the mineral included within the pursuers' notices to the defenders would require to be left unworked to give the said support."

The defenders pleaded;—2. The sums awarded in the said decreets-arbitral are not due to the pursuers, and the defenders are entitled to absolvitor, in respect—(1) the defenders, under the statute in virtue of which said pipe or aqueduct was laid, and at common law, are entitled, under the circumstances above set forth, to have adequate support therefor where it passes through the lands of Pentland and Straiton, so as to receive through it a continuous and uninterrupted flow of water from the Crawley Spring to the Castlehill Reservoir; (2) the minerals for which compensation was claimed and awarded in the said arbitrations could not be worked out without causing the said pipe to subside and be broken, and the defenders therefore were not entitled to work the same, or to be compensated for leaving the same unwrought; (3) the whole of the proceedings in the said arbitrations were expressly under reservation of the defenders' whole rights and pleas with regard to the pursuers' title to work the said minerals and their right to compensation for being prevented from working them.

3. The pursuers having no right or title to take away the support from the said pipe where it is laid in the lands of Pentland and Straiton, or to cause any interruption to or interference with

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the flow of water through the said pipe or aqueduct from the Linwley Spring to the Castlehill Reservoir, are not entitled to compensation for leaving unworked the minerals requisite for said support.

2. In any event, the defenders are entitled to have the present action sisted pending the decision of said action of declarator.

On 1st August 1899 the Lord Ordinary (Pearson) sisted the process for proof in respect of the dependence of the action of declarator and interdict and on a reclaiming note the Court adhered.*

Thereafter on 17th July 1900 the Lord Ordinary (Pearson) pronounced the following interlocutor:—"Recalls the sist pronounced by him on 1st August 1899, and having heard counsel and considered the cause—Finds 1 that the awards sued on were pronounced and are held by the pursuers under reservation of all competent objections to the defenders to the working of the minerals in question and of their right of support of the surface of the roadway through the mineral field; 2 that by the Lands Clauses Consolidation Act 1845 and the relative Act 8 and 9 Vict. cap. 18, and in the relative action of declarator and interdict between the parties, the defenders' right to leave the Linwley pipe supported has been declared to be of the nature of a servitude, and in respect thereof the present pursuers have been interdicted from working the minerals within a certain area which is admitted on the record to be substantially the same as the area of the minerals dealt with in the awards now sued on; 3 that the pursuers' claim to work the said minerals now vested by reason of the awards which were reserved as above mentioned, and the claim of the defenders to the pursuers under the Lands Clauses Act 1845 are not entitled to set up the claim of right against the defenders: Therefore assoilzies the defenders from the conclusions of the summons and decerns."

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* The action of declarator and interdict was disposed of by Lord Pearson on the 1st August 1899, and by the First Division on 17th November 1899, and is reported ante, p. 176.

† [illegible] explained in a letter that my reason for sisting the action was that it would be for the convenience of an action of declarator and interdict at the instance against the present pursuers. The action had been decided in the meantime, and my judgment is under reclaiming note, and the only question I have to decide is whether the sist in the action of damages should be recalled, or whether it should be continued until the action of declarator is disposed of.

‡ [illegible] adopt the first alternative. If the removal of the sist were to lead to a [illegible] of the same nature in proceedings, the cost [illegible] in the end if a different view [illegible] the declarator. I should think that ought to be avoided [illegible] of the case of either side. The discussion in the [illegible] shows that the matters between the parties turn on [illegible] I am not prepared with [illegible] and I shall not now decide them. [illegible] with the action [illegible].

§ The awards which are sued on in this action were pronounced in the arbitration under the Lands Clauses Act, 1845, which [illegible] the same person [illegible] different minerals.

‖ [illegible] that as regards the amount of compen-

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The pursuers reclaimed, and argued;—The basis in fact of the Lord Ordinary's judgment was that the area affected by the statutory notice was practically identical with that covered by the interdict. That was not so. It was apparent from the terms of the final judgment in the action of declarator and interdict[1] that the two areas were, or might be, very different in extent. In law the Lord Ordinary had failed to give due effect to the legal quality and consequences of a counter notice under the statute. It concluded a binding contract between the parties, the terms and results of which were clearly ascertained. On the one hand, an immediate embargo was placed on the working of the minerals by the mineral owners; and, on the other hand, as a condition of the right so to restrict the mineral working, an absolute obligation was imposed on the undertakers to pay such compensation for the minerals affected as an arbiter, failing agreement, might award. In other words, the protection obtained by the Water Trustees under the Water-Works Clauses Act was correlative and reciprocal to their obligation to pay the compensation awarded. The reservations and qualifications in the notices must be construed *contra proferentem*. The construction put upon them by the defen-

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tion the awards are final. Their contention is, that the awards themselves must be regarded as qualified, and that as things have turned out, the qualification bars the pursuers from obtaining decree for the sums ascertained by the awards.

"The circumstances are these: The defenders have two main water-pipes running side by side through the pursuers' mineral field—the one, carrying Crawley water, having been laid in 1821, and the other, carrying Moorfoot water, in 1877. The pursuers had, on 25th November 1896, and at various earlier dates, given notice to the defenders of their intention to work minerals adjacent to and under the pipe-track; and they were in course of so working when the defenders, for the first time, on 17th February 1898, gave them a counter notice, in pursuance of the Water-Works Clauses Act, that the working of the minerals was likely to damage their pipes, and that they were willing to make compensation to them for the same, 'so far as you are entitled thereto,' and requiring them to leave the said minerals unworked.

"The defenders, however, had by this time discovered that while their Moorfoot pipe was regulated by the provisions of the Water-Works Clauses Act, it was open to them to plead that their Crawley pipe was in a different legal position, it having been laid under a statute of 1819, which, they maintained, gave them absolute right to support for the Crawley pipe. They accordingly qualified their statutory notice of 17th February 1898, not merely by stating their willingness to make compensation to the pursuers only so far as they were entitled thereto, but also by adding the following reservation:—'Declaring that the foregoing notice is given without prejudice to, and under reservation of, all our answers and objections to the said notices served on us by or on behalf of you and your predecessors, and of all objections to your working out the said minerals competent to us, and of our right of support of the Crawley pipes passing through said mineral field.' These expressions were repeated at length in the defenders' nomination of an arbiter, which was expressly made 'without prejudice to, and under reservation of, all our said answers and objections, and of our said right of support, all as above mentioned.'

"Two other notices and nominations relating to other strata of minerals were made and given by the defenders in May and June 1898, subject to

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[1] Edinburgh and District Water Trustees v. Clippens Oil Co., Limited, Nov. 17, 1900, *ante*, p. 156.

1896. ... ions was erroneous. Moreover, any reservation or exception in a notice must be read so as to be consistent with and not destructive of the purpose of the notice.[1] The only point which could be reserved was the question of the mineral owners' title,[2] but that was not disputed in this case. It was not competent for the Water Trustees at once to claim the immediate protection of the statute, and yet ultimately to repudiate the claim of the Clippens Company for compensation. Further, it was to be noted that the Water Trustees still enjoyed the remedy which they had obtained under the statute, for they did not even now propose to withdraw the counter notices. Their real and sole complaint was that the award of damages was too large, because the minerals in question could not be worked out without bringing down another pipe which the Clippens Company were under a separate obligation bound to support. That was a point *extra fines compromissi*, and went entirely to the amount of compensation. But the arbiter was final on that, and it was not competent to prove an allegation that the arbiter had overlooked something which he ought to have taken into account.[3] The award is decree no ambiguity of any kind, and must therefore receive effect.[4] An arbitrator, whether under a private or statu-

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the same qualifications and reservations as those just quoted. These became the subject of the second reference.

"It is to be observed that this is not analogous to cases under the Lands Clauses Acts, where a notice to treat makes a contract, which is binding on both parties, that the land included in the notice shall be taken. Under the Water-Works Clauses Acts the position of the parties is quite different. The notice is merely an inhibitory measure, intended to stop the workings, subject to compensation. There seems to be no reason why such a notice should not be qualified by reference to a legal claim to have the workings stopped on a different ground, without compensation.

"But the pursuers contend that the defenders, in giving notice under the Water-Works Clauses Act, chose their remedy; and that they have already got the benefit of it in obtaining an immediate stoppage of the mineral workings. They point out that the qualification or reservation is in general terms, and that its conditions are capable of being satisfied consistently with working out the minerals; while under the statutory notices the mineral owners are bound to leave the minerals unworked. Thus the defenders, having themselves set the statutory machinery in motion, and having obtained thereby the benefit conferred by the statute, must pay the statutory compensation.

"This contention, however, must be examined in connection with what has been done in the declarator. If that action had resulted in the defenders' right of support to the Crawley pipe being maintained otherwise than by leaving the minerals unworked, I think there would have been much force in the pursuers' argument. But I held that the Clippens Company did not in that action succeed in making out a case for substituted support;

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[1] Cripps on Compensation (4th ed.), 153; Chilworth Gunpowder Co. v. Manchester Ship Canal, Nov. 21, 1891, 8 Times L. R. 79.

[2] Metropolitan Board of Works v. Howard, Aug. 7, 1869, 5 Times L. R. 732; Campbell v. Mayor and Corporation of Liverpool, Feb. 10, 1870, L. R. 9 Eq. 579.

[3] Duke of Buccleuch v. Metropolitan Board of Works, 1872, 5 L. R. (H. L.) 418; Brakenridge v. Menzies, Dec. 17, 1841, 4 D. 274, 14 Scot. Jur. 109.

[4] Highland Railway Co. v. Great North of Scotland Railway Co., July 16, 1896, 23 R. (H. L.) 80.

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tory reference, was, according to the law and practice of Scotland, not a mere valuator, but was judge of law as well as of fact.[1]

Argued for the defenders;—The Lord Ordinary was right. The arbiter had in fact failed to take into consideration in estimating the amount of compensation the disability of the Clippens Company to work the minerals in question because of their having to support the Crawley pipe. That was established by the terms of the decreets-arbitral, but if not, then the defenders were entitled to prove it by other evidence. The basis on which the arbiter had fixed the compensation being thus ill founded, the defenders were not bound to pay the awards. Further, the references proceeded under the qualifications and reservations contained in the counter notices. These were competently introduced, and must be given effect to. They went to the very heart of the contract, which amounted to a conditional promise to pay compensation. There was nothing in the statute to strike at the introduction of such a condition. If the Clippens Company had objected to it they should have declined to accept the notices as valid. It had now been established that the Clippens Company were not entitled to work the minerals so as to injure the Crawley pipe, and as the Water Trustees were prepared to prove that the working of the minerals included in the counter notices would injure the Crawley pipe, the Clippens Company were not entitled to the sums in the decreets-arbitral which were fixed as compensation for not working the minerals included in the counter notices. But

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and the result is, that they stand interdicted from working substantially the very minerals to which the statutory notices applied. The area is not exactly the same; but I was informed that the difference is so small that it may be disregarded.

"In my opinion, it follows that the qualifications under which the notices were given and the arbiters were nominated are precisely applicable to the circumstances; and that the whole proceedings in the arbitration must be held as having taken place under reservation of the question of law as to the support of the Crawley pipe. It turns out that the company were not entitled to work the minerals; that, apart from and prior to the statutory notices, they lay under an obligation of support which required the minerals to be left unworked without further payment or compensation. I therefore hold that the qualification has become absolute, and that the awards are not enforceable.

"It was urged for the pursuers that, even so, this result could not receive effect on the record as it stands, and possibly not without the awards being reduced. No motion was made for an amendment of the record. But in the view I take, the record sufficiently raises the true question between the parties, so far as it could be done at the date of closing the record; and in assoilzieing the defenders I shall pronounce findings which will shew the ground of judgment. As to the awards themselves, it is true that in their operative part they give decree against the present defenders in unqualified terms. But in the narrative they distinctly set forth the qualifications under which the reference proceedings were instituted. And even if they did not, I think they must be read in connection with, and subject to, the terms of the initiating documents (the notices and the nominations), which determine the scope of the reference. In this view, the pursuers, in my opinion, hold the awards subject to the qualification that if they are bound to leave the minerals in question unworked otherwise than in pursuance of the statutory notices, then the sums ascertained by the awards shall not be exigible."

[1] Caledonian Railway Co. v. Turcan, Feb. 22, 1898, 25 R. (H. L.) 7, Lord Watson, p. 17.

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which might had the Clippens Company to compensation for minerals of which they were not being deprived, and which they had no right to work. Even apart from the qualifications and reservations in the former awards they would not have been entitled to sums awarded by the arbiter. The question of title was here involved, and that was always reserved. There being no title to work the minerals, there was no right to compensation. The arbiter was only final as to the amount of compensation. He could not decide the question of right to work. He was a mere valuator.[1] A statutory arbitrator was not in the same position as an arbiter at common law. Here he had applied the wrong law for he had treated the Clippens Company as unfettered owners of the minerals. He should at least have issued alternative awards. The Clippens Company had forced on the arbitration to a conclusion before their title was ascertained.*

At advising—

LORD KINNEAR.—This is one of many litigations in which the same parties have been unhappily engaged; and in order to determine the question now before us it is necessary to have in view what was decided in two at least of the former actions. The pursuers in the present case, the Clippens Oil Company, are proprietors of the estate of Straiton in Midlothian, and lessees of the minerals in the adjoining estate of Pentland, and the defenders have two lines of pipes for carrying water into Edinburgh which pass through both estates, and which at that part of their course lie close to one another in one pipe-track. The first of these two pipes, called the Crawley pipe, was laid in 1821 by virtue of an Act of Parliament passed in 1819, which contains no provisions similar to those of the Water-Works Clauses Act of 1847 for regulating the rights of mineral owners. The second, the Moorfoot pipe, was laid in 1877 by virtue of the Edinburgh and District Additional Water Supply Act of 1874, which incorporated the Water-Works Clauses Act. It is so far as regards the Crawley pipe, therefore, the rights and liabilities of the parties respectively are not affected by the Water-Works Clauses Act, 1847, while as regards the Moorfoot pipe, which lies close to the other, they are minutely regulated by that statute.

The first of the two actions to which I have referred was a note of suspension and interdict, which was presented in March 1897, at the instance of the present defenders, the Edinburgh Water Trustees, to have the pursuers interdicted from working the seams of shale and limestone in Pentland and Straiton within 40 yards of the defenders' pipe-track, or at least from working or taking away the pillars or stoops of shale or limestone within 40 yards of the pipe-track. It appeared that from 1877 onwards the pursuers had frequently given notice under the Water-Works Clauses

[1] London and Blackwall Railway Co. v. Cross, 1886, L. R., 31 Ch. Div. 354; Brierly Hill Local Board v. Pearsall, 1884, L. R., 9 App. Cas. 595; London and North-Western Railway Co. v. Walker, L. R. [1897], 1 Q. B. 921.

* At the close of the argument the defenders were allowed to add the following statement to the record:—"The sums decerned for in both the said decrees-arbitral as compensation for and in respect of minerals to be left unworked, as therein specified, were fixed by the oversman on the footing that the pursuers had an absolute right as owners to work out the said minerals unqualified by any legal obligation not to work the same so as to injure the said Crawley water-pipe or interfere with the continuous flow of water through the same."

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Act of their intention to work the minerals under and adjacent to the pipe-track, and that till the interdict was served the defenders had not endeavoured to stop them either by counter notice under the statute nor in any other way, but, on the contrary, had intimated that they preferred to take the risk of the threatened operations. In that process, however, they maintained, first, that the pursuers' company had, by working without notice, lost their right to work minerals within the protected area; and secondly, that assuming the pursuers to be still in the position of mineral owners who had duly given the statutory notice, they had lost their right by working in an unusual manner in violation of the statutory conditions. On these grounds they sought, without offering compensation, to prohibit the defenders from working any part of their minerals within the area in question. The Court thought there was no validity in either of the grounds on which it was sought to restrain the pursuers from working, and refused the interdict.[1] This decision was given on the 3d of February 1898, and on the 17th of February the defenders served upon the pursuers a counter notice under the statute with reference to shale and limestone, and on the 21st of May 1898, and subsequently again at a later date, they served similar counter notices with reference to freestone, intimating in each case that it appeared to them that the working of the mines and minerals mentioned was likely to damage their pipe-track or line of pipes, and that they were willing to make compensation to the pursuers for the same, and for all loss and damage occasioned to the pursuers by the non-working thereof, and to treat with the pursuers for payment of such compensation, and required the pursuers to leave the said mines and minerals unworked. Thereafter the parties, in terms of the Water-Works Clauses Act, and of the Lands Clauses Act, 1845, nominated arbiters to fix and determine the compensation to be paid by the defenders to the pursuers in respect of the minerals required to be left unworked. The arbiters appointed Mr Andrew Jameson, Q.C., to be their oversman, and after certain procedure, which is not alleged to have been other than regular and proper, the oversman, on whom the reference had devolved, issued his decreets-arbitral, fixing the amount of compensation to be paid by the defenders at the sums of £8079 and £2250 respectively, and decerning and ordaining the defenders to make payment to the pursuers of these sums and of the expenses of the reference. The present action is brought to obtain implement of these decrees, and to enforce payment of the sums found to be due.

The previous process of interdict referred, as I understand, to the pipe-track generally without distinguishing between the Crawley and the Moorfoot pipe. But it is common ground between the parties that the whole procedure under the counter notices and the consequent reference was applicable solely to the Moorfoot pipe. This is distinctly averred by the defenders in their answer to the second article of the condescendence, and it is not disputed by the pursuers.

In so far as regards the Moorfoot pipe, the legal effect of the proceeding I have described does not appear to me to be open to question. The statute provides that the undertakers shall not be entitled to any mines under any

[1] 25 R. 504.

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lands purchased by them unless they shall have been expressly purchased. The defenders therefore acquired as much of the surface as was necessary for their reservoirs and pipes, without being required to pay for the underlying minerals. But then the statute contemplates that the owner or lessee of such minerals may desire to work them, and that such working may probably be injurious to pipes or reservoirs. It accordingly enacts by the 22d section that if the owner, lessee, or occupier of minerals lying under the reservoirs or buildings of the undertakers, or under any of their pipes or within 40 yards therefrom, be desirous of working the same, he "shall give the undertakers notice in writing of his intention to do so thirty days before the commencement of working." The undertakers are then empowered to inspect the mines, and if it appear to the undertakers that the working of such mines or minerals is likely to damage the said works, and if they be willing to make compensation for such mines to such owner, lessee, or occupier thereof, then he shall not work the same, and the amount of compensation, if the parties do not agree, is to be fixed as in other cases of disputed compensation. The 23d section provides that if the undertakers do not within thirty days state their willingness to treat for payment of compensation, then the owner, lessee, or occupier may work his mines as if this Act and the special Act had not been passed; and the 24th section provides for the making of airways, headways, and gateways of prescribed dimensions through the protected strata. The effect of all these provisions is, that the defenders were enabled to stop all working by the pursuers within 40 yards of the Moorfoot pipe, on condition of their making payment of compensation for the minerals left unworked, and on no other condition. The effect of their counter notice was to lay upon the pursuers a peremptory and absolute prohibition against working their minerals within the prescribed area to any extent and for any purpose, excepting only for the limited purpose allowed, and under the conditions prescribed by the 24th section. On the other hand they acquired right so to stop the pursuers' workings under the express condition, which is just as absolute and peremptory as the prohibition itself, that they should make payment to the pursuers of the amount of compensation fixed by the arbiters or their oversman under a statutory reference. It seems to follow that the defenders, who have taken advantage of the enactment, must comply with the statutory condition on which alone they obtained it, and pay the compensation which the oversman has awarded.

But in the meantime it had occurred to the defenders—at what stage in their prolonged controversy with the pursuers does not appear—that by virtue of their Act of 1819 they might possibly have a right of support for their Crawley pipe of an entirely different kind from that conferred by the Water-Works Clauses Act, and so might prevent the pipe-track from being injured by mineral workings without any payment of compensation whatever. They accordingly brought an action in this Court for declarator that they were entitled to have the Crawley pipe supported, so that it might serve continuously as a conduit of water, and for a corresponding interdict against the present pursuers, who were made defenders in that action. The Court found their claim to be in substance well founded, although they were not entitled to decree in the exact terms in which it was asked. We held

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that the parliamentary grant of power to lay and maintain the pipe conferred upon the grantees a right to such support as might be necessary to make the purpose of the grant effectual, and therefore that the Clippens Oil Company could not be allowed to carry away minerals so as to destroy or injure the support of the pipe; but on the other hand, that the company were quite entitled to work and carry away such minerals as might be removed without injury, whether by reason of its being unnecessary for the support of the pipe that they should be left undisturbed, or because all risk of injury might be obviated by the provision of adequate substituted support by way of underbuilding or otherwise within the ground belonging to, or held in lease by, the defenders themselves. The Court accordingly did not grant an unqualified interdict against working in any specified area, but they interdicted the defenders—the present pursuers—from working the minerals adjacent to and under the pipe and aqueduct so as to injure them, or to interfere with the continuous flow of water through the pipe. The defenders allege that this interdict, which of course applies only to the Crawley pipe, covers practically the same ground as the area protected by the Water-Works Clauses Act for the safety of the Moorfoot pipe; and for the purpose of the argument this may be assumed to be correct. It is said that the two pipes lie so close together that support cannot be withdrawn from the Moorfoot pipe without injuring the Crawley pipe; and on the other hand that the sufficient support which must be left for the Crawley pipe will necessarily serve to keep up the Moorfoot pipe also. The defenders maintain that since the minerals for which compensation has been awarded cannot be worked out without causing the Crawley pipe to subside, it is now established that the pursuers had no right to work them, or to claim compensation for leaving them unwrought; and therefore that they themselves ought not to be compelled to pay the compensation awarded, because they could have insisted on the minerals in question being left unwrought, irrespective altogether of their rights under the Water-Works Clauses Act. In other words, they say that since the remedy they sought and obtained under the statute turns out to be superfluous, they are set free from the condition on which alone they obtained or could have obtained it.

It appears to me that this discovery comes too late. It may be that both remedies serve the same purpose, but they are nevertheless widely different both in practical and legal effect. The judgment pronounced in November last prevents the pursuers from injuring the Crawley pipe, but does not prevent them from working out if they please all the mineral which it is practicable to work without violating that condition. Under the statute they were absolutely prohibited from the moment the defenders' notice was served upon them from carrying away the smallest quantity of mineral from within the protected area, and even from keeping open the internal communications of their mine, excepting under stringent statutory restrictions. The defenders now discover that one of these remedies would be sufficient for them. But they have chosen to take both. I presume they would not have done so unless the procedure under the statute had given them an advantage which they could not obtain under their action of declarator and interdict. And indeed, this was avowed by their counsel at the bar. Mr Cooper said they served their notices under the statute because that was

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mines and minerals within forty yards therefrom, and that at the expiry of thirty days from the date of receipt of said notice: Now, therefore, we, the said Edinburgh and District Water Trustees, in pursuance of the provisions of the said Water-Works Clauses Act, 1847, and Acts therewith incorporated, hereby give you notice that it appears to us that the working of the mines or minerals hereinafter mentioned is likely to damage our said pipe-track or line of pipes, and that we are willing to make compensation to you for the same, in so far as you are entitled thereto, and for all loss or damage occasioned to you by the non-working thereof, and to treat with you for the payment of such compensation, and we hereby require you to leave the said mines or minerals unworked, *videlicet*—[Here followed a specification of the minerals referred to]. Declaring that the foregoing notice is given without prejudice to, and under reservation of, all our answers and objections to the said notices served on us by or on behalf of you and your predecessors, and of all objections to your working out the said minerals competent to us, and of our right of support of the Crawley pipes passing through said mineral field."

In consequence of this notice the Clippens Company did not work the minerals referred to.

On 21st May and 11th June 1898, the Water Trustees served two other counter notices on the Clippens Company in terms similar to that of 17th February 1898, but referring to freestone lying under or adjacent to the pipe-track. It was agreed by the parties to treat the references under these two later notices as one.

Following on these notices, arbiters were appointed by the Clippens Company and the Water Trustees, and the arbiters appointed Mr Andrew Jameson, Q.C., oversman.

The nomination of arbiters by the Water Trustees contained reservations similar to the reservations in their counter notices.

Before proof was taken in these references an action had been raised on 27th April 1898 by the Water Trustees to have it found and declared that they had a right to have the Crawley pipe supported so that it might serve uninterruptedly as a conduit for bringing water from the Crawley Springs to their reservoir at the Castlehill in Edinburgh, and that the Clippens Company were not entitled so to work the minerals adjacent to or under it as to injure the pipe, and to have the Clippens Company interdicted from so working their minerals. The Water Trustees moved to have the proof in the references postponed until judgment in this action of declarator and interdict should be given, but the Clippens Company opposed this motion and the proof was taken.*

* In their revised answers to the claim of the Clippens Company in the reference with regard to the shale and limestone, the Water Trustees stated :—"The respondents have raised an action in the Court of Session for declarator of their right to support of their Crawley pipe passing through the claimants' mineral field, the summons in which was signeted on 27th April 1898. A copy of the open record in said action is herewith produced and referred to. If the Court decide that action in favour of the respondents, then the claimants could not work either the main shale pillars or the limestone pillars first, second, and third above referred to. The procedure in the present reference should therefore be sisted by the arbiters until the decision of the Court is obtained in the said declarator."

In their answers in the other reference, the Water Trustees also referred to the action about the Crawley pipe.

they find in possession of the minerals, and if such persons give notice of their intention to work, it may be that they are entitled to stop them by serving a counter notice under the statute without being thereby held to concede the validity of their title. But it is unnecessary to consider any question of that kind, because the pursuers' title is unimpeachable. I do not see that the words serve any other purpose. The second ground for maintaining that the notice is conditional is the declaration that the notice is given "without prejudice to, and under reservation of, all objections to your working out the said minerals competent to us, and of our right of support of the Crawley pipe." But a point reserved is kept back from present use or consideration, in order that it may be brought forward in some other proceeding for some future or other purpose; and I cannot see how the allegation of a right which is expressly reserved, or in other words, excluded from the scope of a contract, can be held to add a term to the contract or to qualify its express conditions. The defenders' construction is, in my opinion, inadmissible. It comes to this, that the reservation is equivalent to a stipulation that the liability to pay compensation shall be dependent on their failure to make good in some other process a right of support for the Crawley pipe. But the words will not bear that meaning; and if the defenders desired to make any stipulation of the kind, they were bound to express it in plain language. It is material to observe that any qualification which the notice may be meant to express is as clearly applicable to the requisition to leave the minerals unworked as to the undertaking to make compensation, both because under the statute the two obligations are correlative and reciprocal, and because the declaration is so expressed as to cover the entire notice and every part of it. But when this is seen the defenders' construction is really reduced to an absurdity. A notice to stop working, which is to have immediate effect, and is yet to depend for its effect on the success of the notice-givers in establishing some other right at an indefinite time, in some unspecified process at law, would be unmeaning and ineffectual. But it would be just as ineffectual to require the mine-owners to stop working immediately on payment of compensation, provided the compensation should not be payable if the givers of the notice should succeed in some other process not yet instituted or even specified. The mine-owner could not be expected to comply with any such demand. I do not think that is the true meaning of the notice, and it would not have served the defenders' purpose to state any such condition in plain words. It appears to me that the reservation may have kept open their right to claim support for the Crawley pipes under the Act of 1819, notwithstanding their procedure under the Water-Works Clauses Act. But it does not, in my opinion, detract in the slightest degree from the absolute character, either of the requisition to leave the minerals unworked or of the undertaking to pay the compensation that may be awarded. I should not have dwelt upon this point if it had not been so anxiously urged upon us, and if it had not received some countenance from the Lord Ordinary. But the plain meaning of the notice seems to me to be quite unmistakeable. They say, "We have other rights against you in connection with our Crawley pipe, and other complaints which we do not intend either to abandon or to table for discussion in this proceeding, but setting all these aside for the present, we

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the flow of water through the said pipe or aqueduct *from the* Crawley Spring to the Castlehill Reservoir, are not entitled to compensation for leaving unworked the minerals requisite for *said* support.

6. In any event, the defenders are entitled to have the present action sisted, pending the decision of said action of declarator.

On 10th August 1899 the Lord Ordinary (Pearson) sisted the process *hoc statu*, in respect of the dependence of the action of declarator and interdict, and on a reclaiming note the Court adhered.*

Thereafter, on 17th July 1900, the Lord Ordinary (Pearson) pronounced the following interlocutor:—"Recalls the sist pronounced by interlocutor of 10th August 1899, and having heard counsel and considered the cause—Finds (1) that the awards sued on were obtained and are held by the pursuers under reservation of all objections competent to the defenders to the working out of the minerals in question, and of their right of support *of* the Crawley pipe passing through the mineral field; (2) that by the Lord Ordinary's judgment of 28th June 1900, in the relative action of declarator and interdict between the parties, the defenders' right to have the Crawley pipe supported has been declared in the terms therein set forth, and in respect thereof the present pursuers have been interdicted from working the minerals within an area which is admitted at the bar to be substantially the same as the area of minerals dealt with in the awards now sued on; (3) that the pursuers, being bound to leave the said minerals unworked by reason of the defenders' rights, which were reserved as above mentioned, and independently of the notices given by the defenders to the pursuers under the Water-Works Clauses Act, 1847, are not entitled to enforce the said awards or either of them against the defenders: Therefore assoilzies the defenders from the conclusions of the summons, and decerns."†

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* The action of declarator and interdict was disposed of by Lord Pearson in the Outer-House on 28th June 1900, and by the First Division on 27th November 1900, and is reported *ante*, p. 156.

† "OPINION.—I explained in a former note my reason for sisting this action *hoc statu*, in respect of the dependence of an action of declarator and interdict at the defenders' instance against the present pursuers. That action has now been decided by me, and my judgment is under reclaiming note; and the first question I have to decide is, whether the sist in this action should now be recalled, or whether it should be continued until the action of declarator is finally disposed of.

"This question is largely one of expediency. If the removal of the sist were to lead to a proof or to some costly or protracted procedure, the cost of which might be thrown away in the event of a different view being ultimately taken in the declarator, I should think that ought to be avoided. But there is no such proposal here on either side. The discussion on the merits of this case shews that the dispute between the parties turns on legal questions. I see no good reason why I should not now decide these, so that this case may be dealt with effectively together with the action of declarator and interdict.

"The awards which are sought to be enforced in this action were pronounced in two references under the Water-Works Clauses Act, 1847, which were substantially in the same terms, but applied to different minerals.

"The defenders do not dispute that as regards the amount of compensa-

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The pursuers reclaimed, and argued;—The basis in fact of the Lord Ordinary's judgment was that the area affected by the statutory notice was practically identical with that covered by the interdict. That was not so. It was apparent from the terms of the final judgment in the action of declarator and interdict[1] that the two areas were, or might be, very different in extent. In law the Lord Ordinary had failed to give due effect to the legal quality and consequences of a counter notice under the statute. It concluded a binding contract between the parties, the terms and results of which were clearly ascertained. On the one hand, an immediate embargo was placed on the working of the minerals by the mineral owners; and, on the other hand, as a condition of the right so to restrict the mineral working, an absolute obligation was imposed on the undertakers to pay such compensation for the minerals affected as an arbiter, failing agreement, might award. In other words, the protection obtained by the Water Trustees under the Water-Works Clauses Act was correlative and reciprocal to their obligation to pay the compensation awarded. The reservations and qualifications in the notices must be construed *contra proferentem*. The construction put upon them by the defen-

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tion the awards are final. Their contention is, that the awards themselves must be regarded as qualified, and that as things have turned out, the qualification bars the pursuers from obtaining decree for the sums ascertained by the awards.

"The circumstances are these: The defenders have two main water-pipes running side by side through the pursuers' mineral field—the one, carrying Crawley water, having been laid in 1821, and the other, carrying Moorfoot water, in 1877. The pursuers had, on 25th November 1896, and at various earlier dates, given notice to the defenders of their intention to work minerals adjacent to and under the pipe-track; and they were in course of so working when the defenders, for the first time, on 17th February 1898, gave them a counter notice, in pursuance of the Water-Works Clauses Act, that the working of the minerals was likely to damage their pipes, and that they were willing to make compensation to them for the same, 'so far as you are entitled thereto,' and requiring them to leave the said minerals unworked.

"The defenders, however, had by this time discovered that while their Moorfoot pipe was regulated by the provisions of the Water-Works Clauses Act, it was open to them to plead that their Crawley pipe was in a different legal position, it having been laid under a statute of 1819, which, they maintained, gave them absolute right to support for the Crawley pipe. They accordingly qualified their statutory notice of 17th February 1898, not merely by stating their willingness to make compensation to the pursuers only so far as they were entitled thereto, but also by adding the following reservation:—'Declaring that the foregoing notice is given without prejudice to, and under reservation of, all our answers and objections to the said notices served on us by or on behalf of you and your predecessors, and of all objections to your working out the said minerals competent to us, and of our right of support of the Crawley pipes passing through said mineral field.' These expressions were repeated at length in the defenders' nomination of an arbiter, which was expressly made 'without prejudice to, and under reservation of, all our said answers and objections, and of our said right of support, all as above mentioned.'

"Two other notices and nominations relating to other strata of minerals were made and given by the defenders in May and June 1898, subject to

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[1] Edinburgh and District Water Trustees v. Clippens Oil Co., Limited, Nov. 17, 1900, *ante*, p. 156.

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ders was erroneous. Moreover, any reservation or exception in a notice must be read so as to be consistent with and not destructive of the purpose of the notice.[1] The only point which could be reserved was the question of the mineral owners' title,[2] but that was not disputed in this case. It was not competent for the Water Trustees at once to claim the immediate protection of the statute, and yet ultimately to repudiate the claim of the Clippens Company for compensation. Further, it was to be noted that the Water Trustees still enjoyed the remedy which they had obtained under the statute, for they did not even now propose to withdraw the counter notices. Their real and sole complaint was that the award of damages was too large, because the minerals in question could not be worked out without bringing down another pipe which the Clippens Company were under a separate obligation bound to support. That was a point *intra fines compromissi*, and went entirely to the amount of compensation. But the arbiter was final on that, and it was not competent to prove an allegation that the arbiter had overlooked something which he ought to have taken into account.[3] The awards disclose no ambiguity of any kind, and must therefore receive effect.[4] An arbitrator, whether under a private or statu-

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the same qualifications and reservations as those just quoted. These became the subject of the second reference.

"It is to be observed that this is not analogous to cases under the Lands Clauses Acts, where a notice to treat makes a contract, which is binding on both parties, that the land included in the notice shall be taken. Under the Water-Works Clauses Acts the position of the parties is quite different. The notice is merely an inhibitory measure, intended to stop the workings, subject to compensation. There seems to be no reason why such a notice should not be qualified by reference to a legal claim to have the workings stopped on a different ground, without compensation.

"But the pursuers contend that the defenders, in giving notice under the Water-Works Clauses Act, chose their remedy; and that they have already got the benefit of it in obtaining an immediate stoppage of the mineral workings. They point out that the qualification or reservation is in general terms, and that its conditions are capable of being satisfied consistently with working out the minerals; while under the statutory notices the mineral owners are bound to leave the minerals unworked. Thus the defenders, having themselves set the statutory machinery in motion, and having obtained thereby the benefit conferred by the statute, must pay the statutory compensation.

"This contention, however, must be examined in connection with what has been done in the declarator. If that action had resulted in the defenders' right of support to the Crawley pipe being maintained otherwise than by leaving the minerals unworked, I think there would have been much force in the pursuers' argument. But I held that the Clippens Company did not in that action succeed in making out a case for substituted support;

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[1] Cripps on Compensation (4th ed.), 153; Chilworth Gunpowder Co. v. Manchester Ship Canal, Nov. 21, 1891, 8 Times L. R. 79.

[2] Metropolitan Board of Works v. Howard, Aug. 7, 1889, 5 Times L. R. 732; Campbell v. Mayor and Corporation of Liverpool, Feb. 10, 1870, L. R. 9 Eq. 579.

[3] Duke of Buccleuch v. Metropolitan Board of Works, 1872, 5 L. R. (H. L.) 418; Brakinrig v. Menzies, Dec. 17, 1841, 4 D. 274, 14 Scot. Jur. 109.

[4] Highland Railway Co. v. Great North of Scotland Railway Co., July 16, 1896, 23 R. (H. L.) 80.

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tory reference, was, according to the law and practice of Scotland, not a mere valuator, but was judge of law as well as of fact.[1]

Argued for the defenders;—The Lord Ordinary was right. The arbiter had in fact failed to take into consideration in estimating the amount of compensation the disability of the Clippens Company to work the minerals in question because of their having to support the Crawley pipe. That was established by the terms of the decreets-arbitral, but if not, then the defenders were entitled to prove it by other evidence. The basis on which the arbiter had fixed the compensation being thus ill founded, the defenders were not bound to pay the awards. Further, the references proceeded under the qualifications and reservations contained in the counter notices. These were competently introduced, and must be given effect to. They went to the very heart of the contract, which amounted to a conditional promise to pay compensation. There was nothing in the statute to strike at the introduction of such a condition. If the Clippens Company had objected to it they should have declined to accept the notices as valid. It had now been established that the Clippens Company were not entitled to work the minerals so as to injure the Crawley pipe, and as the Water Trustees were prepared to prove that the working of the minerals included in the counter notices would injure the Crawley pipe, the Clippens Company were not entitled to the sums in the decreets-arbitral which were fixed as compensation for not working the minerals included in the counter notices. But

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and the result is, that they stand interdicted from working substantially the very minerals to which the statutory notices applied. The area is not exactly the same; but I was informed that the difference is so small that it may be disregarded.

"In my opinion, it follows that the qualifications under which the notices were given and the arbiters were nominated are precisely applicable to the circumstances; and that the whole proceedings in the arbitration must be held as having taken place under reservation of the question of law as to the support of the Crawley pipe. It turns out that the company were not entitled to work the minerals; that, apart from and prior to the statutory notices, they lay under an obligation of support which required the minerals to be left unworked without further payment or compensation. I therefore hold that the qualification has become absolute, and that the awards are not enforceable.

"It was urged for the pursuers that, even so, this result could not receive effect on the record as it stands, and possibly not without the awards being reduced. No motion was made for an amendment of the record. But in the view I take, the record sufficiently raises the true question between the parties, so far as it could be done at the date of closing the record; and in assoilzieing the defenders I shall pronounce findings which will shew the ground of judgment. As to the awards themselves, it is true that in their operative part they give decree against the present defenders in unqualified terms. But in the narrative they distinctly set forth the qualifications under which the reference proceedings were instituted. And even if they did not, I think they must be read in connection with, and subject to, the terms of the initiating documents (the notices and the nominations), which determine the scope of the reference. In this view, the pursuers, in my opinion, hold the awards subject to the qualification that if they are bound to leave the minerals in question unworked otherwise than in pursuance of the statutory notices, then the sums ascertained by the awards shall not be exigible."

[1] Caledonian Railway Co. v. Turcan, Feb. 22, 1898, 25 R. (H. L.) 7, Lord Watson, p. 17.

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what right had the Clippens Company to compensation for minerals of which they were not being deprived, and which they had no right to work? Even apart from the qualifications and reservations in the counter notices, they would not have been entitled to sums awarded by the arbiter. The question of title was here involved, and that was always reserved. There being no title to work the minerals, there was no right to compensation. The arbiter was only final as to the amount of compensation. He could not decide the question of right to work. He was a mere valuator.[1] A statutory arbitrator was not in the same position as an arbiter at common law. Here he had applied the wrong law, for he had treated the Clippens Company as unfettered owners of the minerals. He should at least have issued alternative awards. The Clippens Company had forced on the arbitration to a conclusion before their title was ascertained.*

At advising,—

LORD KINNEAR.—This is one of many litigations in which the same parties have been unhappily engaged; and in order to determine the question now before us it is necessary to have in view what was decided in two at least of the former actions. The pursuers in the present case, the Clippens Oil Company, are proprietors of the estate of Straiton in Midlothian, and lessees of the minerals in the adjoining estate of Pentland, and the defenders have two lines of pipes for carrying water into Edinburgh which pass through both estates, and which at that part of their course lie close to one another in one pipe-track. The first of these two pipes, called the Crawley pipe, was laid in 1821 by virtue of an Act of Parliament passed in 1819, which contains no provisions similar to those of the Water-Works Clauses Act of 1847 for regulating the rights of mineral owners. The second, the Moorfoot pipe, was laid in 1877 by virtue of the Edinburgh and District Additional Water Supply Act of 1874, which incorporated the Water-Works Clauses Act. In so far as regards the Crawley pipe, therefore, the rights and liabilities of the parties respectively are not affected by the Water-Works Clauses Act, 1847, while as regards the Moorfoot pipe, which lies close to the other, they are admittedly regulated by that statute.

The first of the two actions to which I have referred was a note of suspension and interdict, which was presented in March 1897, at the instance of the present defenders, the Edinburgh Water Trustees, to have the pursuers interdicted from working the seams of shale and limestone in Pentland and Straiton within 40 yards of the defenders' pipe-track, or at least from working or taking away the pillars or stoops of shale or limestone within 40 yards of the pipe-track. It appeared that from 1877 onwards the pursuers had frequently given notice under the Water-Works Clauses

[1] London and Blackwall Railway Co. v. Cross, 1886, L. R., 31 Ch. Div. 354; Brierly Hill Local Board v. Pearsall, 1884, L. R., 9 App. Cas. 595; London and North-Western Railway Co. v. Walker, L. R. [1897], 1 Q. B. 921.

* At the close of the argument the defenders were allowed to add the following statement to the record:—"The sums decerned for in both the said decrees-arbitral as compensation for and in respect of minerals to be left unworked, as therein specified, were fixed by the oversman on the footing that the pursuers had an absolute right as owners to work out the said minerals unqualified by any legal obligation not to work the same so as to injure the said Crawley water-pipe or interfere with the continuous flow of water through the same."

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Act of their intention to work the minerals under and adjacent to the pipe-track, and that till the interdict was served the defenders had not endeavoured to stop them either by counter notice under the statute nor in any other way, but, on the contrary, had intimated that they preferred to take the risk of the threatened operations. In that process, however, they maintained, first, that the pursuers' company had, by working without notice, lost their right to work minerals within the protected area; and secondly, that assuming the pursuers to be still in the position of mineral owners who had duly given the statutory notice, they had lost their right by working in an unusual manner in violation of the statutory conditions. On these grounds they sought, without offering compensation, to prohibit the defenders from working any part of their minerals within the area in question. The Court thought there was no validity in either of the grounds on which it was sought to restrain the pursuers from working, and refused the interdict.[1] This decision was given on the 3d of February 1898, and on the 17th of February the defenders served upon the pursuers a counter notice under the statute with reference to shale and limestone, and on the 21st of May 1898, and subsequently again at a later date, they served similar counter notices with reference to freestone, intimating in each case that it appeared to them that the working of the mines and minerals mentioned was likely to damage their pipe-track or line of pipes, and that they were willing to make compensation to the pursuers for the same, and for all loss and damage occasioned to the pursuers by the non-working thereof, and to treat with the pursuers for payment of such compensation, and required the pursuers to leave the said mines and minerals unworked. Thereafter the parties, in terms of the Water-Works Clauses Act, and of the Lands Clauses Act, 1845, nominated arbiters to fix and determine the compensation to be paid by the defenders to the pursuers in respect of the minerals required to be left unworked. The arbiters appointed Mr Andrew Jameson, Q.C., to be their oversman, and after certain procedure, which is not alleged to have been other than regular and proper, the oversman, on whom the reference had devolved, issued his decreets-arbitral, fixing the amount of compensation to be paid by the defenders at the sums of £8079 and £2250 respectively, and decerning and ordaining the defenders to make payment to the pursuers of these sums and of the expenses of the reference. The present action is brought to obtain implement of these decrees, and to enforce payment of the sums found to be due.

The previous process of interdict referred, as I understand, to the pipe-track generally without distinguishing between the Crawley and the Moorfoot pipe. But it is common ground between the parties that the whole procedure under the counter notices and the consequent reference was applicable solely to the Moorfoot pipe. This is distinctly averred by the defenders in their answer to the second article of the condescendence, and it is not disputed by the pursuers.

In so far as regards the Moorfoot pipe, the legal effect of the proceeding I have described does not appear to me to be open to question. The statute provides that the undertakers shall not be entitled to any mines under any

[1] 25 R. 504.

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lands purchased by them unless they shall have been expressly purchased. The defenders therefore acquired as much of the surface as was necessary for their reservoirs and pipes, without being required to pay for the underlying minerals. But then the statute contemplates that the owner or lessee of such minerals may desire to work them, and that such working may probably be injurious to pipes or reservoirs. It accordingly enacts by the 22d section that if the owner, lessee, or occupier of minerals lying under the reservoirs or buildings of the undertakers, or under any of their pipes or within 40 yards therefrom, be desirous of working the same, he "shall give the undertakers notice in writing of his intention to do so thirty days before the commencement of working." The undertakers are then empowered to inspect the mines, and if it appear to the undertakers that the working of such mines or minerals is likely to damage the said works, and if they be willing to make compensation for such mines to such owner, lessee, or occupier thereof, then he shall not work the same, and the amount of compensation, if the parties do not agree, is to be fixed as in other cases of disputed compensation. The 23d section provides that if the undertakers do not within thirty days state their willingness to treat for payment of compensation, then the owner, lessee, or occupier may work his mines as if this Act and the special Act had not been passed; and the 24th section provides for the making of airways, headways, and gateways of prescribed dimensions through the protected strata. The effect of all these provisions is, that the defenders were enabled to stop all working by the pursuers within 40 yards of the Moorfoot pipe, on condition of their making payment of compensation for the minerals left unworked, and on no other condition. The effect of their counter notice was to lay upon the pursuers a peremptory and absolute prohibition against working their minerals within the prescribed area to any extent and for any purpose, excepting only for the limited purpose allowed, and under the conditions prescribed by the 24th section. On the other hand they acquired right so to stop the pursuers' workings under the express condition, which is just as absolute and peremptory as the prohibition itself, that they should make payment to the pursuers of the amount of compensation fixed by the arbiters or their oversman under a statutory reference. It seems to follow that the defenders, who have taken advantage of the enactment, must comply with the statutory condition on which alone they obtained it, and pay the compensation which the oversman has awarded.

But in the meantime it had occurred to the defenders—at what stage in their prolonged controversy with the pursuers does not appear—that by virtue of their Act of 1819 they might possibly have a right of support for their Crawley pipe of an entirely different kind from that conferred by the Water-Works Clauses Act, and so might prevent the pipe-track from being injured by mineral workings without any payment of compensation whatever. They accordingly brought an action in this Court for declarator that they were entitled to have the Crawley pipe supported, so that it might serve continuously as a conduit of water, and for a corresponding interdict against the present pursuers, who were made defenders in that action. The Court found their claim to be in substance well founded, although they were not entitled to decree in the exact terms in which it was asked. We held

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that the parliamentary grant of power to lay and maintain the pipe conferred upon the grantees a right to such support as might be necessary to make the purpose of the grant effectual, and therefore that the Clippens Oil Company could not be allowed to carry away minerals so as to destroy or injure the support of the pipe; but on the other hand, that the company were quite entitled to work and carry away such minerals as might be removed without injury, whether by reason of its being unnecessary for the support of the pipe that they should be left undisturbed, or because all risk of injury might be obviated by the provision of adequate substituted support by way of underbuilding or otherwise within the ground belonging to, or held in lease by, the defenders themselves. The Court accordingly did not grant an unqualified interdict against working in any specified area, but they interdicted the defenders—the present pursuers—from working the minerals adjacent to and under the pipe and aqueduct so as to injure them, or to interfere with the continuous flow of water through the pipe. The defenders allege that this interdict, which of course applies only to the Crawley pipe, covers practically the same ground as the area protected by the Water-Works Clauses Act for the safety of the Moorfoot pipe; and for the purpose of the argument this may be assumed to be correct. It is said that the two pipes lie so close together that support cannot be withdrawn from the Moorfoot pipe without injuring the Crawley pipe; and on the other hand that the sufficient support which must be left for the Crawley pipe will necessarily serve to keep up the Moorfoot pipe also. The defenders maintain that since the minerals for which compensation has been awarded cannot be worked out without causing the Crawley pipe to subside, it is now established that the pursuers had no right to work them, or to claim compensation for leaving them unwrought; and therefore that they themselves ought not to be compelled to pay the compensation awarded, because they could have insisted on the minerals in question being left unwrought, irrespective altogether of their rights under the Water-Works Clauses Act. In other words, they say that since the remedy they sought and obtained under the statute turns out to be superfluous, they are set free from the condition on which alone they obtained or could have obtained it.

It appears to me that this discovery comes too late. It may be that both remedies serve the same purpose, but they are nevertheless widely different both in practical and legal effect. The judgment pronounced in November last prevents the pursuers from injuring the Crawley pipe, but does not prevent them from working out if they please all the mineral which it is practicable to work without violating that condition. Under the statute they were absolutely prohibited from the moment the defenders' notice was served upon them from carrying away the smallest quantity of mineral from within the protected area, and even from keeping open the internal communications of their mine, excepting under stringent statutory restrictions. The defenders now discover that one of these remedies would be sufficient for them. But they have chosen to take both. I presume they would not have done so unless the procedure under the statute had given them an advantage which they could not obtain under their action of declarator and interdict. And indeed, this was avowed by their counsel at the bar. Mr Cooper said they served their notices under the statute because that was

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the only remedy available for immediately putting a stop to the pursuers' working, since they were advised that under their action they could not obtain an interim interdict while the question in controversy was still undecided; and he argued that that was a sufficient reason for the course they pursued. I have no doubt it was a good reason for insisting in the statutory procedure, but it is not a reason for taking advantage of that procedure and at the same time rejecting the condition on which it is given. They served a statutory notice which immediately and absolutely stopped the pursuers working, but at the same time they gave, as the statutes required them to give, an unqualified and explicit undertaking to pay the compensation which might be awarded. They have had the advantage which according to their own avowal they proposed to themselves, for the pursuers have been prevented from working during the whole period between February 1898 and the 27th November last, and we cannot know what mineral might have been removed in that time or how much the pursuers may have lost, if they are not to receive compensation. But they obtained that advantage under a statutory contract, and they are bound to perform their part of the contract. But this is not all the advantage they take from the statute. If they had obtained no other benefit than a practical equivalent for the interim interdict which they say they could not have obtained at common law, I do not think we should have been disposed to receive with much favour an argument that they are relieved of their liability to pay compensation, because the statute has served its turn and they are no longer in need of its protection. But in fact they are in full enjoyment of that protection. Over and above the interdict against injuring the pipe, they have the peremptory prohibition of the statute against all working of the minerals within the protected area; and there is nothing on the record to suggest that they are prepared to abandon either remedy in the slightest degree. For all that appears they are still prepared, as they are certainly entitled, to enforce the statutory remedy to its fullest extent. But it is not material whether the whole procedure has been for their advantage or not. They have put the statutory remedy in force upon the statutory condition; and they are bound, in my opinion, to pay the compensation awarded, because that is their contract in terms of the statute. I have said that the defenders gave an unqualified undertaking to pay compensation, because I am unable to accept the argument that their notice was qualified by a condition which relieves them of liability to pay, in consequence of its being found that they have a right to support for the Crawley pipe irrespective of the Water-Works Clauses Act. This is rested, in the first place, on the insertion of the words "in so far as you are entitled thereto" after the words giving notice that the working of the mines and minerals after mentioned is likely to damage their pipes and that they are willing "to make compensation for the same." It appears to me to make no difference whether these words, according to their grammatical construction, mean "entitled to the said minerals" or "entitled to the compensation." In either view they would probably have enabled the defenders, if indeed they were necessary for that purpose, to maintain a plea to title, notwithstanding the statutory notice and the arbitration proceedings. The owners of water-works must deal with the persons whom

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they find in possession of the minerals, and if such persons give notice of their intention to work, it may be that they are entitled to stop them by serving a counter notice under the statute without being thereby held to concede the validity of their title. But it is unnecessary to consider any question of that kind, because the pursuers' title is unimpeachable. I do not see that the words serve any other purpose. The second ground for maintaining that the notice is conditional is the declaration that the notice is given "without prejudice to, and under reservation of, all objections to your working out the said minerals competent to us, and of our right of support of the Crawley pipe." But a point reserved is kept back from present use or consideration, in order that it may be brought forward in some other proceeding for some future or other purpose; and I cannot see how the allegation of a right which is expressly reserved, or in other words, excluded from the scope of a contract, can be held to add a term to the contract or to qualify its express conditions. The defenders' construction is, in my opinion, inadmissible. It comes to this, that the reservation is equivalent to a stipulation that the liability to pay compensation shall be dependent on their failure to make good in some other process a right of support for the Crawley pipe. But the words will not bear that meaning; and if the defenders desired to make any stipulation of the kind, they were bound to express it in plain language. It is material to observe that any qualification which the notice may be meant to express is as clearly applicable to the requisition to leave the minerals unworked as to the undertaking to make compensation, both because under the statute the two obligations are correlative and reciprocal, and because the declaration is so expressed as to cover the entire notice and every part of it. But when this is seen the defenders' construction is really reduced to an absurdity. A notice to stop working, which is to have immediate effect, and is yet to depend for its effect on the success of the notice-givers in establishing some other right at an indefinite time, in some unspecified process at law, would be unmeaning and ineffectual. But it would be just as ineffectual to require the mine-owners to stop working immediately on payment of compensation, provided the compensation should not be payable if the givers of the notice should succeed in some other process not yet instituted or even specified. The mine-owner could not be expected to comply with any such demand. I do not think that is the true meaning of the notice, and it would not have served the defenders' purpose to state any such condition in plain words. It appears to me that the reservation may have kept open their right to claim support for the Crawley pipes under the Act of 1819, notwithstanding their procedure under the Water-Works Clauses Act. But it does not, in my opinion, detract in the slightest degree from the absolute character, either of the requisition to leave the minerals unworked or of the undertaking to pay the compensation that may be awarded. I should not have dwelt upon this point if it had not been so anxiously urged upon us, and if it had not received some countenance from the Lord Ordinary. But the plain meaning of the notice seems to me to be quite unmistakeable. They say, "We have other rights against you in connection with our Crawley pipe, and other complaints which we do not intend either to abandon or to table for discussion in this proceeding, but setting all these aside for the present, we

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now, in pursuance of the Act, give you notice that the working of certain of your minerals will hurt our Moorfoot pipe, and that we are willing to make compensation, and therefore, in respect of our apprehension and of our undertaking to pay you compensation, we call upon you to stop working." This is what the notice says, and I think the legal effect of the obligation it creates is just as clear as the meaning of the words. .

It is a different question whether the right established by the judgment of November last may not affect the value of the pursuers' right to work out their minerals, and consequently the amount of the compensation to which they may be entitled. I cannot assent to the defenders' view that in consequence of that judgment it must be held that their predecessors in 1821 paid to the landowners the full value of the minerals which must be left unwrought in order to support the Crawley pipe. What was held was that the landowners must at this distance of time be taken either to have received satisfaction in the sense of the statute for the permanent occupation of their lands by a pipe and aqueduct requiring permanent support, or to have consented to such occupation without satisfaction by way of money payment. But there was no evidence that any payment of money had in fact been made, and it was held that after the lapse of eighty years no such evidence was required in order to make the Water Company's right effectual. But whatever may have been the transaction between the defenders' predecessors and the landowners, the property of the minerals undoubtedly remained with the latter; and although they held their property subject to the support of the Crawley pipe, no additional burden or restriction can be laid upon them in consequence of that transaction. At the same time, there can be no question that the pursuers' right to work the minerals now in question is subject to a serious restriction, and if the question were open I do not think it doubtful that we should have held that that must affect the amount of compensation. But that was a question for the arbiters and the oversman, and is not a question for this Court. There is nothing on record to shew that the oversman failed to take into account every element of value which ought to have affected his judgment. But after the argument was closed the defenders put in a minute, of which, as I understand, they ask to be allowed a proof, to the effect that the sums allowed for compensation were "fixed by the oversman on the footing that the pursuers had an absolute right as owners to work out the said minerals unqualified by any legal obligation not to work the same so as to injure the Crawley water-pipe." If this were otherwise a relevant averment, I do not at present see how it could be proved. It is settled by the judgment of the House of Lords in the *Duke of Buccleuch* v. *The Metropolitan Board of Works*,[1] that an umpire may be examined for the purpose of proving what were the proceedings before him, so as to arrive at what was the subject-matter of adjudication when the proceedings closed and he was about to make his award, but that no question can be put to him for the purpose of proving how the award was arrived at, or what items it included, or what was the meaning which he intended to be given to it. The decreet-arbitral must speak for itself, and the oversman cannot be examined for the purpose

[1] 5 L. R. (H. L.) 418.

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of discovering what passed in his mind in the exercise of his functions, or what he intended to be included in his decree. But apart from any difficulty of proof, I think the statement is not relevant, because it is a mere statement of what is alleged to have been in the oversman's mind. It is not stated whether he proceeded on the footing alleged because the obligation not to injure the Crawley pipe was not brought before him by the defenders as an element of value tending to diminish the amount of compensation, or because it was brought before him and he rejected it as irrelevant.

In the former case the defenders cannot complain that he failed to consider an element of value which they, for whatever reason, withheld from his consideration. In the latter case he may have committed an error in law, but right or wrong, the question was proper for his decision, and his decision is final. I observe from the printed excerpts from the proceedings, although there is no averment or plea upon the subject in this action, that the fact of the defenders' claim for support of the Crawley pipe, and that they had brought an action to make it good, were brought to the notice of the oversman. This is set out in the answer.* There might or might not have been ground for rejecting the plea for delay, because if the arbitration were premature it might well have been thought that it was the defenders themselves who set it on foot prematurely, and that if they did not postpone their notice to stop working until their right was decided on the action of declarator, that must have been because they desired the immediate advantage of the Act, and that they must submit to the immediate disadvantage. But however that may be, it is not a question for us. It was a question as to the conduct of the arbitration for the oversman to decide; and it is not suggested that there was any misconduct on his part which would entitle us to interfere with his decision. It does not appear whether it was urged upon him that the existence of the claim went to diminish the compensation, nor whether, when he decided to proceed with the arbitration, he did so because he thought the right alleged in the action of declarator irrelevant, or because he formed his own opinion about it, and gave such weight to it in estimating the compensation as he thought fit. But, again, these were questions for him; and this Court has no jurisdiction to review his judgment. It was argued that if he went wrong in law his error may be set right by the Court. But the contrary was decided by the House of Lords, not for the first time, in the *Caledonian Railway* v. *Turcan*,[1] where the law is thus stated by Lord Watson:—"Assuming that the arbiter went wrong, what jurisdiction has this House or the Court below to interfere with his finding? My Lords, by the law of Scotland the oversman, who is appointed in terms of the deed of submission, is made judge of law as well as of fact, and he is not liable to have his decision reviewed, reversed, or modified, unless the parties undertake to shew—what has not been attempted here—either that he was guilty of misconduct in his office, or that he exceeded the bounds of the jurisdiction conferred upon him by the submission." This is said to be inconsistent with the *Brierly Hill Local Board* v. *Pearsall*.[2] If there be such inconsistency it can only arise from a difference between the law and practice of England and that of

* *Ante*, p. 1116, *note*. [1] 25 R. (H. L.) 7, at p. 17. [2] 9 App. Cas. 595.

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Scotland, because both are recent decisions of the House of Lords, and neither can be called in question. Lord Watson seems to suggest in the case of *Turcan*[1] that there may be such a difference. In that case we are bound by the Scottish decision. But I cannot see that there is any conflict between the two judgments. What was decided in the case of *Pearsall*[2] was that when a claim for compensation had been made against a local authority for damages caused by the exercise of their power under the Public Health Act, an arbiter had jurisdiction to make his award as to the fact of damage and to the amount of compensation, which were the only questions referred to arbitration, although the local authority disputed their liability to make compensation at all under the Act, which was a matter reserved for the ordinary tribunals. Whether in such a case the question of liability should be determined before the arbitration, or whether the arbitration may be taken first and the question of liability raised in answer to an action on the award, appears to me to be a question of practice and convenience which has no bearing whatever upon any matter in controversy in this case.

We heard a great deal of argument, with much citation of authority, to shew that an arbiter under the Lands Clauses Act is a mere valuator, and that his award cannot be final on questions of liability, but that discussion appears to me to be beside the question. The principle I take to be that the arbiter's award is final on the questions submitted to him by the contract of reference, but it does not foreclose any question outside the submission; and therefore if a statutory contract refers a question of compensation to arbiters their award cannot be taken as determining a question of title which is outside the reference. But we have nothing to do with questions of that kind in the present case. For the oversman has decided nothing but the question of compensation, and although for that purpose he may have required to consider questions of law, his award determines only the amount to be paid and nothing more. The defenders' liability to pay compensation was not a matter for the judgment of the oversman, and does not depend upon his award. It depends upon the statutory contract which they made, when they, in pursuance of the Water-Works Act, required the pursuers to leave minerals unworked on their undertaking to pay such compensation as might be awarded. I think they have shewn no reason why they should be relieved of that contract.

This is the main ground on which I am unable to assent to the reasoning of the Lord Ordinary. His Lordship says the case is to be distinguished from cases of the taking of land under the Lands Clauses Act, "where the notice to treat makes a contract which is binding on both parties." Under the Water-Works Act," says his Lordship,"," the position of parties is quite different. The notice is merely an inhibitory measure, intended to stop the working." But it is an inhibitory measure which makes a very serious invasion of the proprietary rights of the mineral owner, and which the Water Trustees cannot take, and do not pretend to take, without binding themselves to pay compensation. That is distinctly set out in the notice, by the terms of which it is as plain as words can make it that the payment

[1] 25 R. (H. L.) 7. [2] 9 App. Cas. 595.

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of compensation is the consideration offered in terms of the statute for the stoppage of the mineral working; and therefore the serving of the notice makes a statutory contract just as binding as that from which the Lord Ordinary thinks it is to be distinguished. It is not a voluntary contract on the part of the mineral owners, because the Act of Parliament makes an offer on their behalf from which they cannot withdraw if the undertakers accept it. But it is entirely voluntary on the part of the Water Trustees; and having taken the benefit of it they cannot now turn round and avoid it on any such ground as that suggested. At the same time it is right to observe that the case was presented to the Lord Ordinary under a different aspect from that in which we have to consider it; and it is possible that his Lordship might not have come to the same conclusion if he had not supposed that the pursuers were to be prohibited by interdict from working any mineral within a specific area which is practically identical with the area protected by the Water-Works Clauses Act.

For these reasons I am of opinion that the defenders are bound to pay compensation; and that it is irrelevant to allege that the amount awarded is excessive; because they are bound by this contract of reference to submit to the arbiter's decision, which the Court has no jurisdiction to review.

The LORD PRESIDENT, LORD ADAM, and LORD M'LAREN concurred.

THE COURT pronounced the following interlocutor:—"Recall the said interlocutor: Decern for payment by the defenders to the pursuers, the Clippens Oil Company, Limited, of (1) the sum of £8079 under the reference first mentioned in the summons, with interest thereon at the rate of 5 per centum per annum from 11th November 1898, together with the sum of £564, 10s. 11d., the taxed amount of the expenses in said reference; and (2) the sum of £2250 under the reference second mentioned in the summons, with interest on said sum at the like rate from the same date, together with the sum of £533, 4s. 5d., the taxed amount of the expenses in said second reference: Further find the pursuers entitled to the expenses of this action, and remit the account of said expenses to the Auditor to tax and to report."

J. GORDON MASON, S.S.C.—MILLAR, ROBSON, & M'LEAN, W.S.—Agents.

No. 183.
July 19, 1901.*
Macgregor v. Glasgow District Subway Co.

MALCOLM MACGREGOR, Pursuer (Appellant).—*Baxter—Cullen.*
GLASGOW DISTRICT SUBWAY COMPANY, Defenders (Respondents).—*Salvesen, K.C.—Younger.*

Reparation—Negligence—Railway—Injury to passenger owing to crowd on station platform.—An intending passenger from a station of the Glasgow District Subway, who had been injured through being caught between the station platform and an incoming train, brought an action for damages against the company. He averred that the trains of the company consisted of two carriages, each with a single entrance door; that only persons holding tickets were admitted to the station platforms; that on the day in question the pursuer, having got a ticket, was admitted to the platform of the

* Decided March 19, 1901.

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station in which he was injured; that on that day, owing to a breakdown, trains were running at intervals of fifteen minutes, instead of the advertised interval of three minutes; that the interval being longer a much larger number of intending passengers than usual came to the station before the train arrived; that they were admitted by the ticket-clerk to the platform, with the result that it became greatly overcrowded, particularly at the point where the trains stopped; that on the train entering the station, and while it was still in motion, the crowd concentrated at the point where one of the entry doors would come to a stop, with the result that the pursuer was pressed against the moving train, and being caught between it and the platform, received the injuries on account of which he sued; that these injuries were due to the fault of the defenders or their servants in failing to take proper steps to prevent the overcrowding of the platform. The defenders pleaded that the action was irrelevant.

Held that the pursuer's averments were sufficient to entitle him to inquiry, and issue *allowed*.

2D DIVISION. Sheriff of Lanarkshire.

IN May 1900 Malcolm Macgregor, coal-merchant, Glasgow, brought an action in the Sheriff Court at Glasgow, against the Glasgow District Subway Company, for £1000 as damages for personal injuries.

The pursuer averred (Cond. 1) that the "defenders are proprietors of the undertaking known as the Glasgow District Subway, carrying passengers by cars which are hauled by an endless cable or wire rope on a circular subway route." (Cond. 2) "The defenders in carrying on this undertaking run trains consisting of two cars coupled together, each of which has at its outer extremity an exit door, and at its inner extremity an entry door. The carrying capacity of such trains is about seventy-five passengers. The said trains are run into the stations at a speed of ten or twelve miles an hour, and are suddenly pulled up for egress and ingress of passengers, and immediately restarted with such rapidity as to cause intending passengers to crowd opposite the entry doors. Owing to the construction of the said cars it is difficult, if not impossible, for an intending passenger, while standing on a platform at said stations, to ascertain whether there is vacant accommodation or not. The said trains are run in charge of a driver, a guard or conductor, and a boy, who are the servants of the company. The said platform is about 12 feet wide, and can only, with safety, accommodate from forty to fifty persons opposite where the cars stop."

(Cond. 3) "On Monday, 22d January 1900, . . . the pursuer arrived at the defenders' Kelvinbridge Booking Office about a quarter to nine A.M. for the purpose of travelling by the defenders' subway car eastwards to Saint Enoch Subway Station, and after having passed the turnstile and paid his fare, for which he received a ticket, he was admitted to the station platform, upon which a number of intending passengers had then assembled. In terms of the defenders' regulations only intending passengers holding tickets are admitted to said platform." (Cond. 4) "Defenders' trains are timed by public advertisement and otherwise to run at intervals of three to four minutes. On the morning in question, owing to a breakdown of defenders' system, or other cause, the traffic had become disarranged, and their trains going eastwards had for some time been running at intervals of fifteen minutes or longer, a fact which was well known to the defenders and their servants. From the time of pursuer's arrival on the said platform, no eastward bound train arrived for a period of from twelve to fifteen minutes, while during said period three westward bound trains passed. During this period, which is at one of

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the busiest hours for traffic of the day, a large number of additional passengers had arrived at the Kelvinbridge Station, and had been passed through the said turnstile, and been given access to the said platform by the ticket-clerk or servant of the defenders, and that without any inquiry as to the number of passengers already thereon. The passengers accumulated on said platform amounted in number to 200 or thereby, with the result that the same was greatly overcrowded, particularly at the point in centre of platform opposite where the trains stop. The only official of the defenders in charge of said station was the stationmaster, and notwithstanding that he was aware of the irregularity with which the trains were running, and that owing to the long intervals between trains larger numbers of passengers assembled than was usual, he took no step to regulate the number of passengers to be admitted to the platform at one time, or otherwise to provide for their safety." (Cond. 5) "At the expiry of said period a train for pursuer's destination entered the station. The cars thereof were much overcrowded, and passengers were standing on the exit and entrance platforms, in contravention of defenders' bye-laws. Notwithstanding this the conductor of said train, as it was passing the point where the pursuer was standing, and while the train was still in motion, opened the entrance door thereof. The crowd on the platform thereupon concentrated at the point opposite where the entry door would come to a stop, with the result that pursuer was pressed against the moving train, and in endeavouring to save himself from injury, his left leg was caught between the moving cars and the edge of the platform, and he was dragged for several yards until the train was brought to a standstill." The pursuer then detailed the nature of his injuries. (Cond. 7) "The injuries to the pursuer were caused by culpable negligence of the defenders, or of those for whom they are responsible, in failing to have any proper regulations or to take any proper steps in the conduct of their said undertaking for the protection of their passengers when congregated upon said platform. In particular, the servants of the defenders, the said stationmaster and ticket-clerk at said Kelvinbridge Station, were in fault in allowing upon the platform thereof a larger number of passengers than it could safely accommodate."

The defenders pleaded;—The action is irrelevant.

On 29th June 1900, the Sheriff-substitute (Strachan) allowed a proof before answer.

The pursuer appealed for jury trial, and lodged an issue of fault in ordinary form.

The parties were heard upon the defenders' plea to relevancy.[1]

LORD YOUNG.—In this case the Sheriff-substitute has allowed a proof before answer, and the pursuer has appealed to this Court with a view to jury trial. The defenders object that the pursuer's averments are so obviously irrelevant that we ought to dismiss the action without inquiry into the facts. That is not my opinion. I think that it is impossible to say that within the averments here the pursuer cannot establish a case of fault against the defenders. I think that we should allow an issue.

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[1] *Authorities cited.*—Scott's Trustees v. Moss, Nov. 6, 1889, 17 R. 32; Cannon v. Midland Great-Western Railway Co., 1880, L. R. (Irish) 199; Hogan v. South-Eastern Railway Co., 1873, 28 L. T. 271.

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LORD TRAYNER.—I have great doubt as to the relevancy of the pursuer's averments, but I do not dissent.

LORD MONCREIFF.—According to the statements of the pursuer upon record passengers wishing to travel by this line had to enter the train by one or other of two entry doors. It was natural, therefore, that intending passengers should collect at the points on the platform opposite these doors, and if a larger crowd assembled than was usual there was a risk of passengers being injured in the way that the pursuer says he was injured. The question is whether the pursuer has relevantly averred a case of fault against the defenders in not taking proper precautions against this risk. On that question I say no more than that I think the pursuer is entitled to an issue.

LORD JUSTICE-CLERK.—I have had great doubt, but I cannot say that the pursuer's averments are irrelevant.

THE COURT approved of the issue proposed by the pursuer.

W. KINNIBURGH MORTON, S.S.C.—WEBSTER, WILL, & Co., S.S.C.—Agents.

No. 184.
July 19, 1901.*
Glen v. Semple.

HUGH GLEN, Pursuer (Appellant).—*M'Lennan—Craigie.*
THOMAS SEMPLE, Defender (Respondent).—*Johnston, K.C.—Deas.*

Bill of Exchange—Cheque—Negotiability—Condition—"Pay to A against cheque"—Bills of Exchange Act, 1882 (45 *and* 46 *Vict. cap.* 61), *secs.* 3 *and* 8.—*Held* that the words "against cheque" appearing upon a cheque had no effect upon its negotiability.

2D DIVISION. Sheriff of Lanarkshire.

IN July 1900 Hugh Glen, coalmaster, Cambuslang, brought an action in the Sheriff Court at Glasgow against Thomas Semple, 45 Hope Street, Glasgow, for payment of £400, being the sum in a cheque in the following terms:—

"£400. *Glasgow, 27th Nov.* 1899.

"The Commercial Bank of Scotland, Limited, St George's Cross Branch, 135 Great Western Road.

"Pay to Messrs Kyle & Hurry against Cheque or [the word 'Order' was deleted] four hundred pounds sterling.

"No. 23787.

"THO. SEMPLE."

The cheque was crossed "& Co.", and was indorsed "Kyle & Hurry"—"Hugh Glen."

The pursuer averred;—(Cond. 1) "On or about 27th November 1899 the defender drew on the Commercial Bank of Scotland, Limited, St George's Cross Branch, Glasgow, a cheque for £400 in favour of Messrs Kyle & Hurry, writers, Glasgow. The said payees indorsed and delivered said cheque to pursuer, who is now the holder in due course. The defender's explanation in answer is not known and not admitted. Explained that the pursuer had no concern with or knowledge of the circumstances under which the said cheque was granted, and had no knowledge of the same when he became holder of the said cheque. . . . Denied that the cheque produced bears

* Decided July 18, 1901.

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any condition on its face. Explained further and averred, that the said cheque was indorsed and handed to the pursuer by Kyle & Hurry in part payment of an antecedent debt due by them to the pursuer, and was accepted by the pursuer in part payment of said debt." (Cond. 3) "The pursuer duly presented the said cheque for payment at the said branch of the Commercial Bank of Scotland, but payment was refused. . . ."

The defender answered;—(Ans. 2) "Admitted that on the date mentioned the defender granted the document in question, which is referred to for its terms. *Quoad ultra* not known and not admitted. Explained that on 27th November 1899 Mr Alfred Hurry, writer, Glasgow, called on the defender and requested a loan of £610. He explained that he would be in a position to repay the money the following day, and offered his firm's cheque for the amount of the loan, stating that his cheque would be honoured the following morning. The defender thereupon obtained from the said Alfred Hurry his firm's cheque for £610, dated 27th November 1899, and the defender handed him the document in question, and another for £210 of same date. It was arranged between the parties that the documents granted by defender were not to be honoured until Messrs Kyle & Hurry's cheque was also honoured, and the document produced bears this condition on the face of it. The said Alfred Hurry further agreed, that in the event of his transferring the documents by indorsation, he would make this condition known to the indorsee, and averred that he did so. . . ." (Ans. 3) "Admitted that on presentation at the bank payment was refused, as the condition attached had not been purified."

The pursuer pleaded, *inter alia*;—(1) The defender having drawn said cheque, and the payees therein having indorsed and delivered same to pursuer, the defender is liable to pay the sum contained in said cheque to the pursuer, as holder thereof, in due course.

The defender pleaded, *inter alia*;—(3) The conditions in said document not having been purified, the pursuer is not entitled to decree.*

A proof before answer was allowed. The import of the evidence led at the proof sufficiently, for the purposes of this report, appears from the opinions of the Court.

On 22d February 1901, the Sheriff-substitute (Guthrie) pronounced this interlocutor:—". . . Finds that the cheque bears the words 'against cheque,' meaning thereby, as was understood by the parties thereto, that it was not to be paid unless a cheque

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* The Bills of Exchange Act, 1882 (45 and 46 Vict. cap. 61), enacts, sec. 3, *inter alia*,—"(1) A bill of exchange is an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a certain sum in money, to or to the order of a specified person, or to bearer."

"(3) An order to pay out of a particular fund is not unconditional within the meaning of this section; but an unqualified order to pay, coupled with (*a*) an indication of a particular fund out of which the drawee is to reimburse himself, or a particular account to be debited with the amount, or (*b*) a statement of the transaction which gives rise to the bill, is unconditional."

Sec. 8, *inter alia*,—"(1) When a bill contains words prohibiting transfer, or indicating an intention that it should not be transferable, it is valid as between the parties thereto, but it is not negotiable."

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of the same date, by the firm of Kyle & Hurry to the defender upon their banker, should be honoured: Finds that this condition and understanding was known to pursuer when he received the cheque: Finds that Kyle & Hurry's cheque was dishonoured, and that the defender stopped payment at his bank of the said cheque: Therefore sustains the defender's third plea in law, and assoilzies him from the conclusions of the action, and decerns: Finds him entitled to expenses," &c.

The pursuer appealed.[1]

At advising,—

LORD JUSTICE-CLERK.—The defender in this case drew a cheque for £400 in favour of Messrs Kyle & Hurry, who indorsed and delivered the cheque to the pursuer. The defender refuses to pay, on the plea that the cheque bears a condition on its face, and that the condition not having been fulfilled the pursuer is not entitled to succeed. In other words, he maintains that it was not a cheque negotiable in the ordinary way. Certain communications between the defender and Messrs Kyle & Hurry are referred to in the proceedings, but these have not, in my opinion, any bearing upon the case. The sole and the simple question is, whether there is anything on the face of the cheque which places an indorsee in any worse position as regards his rights under it than in the case of an ordinary cheque, which is a negotiable document.

Now, the fact is that there are only two things in the cheque by which it can be distinguished from an ordinary cheque. First, there is on the face of it no reference to "bearer" or "order." I say on the face of it, for although this arises from a pen having been put through the word "order," that is equivalent to that word not being there at all, and nothing can be founded on this being the result of a deletion, as the fact of deletion excludes the reading in of the word for any purpose whatever. It only results in this being a cheque drawn in favour of Kyle & Hurry. There is nothing to shew how the cheque came to be in that form, but I am unable to see how the pursuer's rights and interests as an indorsee can be affected by the fact. It cannot be maintained, and it was not in fact maintained, that a cheque drawn in favour of A B, without any other words, cannot be indorsed on to another so as to transfer the right to the proceeds.

The second ground of refusal to pay maintained by the defender is, that there are written on the cheque these two words, "against cheque." It is argued by the defender, and the Sheriff-substitute has given effect to the contention, that these words constitute a condition which deprived the holder of the cheque of the rights of an indorsee, and that the condition remaining unfulfilled the pursuer cannot insist on payment. Now, if an onerous indorsee of a cheque is to be precluded from his ordinary rights as holder

[1] *Cited by the parties at the hearing.*—Carlos v. Fancourt, 1794, 5 Durn. and East, 482; Jenny v. Herle, 2 Raym. 1361; Inman v. Clare, 1858, Johns. Chanc. Rep. 769; Banner v. Johnston, 1871, L. R., 5 Eng. and Ir. App. 157; Griffin v. Weatherby, 1868, L. R., 3 Q. B. 753; Jury v. Barker, 1858, 27 L. J., Q. B. 255; *In re* Boyse, 1886, L. R., 33 Ch. D. 612; Thomson on Bills, p. 15; Chalmers on Bills of Exchange Act, sec. 3; Byles on Bills (10th ed.), 109-10.

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of a cheque because of something written on the cheque by the drawer which imports only conditional rights under it, it appears to me that two things are essential—first, it shall be manifest that a condition is imposed, and second, that the condition should be self-explanatory. I am unable to hold that the words written on this cheque have the effect of a condition and I am unable to see from the words what the condition could be. Cases occur where words are written on cheques which are of the nature of a memorandum or note by the drawer, and which would more appropriately find their place on the counterfoil. Therefore the mere presence of words cannot be held to import any restriction of an indorsee's rights. The words in this case do not appear to me to be nearly so strong to imply a condition as were the words in numerous cases quoted at the bar, in which the argument in favour of a superimposed condition was rejected. And certainly the words are not self-explanatory. As Mr Park, the bank-agent, says, he would not, before paying such a cheque, take steps to ascertain what condition, if any, such words were intended to import, it not being possible to ascertain the condition from the cheque itself. I am further unable to hold that the evidence establishes that the pursuer knew what the meaning of the words was, and that they made the cheque not negotiable in ordinary course. Any expressions used by the pursuer did not necessarily infer that he knew of or attached any such meaning to them. To make such a conclusion right it would, I think, require something much more pregnant than what is found in the evidence in this case.

My opinion is that the decision of the Sheriff is not well founded, and that he erred in sustaining the third plea in law for the defender to the effect that "the conditions in said document not having been purified the pursuer is not entitled to decree."

I would move your Lordships to recall the interlocutor and grant decree in terms of the conclusions of the petition.

LORD YOUNG.—I arrive at the same conclusion.

The pursuer is the indorsee and holder of the cheque on which he sues, and it may be presumed, in the absence of sufficient evidence to the contrary, that he is the *bona fide* onerous holder of the cheque, and that his action is good, and without any defence to it unless the defence is to be found in the words "against cheque," to which your Lordship has referred, and the evidence that has been led regarding these words. I am of opinion that these words are no answer to the action.

I think that it was admitted before us—at all events it is to my mind quite clear—that the words of themselves are no defence to the action. But the defender avers, as usual quite irregularly in answer to the pursuer's statement, that this cheque was given under certain circumstances of which he gives this account—[His Lordship read the defender's Ans. 2 above quoted]. On that averment the Sheriff-substitute allowed a proof before answer, and we have the proof before us. Now, I think we do not need to decide the question whether a case for proof is averred. There is no averment of any agreement between the defender and the pursuer, the indorsee. It is averred that Hurry agreed to make the condition known to the indorsee, and that he did so. Taking that to mean an averment of an

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agreement between the indorsee and the pursuer that the cheque would not be honoured except on condition that Hurry's cheque was paid, and that the proof was allowed properly, I think it is not established that there was any such agreement, and that is sufficient for the decision of the case.

What the defender did was to send intimation to the bank stopping payment of the cheque. Now, the granter of a cheque may stop payment of it on good cause. The defender might have good cause as against Hurry until a certain cheque of his was paid, but that is not good cause for stopping the cheque as in a question with a *bona fide* onerous indorsee, which the present pursuer was and is.

With reference to the argument that the words "against cheque" are equivalent to "not negotiable," it is important to observe that Mr Park, the bank-agent, does not say that that is their meaning; but says that on presentation of the cheque with these words upon it payment would have been made to the indorsee unless the bank had received the letter stopping payment. It was not in consequence of the words on the cheque, but in consequence of the letter, that payment was stopped. I am of opinion that this is not a case of making any exception to the ordinary rule in business, that a cheque should be paid on presentation except upon a very distinct statement of an agreement to the contrary. If it is not so paid, the granter is liable. I think the Sheriff-substitute's interlocutor should be recalled. I think it is better not to find that the proof is irrelevant, although my opinion is that it is, but I think that we should make findings in fact negativing the averments of special contract with the indorsee.

Lord Trayner.—There is no doubt that the cheque in question constitutes a good obligation on the defender to pay £400 to the pursuer as indorsee and holder thereof, unless the words "against cheque," which appear on the face of it, have the effect of making the cheque not negotiable or indicate in the words of the statute—"an intention that it should not be transferable." I cannot attribute any such effect or meaning to the words. It is obvious to remark that had the defender intended to make his cheque "not negotiable" the easiest and most direct way of doing so would have been to write these words upon the cheque. The words are well known and in constant use among merchants—their purpose and effect are equally well known and recognised. The words "against cheque" are not, so far as I can ascertain from the proof, either of common use or of well defined and recognised meaning. That they did not indicate any intention to make the cheque non-transferable may be gathered from the evidence of the banker, Mr Park, who says that he would have paid that cheque in ordinary course across the counter if the defender had not by letter stopped payment. It was nothing on the face of the cheque itself which stopped payment to an indorsee. What the words in question do mean it is hard to discover, and although the pursuer says he knew what they meant, and Mr Park says they are "intelligible," neither of them says exactly what they do mean. For my own part, unaided by any evidence on the subject, I should have been disposed to regard the words as indicating to the banker to whom the cheque was addressed the particular fund or account "against" which that cheque was debited. However that may be, I think we cannot

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hold on the evidence before us that the words "against cheque" are equivalent to "not negotiable," or indicate any intention that the cheque was not to be transferable. But if the pursuer took the cheque in the knowledge that the words "against cheque" meant that the cheque in question was not to be payable until some other valid cheque had been presented of equal or greater amount, out of which such payment alone was to be operated, and that this was the condition on which the cheque was granted, he may be personally barred from claiming payment, the condition not having been fulfilled. This I understand is the ground on which the Sheriff-substitute has decided the case against the pursuer. He thinks it is proved not only that the defender granted the cheque on that condition, but that the pursuer took the cheque in the knowledge of that condition. I do not think there is evidence to support that view.

Further, I am unable to accept the view that the pursuer, pressing his debtor for payment, accepted the cheque on such a condition as made it of no value to any indorsee. To avoid the liability which in ordinary course attached to the defender as the granter of a dishonoured cheque, it lay upon the defender to shew that his obligation to meet the cheque was conditional, and if the condition did not appear *ex facie* of the cheque, to bring home knowledge of the condition to the onerous indorsee and holder of it. This *onus* I think the defender has not discharged, and therefore the pursuer is entitled to our judgment.

LORD MONCREIFF.—I concur.

(1) The meaning which the defender now seeks to put on the words "against cheque" is "not negotiable." But there is no proof whatever of practice or custom warranting such an interpretation—it is unknown.

Besides, such a meaning would not be consistent with the purpose for which the cheque was granted, which was, that it might be at once transferred to a creditor. If it was only to be paid out of funds provided by Hurry, Hurry's own cheque would have been equally good.

(2) Assuming the competency of the proof allowed, it is not satisfactorily proved that the pursuer took the cheque in the knowledge of the meaning and effect of the words contended for by the defender and accepted it on that footing.

THE COURT pronounced this interlocutor:—"Sustain the appeal, and recall the interlocutor appealed against: Find in fact (1) that the defender drew a cheque for £400 in favour of Messrs Kyle & Hurry, writers, Glasgow, on the Commercial Bank of Scotland, Limited (St George's Cross Branch, Glasgow), on 27th November 1899; (2) that the said payees indorsed and delivered said cheque to the pursuer, who became the holder in due course; (3) that the pursuer duly presented the said cheque for payment at the said branch of the said Commercial Bank of Scotland, and that payment was refused; and (4) that the defender has been applied to for payment of the sum contained in said cheque, but he delays or refuses to pay said sum: Find in law that the defender is liable to pay the said sum of £400 to the pursuer as holder in due course of said cheque: Therefore repel the defences, and ordain the defender to make

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payment to the pursuer of the said sum of £400, with interest thereon at 5 per cent per annum from 27th November 1899 till payment, and decern: Find the pursuer entitled to expenses," &c.

MILLER & MURRAY, S.S.C.—J. & D. SMITH CLARK, W.S.—Agents.

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MRS MARY KIRKLAND FERGUSSON, Pursuer (Respondent).—*Campbell, Q.C.—Hunter.*
ROBERT MORRIS POLLOK AND OTHERS, Defenders (Appellants).—*Sol.-Gen. Dickson—Guy.*

Nuisance—Rifle Range—Army—Foreshore—Artillery and Rifle Ranges Act, 1885 (48 *and* 49 *Vict. cap.* 36), *sec.* 3.—The firing on a rifle range near the sea leased by a certain corps of volunteers and sanctioned by the Secretary of State for War, made the foreshore in the vicinity of the targets unsafe for persons passing along the foreshore. The public had from time immemorial used this part of the foreshore for recreation and as a means of passage. The consent of the Board of Trade under section 3 of the Artillery and Rifle Ranges Act 1885 had not been obtained to any bye-laws made by a Secretary of State restricting the use of the foreshore by the public in order that the range might be used as such.

Held that a member of the public was entitled to interdict against the use of the rifle range.

Nuisance—Rifle Range—Army—Public Road—Military Lands Act, 1892 (55 *and* 56 *Vict. cap.* 43), *sec.* 16.—*Held* that a member of the public was entitled to interdict against the use of a rifle range by volunteers in respect that the noise of the firing was a source of danger to horse traffic on a public road in the vicinity, and that the consent of the road authorities had not been obtained under section 16 of the Military Lands Act, 1892.

Nuisance—Rifle Range—Adjoining Proprietor.—Evidence on a consideration of which it was *held* that the proprietor of an adjoining piece of ground was not entitled to interdict against the use of a rifle range by volunteers, in respect that no appreciable risk of injury had been proved.

2D DIVISION. Sheriff of Ayrshire.

THE Kingcase rifle shooting ranges, for yeomanry and volunteers, were situated immediately to the north of the town of Ayr, close to the sea-shore. There were two ranges—the north and the south range. The north range, which was 500 yards in length, was wholly within a field called the Quarry Park, belonging to James Mutter, Ardrossan. The south range—600 yards long—was partly in the Quarry Park, but terminated in a field immediately to the south, called the Shorefield, belonging to the trustees of Mr J. M. Ferguson. The Kingcase Road—a public road from the Ayr and Prestwick Road to the sea-shore—ran along the northern boundary of the Quarry Park, being separated from it by a wall four feet high. The extreme firing points of both ranges were in the north-east corner of the Quarry Park, that of one range being ten feet, and that of the other range being twenty feet from the Kingcase Road. The direction of the ranges from these points was to the south-west, towards the sea. The target of the north range was 30 yards, and that of the south range 53 yards, from the line of high-water mark.

Mrs Mary Kirkland Fergusson, wife of David Fergusson, solicitor, Ayr, was the proprietor of the property abutting on the sea-shore immediately to the south of the Shorefield.

* Decided Nov. 20, 1900.

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In April 1894 Mrs Fergusson, with consent of her husband, raised an action in the Sheriff Court at Ayr against Mutter and J. M. Ferguson's trustees, as proprietors respectively of the Quarry Park and the Shorefield, and also against Colonel Robert Morris Pollok, the officer commanding the Ayrshire Yeomanry Cavalry, and four other officers, being the officers commanding batteries of volunteer artillery and companies of volunteer infantry in Ayr. Colonel Pollok and the other officers called as defenders were the tenants of the Quarry Park and of the Shorefield under leases granted by the first mentioned defenders respectively and their agricultural tenants.

The pursuer prayed (1) for a finding that the shooting-ranges on the Quarry Park and the Shorefield, and the shooting which took place at the said ranges, were nuisances, and dangerous, noisome, and disagreeable to the pursuer and her tenants, and caused real and substantial injury to her properties, and were dangerous, noisome, and disagreeable to the pursuer and her tenants and to the public generally when they had occasion to use the Kingcase Road and the foreshore; (2) for interdict against the defenders Colonel Pollok and the volunteer officers, and the volunteers under or that might be at any time under their command, or under the command of their successors in office, conjunctly and severally and individually, from shooting with guns or rifles upon or over the said fields belonging to the other defenders; (3) for interdict in similar terms against shooting over the foreshore; and (4) for interdict in similar terms against shooting in the quarry field within a radius of 500 yards of the Kingcase Road.

Colonel Pollok and the other officers called as defenders lodged defences.

On 26th June 1894 process was sisted to await the issue of proceedings under the Artillery and Rifle Ranges Act, 1885 (48 and 49 Vict. cap. 36), sec. 3, and the Military Lands Act, 1892 (55 and 56 Vict. cap. 43), secs. 14 *et seqq.* In the result no bye-laws under these statutes were obtained. Nor was the consent of the road authorities obtained to any bye-law providing for the restriction of the use of the Kingcase Road under section 16 of the Military Lands Act, 1892. After repeated sists proof was allowed on 9th June 1898.

The evidence led at the proof disclosed the following facts (in addition to those above narrated):—The ranges had existed and had been used for over thirty years—during the later years to a greater extent than formerly. No member of the public had ever been injured by a bullet fired on the ranges. The public had from time immemorial used the foreshore, including the portion behind the targets, for recreation, and as a means of communication between Ayr and Prestwick. Although precautions were taken with a view to stopping the firing when anyone came within the zone of danger on the foreshore, it was not safe to use that part of the foreshore while the ranges were occupied by firing parties. The ground sloped down from the targets to the foreshore. There was evidence that the firing from the extreme firing points close to the Kingcase Road was a danger to horse traffic passing along that road. There was evidence that a rifle bullet ricochetted on to or in some other way reached the pursuer's lands on one occasion in 1886 or 1887. The "line of safety" was a line fixed in conformity with the War Office Regulations. This line diverged gradually from the line of fire, until, in the present case, when it was in a line with the target, it was 100 yards off the line of fire. The nearest point of the pursuer's property was 80

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yards from the line of safety. Further evidence in regard to the alleged injury to the pursuer's property is found in the notes of the Sheriffs.

On 23d December 1898 the Sheriff-substitute (Orr Paterson) pronounced this interlocutor:—"Finds in fact . . . That the foreshore behind the targets, and for at least 100 yards on each side of the targets, is in the line of fire, and that persons passing along the foreshore between these points are in danger from direct fire or from bullets which ricochet: That the public have for time immemorial used the foreshore between Ayr and Prestwick, including this portion of it, for recreation and as a means of communication between these places: That the 600 yards firing point of the south range is within 10 feet of the Kingcase public road, and the 500 yards firing point of the north range is within 20 feet of the said road: That the near proximity of these firing points to this public road is a source of danger to the horse traffic passing along the road: . . . That there is risk of injury to persons on the western portion of the pursuer's lands adjoining the sea-shore from the firing at the rifle ranges, or at least that the possibility of danger from the firing has not been disproved: That the pursuer's property is materially depreciated in value through the proximity of the rifle ranges: That the use by the defenders of the existing ranges for rifle shooting in the manner hitherto practised by them is to the nuisance of the pursuer and of the public using said foreshore for the purpose of recreation, and of passing between Ayr and Prestwick, and of the pursuer and of the public using said Kingcase Road for the purpose of horse traffic, and of the pursuer as proprietor of said lands: Finds in law that the pursuer is entitled to interdict against the defenders using these ranges in the manner hitherto practised by them, or in any other manner whereby nuisance may be caused to the public or to the pursuer: Therefore interdicts, prohibits, and discharges the said defenders, Robert Morris Pollok," &c., "and the volunteers at present under, or that may be at any time under their command, or under the command of their successors in office, conjunctly and severally and individually, from shooting over said ranges in the manner hitherto practised by them, or in any other manner whereby nuisance may be caused to the pursuer or to the public using the said foreshore for recreation or as a public way, or using the said Kingcase Road for horse traffic, or to the pursuer as proprietor of said lands in Newton," &c.*

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* "NOTE.— . . . The pursuer has not only a theoretical title, but, from the proximity of her lands, a practical interest to sue for the removal of this interference with the public use of the foreshore.

"Her tenants have been in the habit of resorting to the foreshore, and, in the language of Lord Chancellor Herschell (in *Magistrates of Edinburgh*, 13 R. (H. L.), p. 79), 'It is competent to those who have been in the use of a right common to the public to bring an action when that right is interfered with.'" (The Sheriff-substitute then adverted to the evidence bearing on the alleged interference with public rights.)

"The question whether the pursuer as proprietor of her Newton lands, lying to the south at a distance of 253 yards from the ranges, is entitled to complain of these ranges, and whether her lands are injuriously affected by the firing at the ranges so as to constitute a nuisance, is one of some nicety on the proof; but the Sheriff-substitute has come to be of opinion, although not without hesitation, (1) that there is possible danger to persons using the portions of the pursuer's lands adjoining the sea, or, at least, that the defenders who make such an exceptional and dangerous use of their

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On appeal the Sheriff (Brand), on 30th March 1899, adhered.*
The defenders appealed.

After the parties had been heard, the cause was delayed in order to the matter being laid before the Board of Trade, under the Artillery and Rifle Ranges Act, 1885, section 3. It having been intimated to the Court that nothing had been done by the Board of Trade,

At advising,—

LORD JUSTICE-CLERK.—This case has been for a long time before the law Courts. Being a litigation relating to a military rifle range, as to which it is alleged that its use is dangerous to persons who may frequent the foreshore in front of it for the purposes of passage and recreation, it was thought desirable that there should be opportunity for the matter being brought before the Board of Trade, that the Department might consider whether regulations could not be made which would ensure safety in the use of the range. After a long delay the Court is informed that nothing

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property have not proved that the apprehension of danger is imaginary and unreasonable; and (2) that pursuer's property is materially injured in value through the apprehension of danger from the firing at the ranges.

"The skilled witnesses for the defenders say that the zone of danger as ascertained by experiment, and defined in the musketry regulations, is within 100 yards on each side of the targets, but this, although perhaps practically sufficient for military purposes, is to a certain extent an arbitrary limit, and many persons like Sergeant-instructor Brownlee and Corporal Fidler will, notwithstanding, be of opinion that it is impossible to tell when a bullet ricochets in what direction it may be diverted, or how far it may go.

"In addition to the contingency of danger from bullets which ricochet, there is also a possibility of danger to the seaward portion of pursuer's lands from direct fire.

"Although the danger either from ricochet bullets or direct fire is to some extent problematical, the proof goes to establish that the apprehension of possible danger depreciates the value of pursuer's property, at least for feuing purposes. . . .

"Statutory provision has been made for the restriction of public rights where land appropriated to military purposes abuts on the sea, or where its use interferes with a highway, but up to the present time the defenders have not obtained the benefit of these provisions, or statutory authority, for the use of their rifle ranges."

* "NOTE.—. . . The pursuer's contentions are not without considerable support from some of the defenders' witnesses. Thus Christie, of twenty-four years' experience as a marker at one or more of the ranges in question, admits the possibility of danger from a ricochet bullet passing over the pursuer's lands lying next to the sea. Again, Mr J. M. Ferguson admits (assuming the pursuer's lands to be suitable for building purposes) that no one would feu or build on these lands while the rifle ranges exist, or, at least, these ranges would affect the value of the said lands for building. Mr Ferguson is a proprietor in the locality, and in the main a witness hostile to the pursuer. The above admission, therefore, is of the greatest significance. So, likewise, the witness Dunlop, when asked whether the proximity of the rifle ranges to the pursuer's lands would prevent anyone building, thus answers:—'They might be shot if they were building there forenent the targets.' When under re-examination for the defenders, and on being shewn the plan with the line of fire and the pursuer's ground, says:—'I think, looking at that plan, it would be dangerous to build a house on the pursuer's lands next the sea.' Thomas M'Cracken, formerly a

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has been done affecting the position of the case since it was taken to avizandum. The pursuer is therefore well entitled to ask that the case be now disposed of.

There are three grounds of complaint by the pursuer—(first) that the use of the range is directly a nuisance to her from the risk of bullets fired on the range falling on her property; (second) that the use of the range interferes with the safe use of the foreshore by foot-passengers, in consequence of bullets fired in the direction of the targets passing over the ground behind the butts, and either directly, or by ricochetting, falling on the shore; and (third) that certain firing points are so near to a public road that the shots fired tend to alarm persons and to excite horses so as to cause danger.

As regards the first ground of complaint, I have come to the conclusion that the pursuer is not entitled to succeed. I cannot hold on the evidence that it discloses any case of injury, present or prospective, of which she can complain or ask that in anticipation she should be protected. It cannot be said that in the regular use of the range for target practice there is no possibility of bullets coming on to her ground. That such a thing may happen must be admitted. For of course at any rifle range it is

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marker, speaks to a complaint of a supposed danger by two pedestrians coming along the shore, who afterwards wrote to the public press stating the danger they had incurred. Then Sergeant Burrell candidly concedes that 'in volley firing the firing is bad, and bullets do not always go to the same place.' He also admits that the proportion of misses in volley firing is for the yeomanry about one-half at the distance of 200 yards,' and he mentions one instance where a man fired wildly, when 'he stopped that man from firing any more.' Lastly, the defenders' witness Morris says 'that the selling value of the pursuer's lands may be, and probably is, affected by the proximity of the ranges,' and on being asked as to the neighbouring lands, in particular Mr Lelland's field, Hamilton's fields, and Bone's field, concedes with regard to these that, on account of the ranges, people would be 'chary of feuing' there. This evidence from witnesses adduced against the pursuer is of much force in aiding to prove that the pursuer's witnesses are not mere nervous and imaginative persons, but that the complaints are well founded and reasonable.

"On the legal aspects of the case I do not think there is room for serious doubt. The pursuer has proved, despite what may be called the professional evidence as to the safety of the range, that the rifle practice carried on (1) is attended with danger to the pursuer or her tenants, both in their use and occupation of the lands in Newton, and in passing along the foreshore below the targets; (2) is the cause of discomfort and annoyance, and therefore a nuisance, using that word in the sense assigned to it in *Hislop* v. *Fleming*, Dec. 22, 1882, 10 R. 426 and 432, as also in *Crump* v. *Lambert*, 1867, L. R., 3 Eq. 409, see p. 412 (see also *Fraser's Trustees* v. *Cran*, June 1, 1877, 4 R. 794); and (3) is injurious to the feuing value of the lands in question.

"With regard to the foreshore, it was strenuously urged for the defenders that the instance of the action was defective in respect the Crown had not been called as a party. I cannot agree with that view. The pursuer is not seeking to vindicate the rights of the Crown or the general right of the public in the foreshore, but to vindicate and make good her own and her tenants' right of access thereto as members of the community, and this she is entitled to do without calling the Crown. The fact that the Crown has the right of property in the foreshore does not derogate from this view. Nor is it inconsistent with the ruling in *Cameron and Gunn* v. *Ainslie*, Jan. 21, 1848, 10 D. 446, that a private party has no right to complain of

possible that on some occasion an accident may occur by which a shot may go in some direction from a firing point on a range, not being the direction of the target. If that were a sufficient ground for interdict, then no range could be kept open where there was inhabited ground anywhere all round within the extreme range of the firearm used there. The matter is dealt with in a practical fashion by ascertaining the reasonable margin on either side of the target within which danger may be apprehended in the ordinary use of the range. In practice this is found to give all reasonable safety, and the large number of rifle ranges throughout the country which are passed by authority, on which a very large quantity of ammunition is being constantly fired at the target, without there being any indication of danger calling for legal interference, proves that this recognised margin for safety is sufficient, although, of course, in very rare cases accidents may occur, the use of firearms at all having always an element of risk if due care is not observed.

In this case, although the range has been in regular use for many years, there is no evidence tending to shew that the range has in any true sense been a cause of danger on the pursuer's property. There is evidence that once a bullet did fall within the lines of her lands, but that is all, and there is no evidence in regard to the circumstances. I cannot hold, therefore, that any such danger has been proved from the occupancy of the range as to entitle the pursuer to a judgment in respect of her own property.

The second question relates to the foreshore *ex adverso* of the ranges. The case must be taken upon the footing that at the present time those using the rifle range have no authority from the Crown to use the foreshore by making it a background to a range from which bullets may pass over or fall on the foreshore. The Board of Trade has issued no regulations, and therefore the question is purely between a member of the public who has the public right of going on the foreshore, and persons who interfere with the safety and comfort of those so going. Whatever power the Board of Trade may have in the matter, the Board of Trade is not interfering, and

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encroachments on the foreshore. The words quoted by the Sheriff-substitute from the judgment of Lord Herschell in the case of the *Magistrates and Town-Council of Edinburgh* v. *Blackie, &c.*, Feb. 18, 1886, 13 R. (H. L.) at p. 79, directly support the opinion now stated. In using these words Lord Herschell makes it clear that he was proceeding on the decision of the House of Lords in the *Duke of Atholl* v. *Torrie*, June 4, 1852, 1 Macq. 65.

"In like manner the pursuer is entitled to vindicate her right, as one of the public, to a public right of way, without obstruction or annoyance, along the Kingcase Road.

"It was observed by Lord Chancellor Halsbury in *Ogston* v. *Aberdeen Tramways Co.*, Dec. 14, 1896, 24 R. (H. L.) p. 11, that the pursuer there was 'entitled to sue in respect of an interference with the highway which is applicable to him in common with the rest of Her Majesty's subjects.' That observation has a direct bearing here. . . .

"The course taken in England in *Bannister* v. *Bigge*, 1865, 34 Beav. 287, of granting an injunction to prevent the use of a volunteer rifle range till it had been rendered free from danger is not applicable here, particularly in view of the inquiry before referred to.

"I would only add that the judgment of Jessel, M. R., in the case *Hawley* v. *Steele*, 1877, L. R., 6 Ch. Div. 521, proceeds on very special circumstances, and is not at variance with the decision now given. . . ."

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has done nothing to solve the question whether the range can be used with safety to the public under regulations framed for the purpose of securing it. Whether any such arrangements can be made we do not know, but in the meantime the case must be dealt with as we find it. Now, I can have no doubt that at these ranges, both at ordinary individual practice, and still more at collective firing of any kind, bullets will pass over the butts and ground intervening between the targets and the shore. That is a state of matters of which I think the pursuer has a right to complain, and to demand that it be interdicted by a Court of law.

The last question relates to the firing points. These are in one or two cases within fifteen or a few more feet of the road. This must I think be an interference with traffic on the road, and may cause annoyance to passengers and even danger in connection with horse traffic. There may be many places where the public, from good nature, and a desire for patriotic reasons not to interfere with the musketry of troops, are content to allow such firing near a road to take place, provided the firing is stopped when required by persons who have to ride or drive along the road. But I cannot hold that, if a member of the public objects to such practice he is not entitled to have it stopped by a Court of law. Accordingly I think that upon this part of the case the pursuer is also entitled to interdict.

LORD YOUNG concurred.

LORD TRAYNER.—I think the pursuer has failed to shew that she as an individual is entitled to interdict against the defenders on the ground of nuisance or infringement of private rights. On the other hand, the claim for interdict on the ground that the proceedings complained of are a nuisance to and infringement of the rights of the public is, in my opinion, made out, and to that extent ought to be granted.

LORD MONCREIFF.—Except in one particular I entirely agree in the carefully considered judgments of the Sheriffs. The one point as to which I differ is the finding to the effect that the use by the defenders of the existing ranges for rifle-shooting in the manner hitherto practised by them involves a risk of injury to persons on the western portion of the pursuer's lands adjoining the sea-shore, and that the pursuer's property has materially depreciated in value through the proximity of the rifle ranges. It is not proved to my satisfaction that there is any risk of injury to persons upon the pursuer's lands. The only evidence offered in support of that contention is, that in 1886 or 1887 a bullet ricochetted and landed on the pursuer's ground. There is nothing to shew that such an accident ever occurred again, or is likely to occur again, and the conclusion from the evidence is that it cannot have been the result of a shot fired fairly at the targets.

In regard to the foreshore and roads adjoining the rifle range, I am of opinion that the pursuer has made good her right as a member of the public to the interdict she asks. We can only dispose of the case according to the existing law and statutory regulations applying to such ranges. There is distinct evidence of danger to the public, from the proximity of the ranges in their present position, in their use of the foreshore and the adjoining public roads, against which they are entitled in law to be protected by

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interdict. It is satisfactory to know that in this manner we are, in a sense, not final, because, as the Sheriff-substitute points out, statutory provision has been made for the restriction of public rights where land appropriated to military purposes abuts on the sea, or where its use interferes with a highway. From section 3 (1) of 48 and 49 Vict. cap. 36, it appears that if the consent of the Board of Trade is obtained, the rights of the public on the foreshore may be restricted if this is required for the exigencies of the military purposes to which the land abutting on the sea is appropriated; and by the Military Lands Act, 1892, section 16, provision is made for the regulation of the use of land acquired for military purposes, as in a question with the public, where a bye-law framed by authority of the statute interferes with any highway.

I am therefore of opinion that, subject to a slight alteration in regard to injury to the pursuer's own lands, the Sheriff's judgment should be affirmed and the appeal dismissed.

THE COURT pronounced this interlocutor:—"Recall the interlocutors of the Sheriff-substitute and the Sheriff of Ayrshire, dated respectively 23d December 1898 and 30th March 1899: Find in fact that the defenders are lessees of lands in Prestwick and Newton which they use as rifle ranges, on the lines delineated on the plan No. 125 of process: That the foreshore behind the targets, and for at least 100 yards on each side of the targets, is in the line of fire, and that persons passing along the foreshore between these points are in danger from direct fire or from bullets which ricochet: That the public have from time immemorial used the foreshore between Ayr and Prestwick, including this portion of it, for recreation and as a means of communication between these places: That the 600 yards firing point of the south range is within 10 feet of the Kingcase public road, and the 500 yards firing point of the north range is within 20 feet of the said road: That the near proximity of these firing points to this public road is a source of danger to the horse traffic passing along the road: That the use by the defenders of the existing ranges for rifle shooting in the manner hitherto practised by them is to the nuisance of the pursuer and of the public using said foreshore for the purpose of recreation, and of passing between Ayr and Prestwick, and of the pursuer and of the public using said Kingcase Road for the purpose of horse traffic: Find in law that the pursuer is entitled to interdict against the defenders using these ranges in the manner hitherto practised by them: Therefore interdict, prohibit, and discharge the defenders . . . and the volunteers at present under, or that may be at any time under, their command, or under the command of their successors in office, conjunctly and severally and individually, from shooting from the said firing points and over said ranges in the manner hitherto practised by them, and decern: Find" as to expenses.

DALGLEISH & DOBBIE, W.S.—IRONS, ROBERTS, & COSENS, W.S.—Agents.

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IN

VOLUME III.

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AGENT (LAW). *Women—Law-Agents Act*, 1873.

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AGENT AND CLIENT. *Trust—Liability for Imprudent Investment.*

1. Trustees having been held liable to the beneficiaries on the ground that a trust investment was imprudent and had resulted in loss to the trust, one of the trustees brought an action against the law-agent to the trust for relief on the ground that he had failed in his duty to advise the trustees as to the expediency of the investment. *Held* (after a proof) that in making the investment the trustees had not relied on the agent's recommendation, but on their own independent inquiries, and that accordingly the agent was not liable in relief. Johnstone v. Thorburn, Feb. 19, 1901, p. 497.

Remuneration—Promotion of Private Bill in Parliament—Attendance in London of Local Agent—Proof of Employment.

2. The promoters of a bill for making a railway from Motherwell to Bellshill employed a firm of law-agents in Glasgow as agents for the bill and also Burns, a solicitor in Motherwell, as a local agent. When the bill was before the Committee in the House of Commons, Burns went to London and gave assistance to the promoters, without being formally instructed to do so. Subsequently the promoters declined to pay for his services. *Held* that Burns was entitled to payment of his charges for his services in London. Burns v. Colville, July 19, 1901, p. 1108.

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ARBITRATION. *Award—Leave to Appeal—Failure of Justice—Housing of Working Classes Act*, 1890, *Schedule II.* (26).

1. Under Schedule II. (26) of the Housing of Working Classes Act, 1890, leave to appeal against the arbitrator's award fixing the amount of compensation for lands compulsorily taken under the Act can be granted by the Court only "upon being satisfied that a failure of justice will take place if such leave is not granted." In an application for leave to appeal by the owner of the lands in terms of the Schedule, *held* that it was not a sufficient ground for granting leave—(1) that the arbitrator had limited the skilled evidence of the value of the lands to two witnesses on each side, or (2) that he had, in addition to hearing such evidence, personally inspected the lands in the presence of the parties, and in his award had proceeded in part on his own judgment as a man of skill. Macknight's Trustee v. Corporation of Edinburgh, Nov. 14, 1900, p. 90.

Informal reference to person of skill—Refusal by Arbiter to allow law-agents to appear—Award of lump sum where separate claims referred.

2. *A firm of contractors and the corporation of a burgh agreed by informal missives to refer to an engineer, as arbiter, the question of "the amount to be paid" by the corporation to the contractors "in respect of the extra cost incurred by the necessary adoption of" the system of air pressure in the tunnelling for certain portions of a sewer, which the contractors had undertaken to construct for the corporation. The contract for the construction of the sewer contained no provision for the use of air pressure. While the reference was pending the contractors and the corporation agreed to refer to the same arbiter certain other disputed items—not relating to the use of air pressure—in the contractors' account.* Held (rev. *judgment of Second Division*) (1) *that the parties had agreed to refer to the arbiter as a person of skill and experience to adjust, without the legal formalities of an arbitration, the amount to be paid "in respect of the extra cost incurred" by the use of the air-pressure system, and that the arbiter was entitled to object to the appearance of law-agents as being against the original understanding of the parties, and that, apart from this, as arbiter he was entitled to do so;* (2) *that the arbiter was entitled to determine the amount that should be paid to the contractors in respect of the extra cost without taking evidence as to the amount which was actually expended by them;* (3) *that the decree-arbitral was not invalid because it did not distinguish the sum awarded on account of the use of the air-pressure system from the sum (if any) awarded under the second branch of the reference.* Paterson & Son, Limited, v. Corporation of Glasgow, July 29, 1901, H. L., p. 34.

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ASSIGNATION. See *Contract*, 5—*Trust*, 2.

BANK. See *Cautioner*, 2, 3.

BANKRUPTCY. *Trust—Trust-deed granted by solvent proprietor to prevent dilapidation of family estates—Supervening Bankruptcy.*

1. In 1893 a Scotch Earl, on the narrative that he had contracted large debts, and that V, his father-in-law, had agreed to lend him £40,000 in order to pay off certain unsecured debts, on the express condition that he should grant a trust-disposition of his whole estates for the purposes after-written, and that he had agreed to do so, disponed to himself, his father-in-law, and another person, his whole heritable and moveable estates *acquisita et acquirenda*, with power to sell, in trust for the following purposes:—(1) For payment of the £40,000 advanced, and of future advances; (2) for payment of debts then due by the granter; (3) for such alimentary payments as the trustees should see fit to make to the granter and his family; (4) on the granter's death to convey the residue to the granter's widow and children, subject to his appointment, and failing appointment, to the child succeeding to the title. The trust was declared to be irrevocable by the granter unless with the consent and concurrence of the trustees, but it was declared that with such consent and concurrence it might be brought to an end, and the residue reconveyed to the Earl subject to the debts and liabilities then affecting it. The trustees at once entered into possession, and recorded the disposition in the Register of Sasines. In 1898, the Earl having, on his own petition, been adjudicated bankrupt in England, a trustee in bankruptcy was appointed upon his estates. *Held* that the trust-disposition had *in hoc statu* been superseded by the bankruptcy, that the trustees were bound to denude of the estate and effects, subject to any valid securities over the estate and effects, and on satisfaction of such rights of lien or indemnity as they might have, in favour of the trustee in bankruptcy, and that they were bound to count and reckon with him for their intromissions. Salaman v. Rosslyn's Trustees, Dec. 21, 1900, p. 298.

Sequestration—Acquisitions of Undischarged Bankrupt after sequestration—Diligence—Bankruptcy (Scotland) Act, 1856, *sec.* 103.

2. In a competition relating to estate acquired by a bankrupt after the date of his sequestration, *held* that a declarator by the Lord Ordinary, in terms of section 103 of the Bankruptcy Act, 1856, was necessary to make the trustee's right to such estate effectual against the diligence of creditors of the bankrupt whose debts had been incurred after the date of the sequestration. Grant v. Green's Trustee, June 28, 1901, p. 1016.

Sequestration—Business carried on by Undischarged Bankrupt.

3. *Held* that where the creditors of an undischarged bankrupt allow him to carry on business on his own account, they will be barred from claiming the proceeds of the business to the prejudice of the business creditors. Grant v. Green's Trustee, June 28, 1901, p. 1016.

Sequestration—Discharge of Bankrupt—Failure to pay 5s. in the £1—Bankruptcy and Cessio (Scotland) Act, 1881, *sec.* 6.

4. A sequestrated bankrupt, whose estate paid no dividend, two years after his sequestration applied for his discharge. Circumstances in which the Court *refused* the application, in respect that the bankrupt had failed to discharge the *onus* of shewing that his failure to pay 5s. in the £1 had arisen from circumstances for which he could not justly be held responsible. Neilson, Feb. 12, 1901, p. 446.

Sequestration—Discharge of Bankrupt—Procedure where bankrupt becomes insane—Nobile Officium—Bankruptcy (Scotland) Act, 1856, *secs.* 146, 147.

5. In a petition by a sequestrated bankrupt for his discharge, which was ultimately not opposed, the Lord Ordinary pronounced a deliverance finding the bankrupt entitled to a discharge, and appointing him to take the declaration required by section 147 of the Bankruptcy (Scotland) Act, 1856. No declaration was made, the bankrupt having

BANKRUPTCY—*Continued.*

become insane. The bankrupt's curator bonis having been sisted as a party, the Court, on a report by the Lord Ordinary, *dispensed* with the declaration and *remitted* to the Lord Ordinary to grant the discharge. Roberts, May 14, 1901, p. 779.

See *Entail*, 1—*Marriage-Contract*, 5.

BETTING. See *Justiciary Cases*, 1, 7.

BILL OF EXCHANGE. *Proof—Payment—Bills of Exchange Act*, 1882, *sec.* 100.

1. *Held* that section 100 of the Bills of Exchange Act, 1882, did not make parole proof of payment of a bill competent. Robertson v. Thomson, Oct. 19, 1900, p. 5.

Joint Acceptors—Relief inter se—Proof—Cautioner.

2. In a claim of relief by one of two acceptors of a bill against the other it is competent to prove by parole the true nature of the transaction between the acceptors and their reciprocal obligations. Crosbie v. Brown, Nov. 7, 1900, p. 83.

Proof—Parole—Collateral Agreement—Bill drawn on behalf of another.

3. A bill was drawn by A and accepted by B, who became bankrupt. In the sequestration a claim was made by C, who produced, along with the bill, an affidavit signed by A, to the effect that he had drawn the bill on behalf of C, and in pursuance of this A blank indorsed the bill to C after C's claim had been lodged. In a proof before the trustee it was established by parole evidence that A had signed the bill as drawer on behalf of C, and that B had accepted the bill in consideration of a debt due by him to C. *Held* that the parole proof was competent, and that C as holder, indorsee, and true creditor, was entitled to a ranking. Crosbie v. Brown, Nov. 7, 1900, p. 83.

Cheque—Negotiability—Condition—"Pay to A against cheque"—Bills of Exchange Act, 1882, *secs.* 3 *and* 8.

4. *Held* that the words "against cheque" appearing upon a cheque had no effect upon its negotiability. Glen v. Semple, July 19, 1901, p. 1134.

BONA FIDES. See *Justiciary Cases*, 8.

BRIBERY. See *Justiciary Cases*, 2, 3.

BURGH. *Dean of Guild—Civil or Criminal Jurisdiction—Penalty—Burgh Police Act*, 1892, *sec.* 487—*Summary Procedure Act*, 1864, *sec.* 28.

1. In a petition to a Dean of Guild Court, that Court imposed a penalty of £5 on the respondent. An appeal by the respondent to the Court of Session was objected to as incompetent, on the ground that the proceedings were criminal and not civil, in respect that by sec. 487 of the Police Act, 1892, the Magistrates of burghs were authorised to pronounce a sentence of imprisonment in default of payment of a pecuniary penalty, and that by sec. 28 of the Summary Procedure Act all proceedings by way of complaint were to be deemed to be of a criminal nature where the Magistrate was authorised to pronounce a sentence of imprisonment. The Court *repelled* the objection, on the ground that sec. 487 of the Burgh Police Act, 1892, did not apply to a Dean of Guild Court. Fraser v. Downie, June 4, 1901, p. 881.

Dean of Guild—Jurisdiction—Burgh Police (Scotland) Act, 1892, *secs.* 152, 153.

2. *Held* that by sec. 153 of the Burgh Police (Scotland) Act, 1892, the commissioners of a burgh have power, "on a consideration of the special circumstances of the case," to sanction the laying out of a "new street" less than 36 feet wide, and that where they have done so their decision is binding on the Burgh Dean of Guild Court, and it is thereafter *ultra vires* of the latter to refuse a warrant for the erection of buildings on the street so sanctioned, on the ground that it is less than 36 feet wide. Barr v. Lee, Feb. 14, 1901, p. 484.

BURGH—*Continued.*

Dean of Guild—Jurisdiction—Railway Bridge over public street—"Building"—Edinburgh Municipal and Police Act, 1891, *secs.* 48 *and* 59—*The Edinburgh Improvement and Tramways Act*, 1896, *sec.* 74.

3. *Held* (1) that a girder bridge supported by stone piers abutting on a public street was a building within the meaning of section 59 of the Edinburgh Municipal and Police Act, 1891, and required a warrant from the Dean of Guild Court for its erection, and (2) that the Edinburgh Improvement and Tramways Act, 1896, did not exempt railway buildings from the jurisdiction of the Dean of Guild Court. Caledonian Railway Co. v. Somerville, Nov. 6, 1900, p. 50.

Dean of Guild—Warrant to erect building—Procedure.

4. *Held* that an order by the Dean of Guild Court to lodge an application for a warrant and relative plans was competent, although the buildings to which the warrant referred were already erected. Caledonian Railway Co. v. Somerville, Nov. 6, 1900, p. 50.

Dean of Guild—Appeal—Penalty—Reduction on Appeal—Expenses.

5. On a petition under the Burgh Police (Scotland) Act, 1892, the owner of certain new buildings was found to have contravened section 180 of the Act, by having permitted his building to be occupied before he had obtained a certificate from the burgh surveyor, and the maximum penalty of five pounds was imposed on him. In an appeal the Court, holding that there had been a contravention, but that it was merely technical, *reduced* the penalty to 2s. 6d., and found the appellant entitled to two-thirds of his expenses. Downie v. Fraser, July 10, 1901, p. 1044.

Dean of Guild—Appeal—Competency—Order to take down ruinous buildings—Edinburgh Municipal and Police Act, 1879, *sec.* 166.

6. In a complaint under section 166 of the Edinburgh Municipal and Police Act, 1879, the Dean of Guild Court, proceeding on their own skill and knowledge, after due inspection of the buildings in question, pronounced an interlocutor finding that the buildings were in a ruinous state and ordering the owner to take them down. In an appeal the owner asked for further inquiry as to the condition of the buildings, either by a remit or by proof. *Held* that no case had been made out for disturbing the judgment of the Dean of Guild Court, even if review was competent on the question of fact. Somerville v. Macdonald's Trustee, Jan. 25, 1901, p. 390.

See *Justiciary Cases*, 2, 3—*Police—Public Health.*

BYE-LAW. See *Justiciary Cases*, 1—*Police*, 14.

CASUALTY. See *Fee and Liferent*, 2—*Superior and Vassal*, 1, 2.

CAUTIONER. *Reduction—Facility and circumvention—Liability of creditor for misrepresentations by principal debtor—Agent and Principal.*

1. In an action for reduction of a cautionary obligation in a bond granted by Thomson as principal debtor and by the pursuer as cautioner, in favour of Low, the following facts were proved:—Thomson, who was insolvent, being pressed by Low, who was one of his creditors, to obtain security for his debt, asked the pursuer, who was his brother-in-law, to become cautioner in a bond for the amount of the debt. The pursuer was a retired butler, seventy-eight years of age, and was infirm and facile. The pursuer refused to become cautioner without consulting his law-agent. Thomson then returned to Low and informed him of the pursuer's refusal. Low told Thomson to tell the pursuer that it was unnecessary to consult a law-agent, and that he would never be required to pay anything if he signed. Thomson told this to the pursuer, who then signed the bond without consulting his law-agent. The fact that Thomson was insolvent was not disclosed to the pursuer. The pursuer was charged to pay the sum in the bond. *Held*

CAUTIONER—*Continued.*
that the cautionary obligation fell to be reduced. Sutherland v. W. M. Low & Co., Limited, June 19, 1901, p. 972.
Payment—Appropriation—Bank.
2. By letter of guarantee dated in 1894 five persons jointly and severally guaranteed to a bank "due payment of all sums for which the U. Company, Limited, are or may become liable to you, the amount which we are to be bound to pay under this guarantee not to exceed £12,500," it being declared that the bank might at their discretion grant time or any other indulgence to the U. Company without discharging the liability of the guarantors; and further, "that this guarantee shall apply to and secure any ultimate balance of the sums that shall remain due to you after applying any dividends, compositions, and payments you may receive, . . . and shall be without prejudice to any other securities or remedies you may have for the general obligations or any particular obligation of the U. Company." In January 1896 Main, one of the guarantors, intimated to the bank that he withdrew from the guarantee. The bank on receiving this intimation closed an account-current which the U. Company had with them, and which was then overdrawn to the extent of £12,000. Immediately thereafter the directors of the U. Company called up its remaining capital, the call being payable at the bank. In all £6000 was paid into the bank in respect of the call, and was entered by the bank in a special account headed "Call Account." This was a credit account only. This was done in accordance with the intention of the company that the £6000 should be available for its business. Shortly afterwards the bank opened a new account-current with the U. Company. This account-current did not contain any reference to the earlier account-current. In May 1896 the U. Company went into liquidation. The new account-current was then overdrawn to the extent of £2300. The respective debit and credit balances shewn on the old account-current and the call account were undiminished. Ultimately a dividend of 10s. in the £1 was paid in the liquidation. The bank then called on Buchanan and Brown, two of the guarantors, to pay £4300 as being the sum due under the guarantee. In bringing out this sum the bank had applied the £6000 of call money in reduction of the general indebtedness of the U. Company to the bank. Buchanan and Brown paid £4300 to the bank, and then brought an action against Main for payment of his share thereof. Main contended that the £6000 of call money ought to have been applied exclusively to the reduction of the overdraft of £12,000 existing when he withdrew from the guarantee. *Held* that the defender had no right to require that the call money should be applied exclusively to the reduction of the £12,000 overdraft, and that he was liable for his share of the sum paid by the pursuers. Buchanan v. Main, Nov. 30, 1900, p. 215.
Joint Cautioners—Relief—Measure of cautioners' liability inter se—Insolvency.
3. Five persons jointly and severally guaranteed to a bank payment of all sums for which a company might become liable to the bank. The company having gone into liquidation, the bank called on two of the cautioners to pay the balance due under the guarantee. They did so, and then brought an action against another of the guarantors for relief to the extent of one-third of the sum they had paid. The pursuers averred, and led evidence to prove, that the two remaining guarantors were insolvent. The defender denied that the insolvency of either of the remaining guarantors had been proved, and pleaded that he was liable in relief to the extent of a fifth only of the sum paid by the pursuers. *Held* that, whether the two remaining guarantors were insol-

CAUTIONER—*Continued.*

vent or not, the pursuers were not bound to bear the whole risk of their insolvency, and therefore that the defender was liable in relief to the extent of one-third of the sum paid by the pursuers. Buchanan v. Main, Nov. 30, 1900, p. 215.

See *Bill of Exchange*, 2.

CHARITABLE AND EDUCATIONAL BEQUESTS AND TRUSTS. *"Cottage Hospital"—Application for a scheme by trustees who have full discretion—Competency.*

A testator directed his trustees to apply the residue of his estate "in the establishment of a cottage hospital for the parish of M." The trustees having presented a petition for the settlement of a scheme for the equipment of a small hospital for the surgical and medical treatment of persons suffering from injuries and non-infectious diseases, answers were lodged by the Magistrates of the burgh of M. and by the Parish Council of the parish of M. objecting to the scheme on the ground that the existence of a large hospital in a town adjacent to the parish of M. rendered the existence of a small hospital inexpedient and unnecessary, and suggesting the establishment of either (1) a cottage hospital for infectious diseases or (2) a home or almshouse. The Court, being of opinion that the institution of the cottage hospital proposed by the trustees was within their powers, *repelled* the answers. Gerard Trustees v. Magistrates of Monifieth, May 28, 1901, p. 800.

CHEQUE. See *Bill of Exchange*, 4.

CHURCH. See *Poor*, 2 *to* 5—*Succession*, 8.

CIRCUMVENTION. See *Cautioner*, 1.

COMPANY. *Sale of Shares—Right of Pre-emption under Articles of Association by Company and other Shareholders—Right of Shareholder to withdraw offer to sell to Company.*

1. Article 4 of the articles of association of a company provided that "If any holder of Ordinary B shares wishes to sell his B shares, he shall, before doing so or transferring them to any party, offer them to the company in writing, specifying the price which he is willing to accept for said B shares, and the directors shall either take said shares on behalf of the company at such price, or intimate said offer to the other Ordinary B shareholders, who may lodge sealed offers with the company specifying the sum or price which they are willing to pay for such shares, and which offers shall be opened at a meeting of the directors to be held within fourteen days after the directors shall have given the aforesaid notice to the other shareholders, and the highest offer shall be accepted by the seller provided it is equal to or above the sum specified in his letter." Where a holder of certain B shares offered them to the company under article 4 at a certain price and afterwards withdrew his offer before the company had either intimated its acceptance to the shareholder or intimated to the other B shareholders that the offer had been made, *held* that the offer had been validly withdrawn. J. M. Smith, Limited, v. Colquhoun's Trustee, June 21, 1901, p. 981.

Winding-up—Contributory—Shares allotted as fully paid up—Surplus Assets—Rights of contributories inter se—Companies Act, 1862, *secs.* 38 *and* 133.

2. By minute of agreement between seven persons and an eighth person on behalf of a company intended to be formed and to be called the Syndicate, Limited, it was agreed that the Syndicate, Limited, should be formed and registered under the Companies Acts, for the purpose of promoting a second working company. The capital of the Syndicate, Limited, was to be 3000 shares of £1 each, of which 2401 were to be

No. 185. July 19, 1901. Fergusson v. Pollok.

has done nothing to solve the question whether the range can be used with safety to the public under regulations framed for the purpose of securing it. Whether any such arrangements can be made we do not know, but in the meantime the case must be dealt with as we find it. Now, I can have no doubt that at these ranges, both at ordinary individual practice, and still more at collective firing of any kind, bullets will pass over the butts and ground intervening between the targets and the shore. That is a state of matters of which I think the pursuer has a right to complain, and to demand that it be interdicted by a Court of law.

The last question relates to the firing points. These are in one or two cases within fifteen or a few more feet of the road. This must I think be an interference with traffic on the road, and may cause annoyance to passengers and even danger in connection with horse traffic. There may be many places where the public, from good nature, and a desire for patriotic reasons not to interfere with the musketry of troops, are content to allow such firing near a road to take place, provided the firing is stopped when required by persons who have to ride or drive along the road. But I cannot hold that, if a member of the public objects to such practice he is not entitled to have it stopped by a Court of law. Accordingly I think that upon this part of the case the pursuer is also entitled to interdict.

LORD YOUNG concurred.

LORD TRAYNER.—I think the pursuer has failed to shew that she as an individual is entitled to interdict against the defenders on the ground of nuisance or infringement of private rights. On the other hand, the claim for interdict on the ground that the proceedings complained of are a nuisance to and infringement of the rights of the public is, in my opinion, made out, and to that extent ought to be granted.

LORD MONCREIFF.—Except in one particular I entirely agree in the carefully considered judgments of the Sheriffs. The one point as to which I differ is the finding to the effect that the use by the defenders of the existing ranges for rifle-shooting in the manner hitherto practised by them involves a risk of injury to persons on the western portion of the pursuer's lands adjoining the sea-shore, and that the pursuer's property has materially depreciated in value through the proximity of the rifle ranges. It is not proved to my satisfaction that there is any risk of injury to persons upon the pursuer's lands. The only evidence offered in support of that contention is, that in 1886 or 1887 a bullet ricochetted and landed on the pursuer's ground. There is nothing to shew that such an accident ever occurred again, or is likely to occur again, and the conclusion from the evidence is that it cannot have been the result of a shot fired fairly at the targets.

In regard to the foreshore and roads adjoining the rifle range, I am of opinion that the pursuer has made good her right as a member of the public to the interdict she asks. We can only dispose of the case according to the existing law and statutory regulations applying to such ranges. There is distinct evidence of danger to the public, from the proximity of the ranges in their present position, in their use of the foreshore and the adjoining public roads, against which they are entitled in law to be protected by

CONTRACT—*Continued.*

tions on original plan—Alterations ordered after date fixed for completion of work. Steel v. Bell, Dec. 21, 1900, p. 319.

Proof.

2. Writ or oath—Written Contract of Sale—Prior Oral Agreement—Innominate Contract. Müller & Co. v. Weber & Schaer, Jan. 29, 1901, p. 401.

Jus quæsitum tertio—Promise.

3. A sent an offer to B's agent to purchase a hotel belonging to B at the price of £7000. Enclosed with the offer was a letter from A to B's agent, in which A wrote, *inter alia*,—"I will be pleased to give to Mrs B a sum of not less than £100 as some compensation for the annoyance and worry of the past few days, and for kindness and attention to me on my several visits to" the town in which the hotel was situated. B wrote accepting the offer "as supplemented by your letter." A paid £7000 to B, and entered into possession of the hotel, but declined to pay £100 to Mrs B, who brought an action against A for that sum. *Held* that the pursuer was entitled to decree for the sum sued for. Lamont v. Burnett, May 21, 1901, p. 797.

Constitution—Contract or honourable understanding—Discharge.

4. Cowan & Kinghorn, creditors of Ritchie, on receiving payment of 10s. in the £1 of their debts, granted a receipt for the amount, "being 10s. per £1, in full of our claim against the said Ritchie, . . . it being, however, understood that the said Ritchie will pay the balance of 10s. per £1 whenever he is able to do so." *Held* that the document instructed no legal obligation on Ritchie to pay the balance of 10s. in the £1, but merely an honourable understanding that he would pay whenever he was able. Ritchie v. Cowan & Kinghorn, July 16, 1901, p. 1071.

Assignation—Delectus personæ.

5. *Dear, the owner of a patent for a fibre decorticating machine, entered into a contract with Dawson, the owner of an estate in Borneo, by which it was agreed as follows:—Dear was to supply and erect one of the machines on Dawson's estate; and, on this machine working satisfactorily, Dawson was to pay the price of it to Dear, and terms were to be arranged for the further supply of machines by Dear to Dawson, who undertook to bring a specified area of his estate into fibre cultivation. After the machine first mentioned had been supplied and erected by Dear in implement of the contract, Dear assigned his patent, "licence, concessions and the like," to a limited company. In a schedule part of the price was allocated to "contracts and concessions." The company thereafter, with consent of Dear, brought an action against Dawson for payment of the price of the machine supplied, averring that the contract with him had been assigned by Dear to them. The defender pleaded,* inter alia, *No title to sue.* Held (*in* aff. *judgment of Second Division*) (1) *That in so far as the pursuers' claim was for implement of the contract, they had no title to sue, as the contract implied* delectus personæ *and was not assignable; and* (2) *that in so far as the claim was for payment of a debt accrued before the assignation, the pursuers had no title to sue, as the debt was not assigned.* International Fibre Syndicate, Limited, v. Dawson, May 9, 1901, H. L., p. 32.

See *Error.*

CONVERSION. See *Succession*, 5.

COUNTY COUNCIL. *Bye-Law—Local Government (Scotland) Act*, 1889, *sec.* 57 (1).

A bye-law made by a County Council under sec. 57 of the Local Government (Scotland) Act, 1889, was in the following terms:—"Betting on roads.—No person shall frequent and use any road or other public

COUNTY COUNCIL—*Continued.*
place, on behalf either of himself or of any other person, for the purpose of bookmaking or betting, or wagering, or agreeing to bet or wager with any person, or paying or receiving or settling bets." In a suspension of a conviction for a contravention of this bye-law on the ground that the bye-law was *ultra vires* of the County Council, *held* that the bye-law was not *ultra vires*, and suspension *refused*. Slowey v. Threshie, June 7, 1901, Just. Cases, p. 73.
See *Public Health*.

CROFTERS HOLDINGS ACTS. *Rights of Crofter—Building on Croft for Fish-curing—Crofters Holdings (Scotland) Act*, 1886, *secs.* 1, 8, 32, *and* 34. *Held* that a crofter whose holding adjoined the seashore was not entitled under the Crofters Holdings (Scotland) Act, 1886, to erect or use buildings on his croft for the purpose of fish-curing. Gilmour v. Peterson, Feb, 26, 1901, p. 569.

CULPA. See *Reparation*.

CUSTODY OF CHILDREN. See *Minor and Pupil*, 2, 3.

DEAN OF GUILD. See *Burgh*.

DECREE. See *Sheriff*.

DEPOSIT-RECEIPT. See *Donation*.

DESTINATION. *Condition—Clause of Devolution—Repugnancy.*
Robert Cruickshank, by gratuitous *inter vivos* disposition, disponed certain heritable subjects to Mrs Forsyth, his daughter, in liferent for her liferent use allenarly, and to her daughter Miss Agnes Forsyth in fee and to the heirs of her body, heritably and irredeemably, "but these presents are granted under the express condition and declaration that . . . in the event of the said Agnes Forsyth dying before attaining the age of twenty-five (without leaving issue) survived by me, the said subjects shall revert to me, and these presents shall, *ipso facto*, become void and null, and in that event I shall be entitled to deal with the subjects as my own, and to sell or burden the same as freely as if these presents had never been granted; and in the event of my predeceasing my granddaughter before she attains said age, the subjects shall transmit to my said daughter, and failing her, to my own heirs whomsoever." The disposition was recorded in the Register of Sasines on behalf of Mrs Forsyth in liferent allenarly and Miss Agnes Forsyth in fee, and Mrs Forsyth entered into possession of the subjects. The granter of the disposition died before Miss Agnes Forsyth had attained the age of twenty-five. *Held* that the clause of transmission to Mrs Forsyth in the event of the granter dying before Miss Forsyth had attained the age of twenty-five was repugnant to the gift of the fee to Miss Forsyth, and was ineffectual, and that the fee of the property belonged to Miss Forsyth. Forsyth v. Forsyth, June 14, 1901, p. 929.
See *Succession*.

DILIGENCE. See *Bankruptcy*, 2.

DILIGENCE FOR THE RECOVERY OF DOCUMENTS. See *Process*, 5, 6.

DISCHARGE. See *Contract*, 4.

DOMINUS LITIS. See *Expenses*, 6, 10.

DONATION. *Donatio mortis causa—Deposit-receipt—Delivery—Expectation of death.*
A took a deposit-receipt from a bank in these terms,—"Received from A and B (payable to either or survivor), £1000 to their credit." The deposit-receipt was found in A's repositories at his death. Evidence on which *held* that no donation *mortis causa* had been proved.

DONATION—*Continued.*

Question whether delivery is essential to donation *mortis causa.* Rose v. Cameron's Executor, Jan. 10, 1901, p. 337.

See *Marriage-Contract*, 5.

DRAINAGE. See *Police*, 10, 11, 12—*Railway*, 2.

ELECTION. See *Process*, 4—*Succession*, 3, 4, 14.

ENTAIL. *Disentail—Bankruptcy—Application by Trustee in Sequestration for Disentail of debtor's estate—Entail (Scotland) Act*, 1882, *sec.* 18.

1. *Held* that in an application for disentail by the trustee in a sequestration of the estates of an heir of entail in possession, as in the case of an application by a creditor, intimation to an heir whose consent is required, or must be dispensed with, cannot validly be given till after the expiration of three months from the date of the application. Lord Napier and Ettrick's Trustee v. Napier, Feb. 26, 1901, p. 579.

Provisions to younger children—Deductions from free rental—Burdens imposed under legislation subsequent to entail.

2. A deed of entail, dated in 1808, which reserved power to the heir in possession to grant provisions for his widow and younger children out of the free rental of the estate, but no power to burden the fee under any circumstances, provided that provisions for younger children might be granted to an amount not exceeding four years' free rental of the estate, under deduction of "feu-duties and all other legal and annual burdens, excepting liferents to widows or widowers, and any debts contracted for improvements and buildings under the Act 10 Geo. III. cap. 51." In a petition for the restriction of younger children's provisions, and for disentail, *held* that the deductions from the free rental fell to be determined on the construction of the deed of entail, and that the interest on bonds and dispositions in security, and the annual amount of certain rent charges and bonds of annualrent, by which the estate was burdened under powers conferred by statutes subsequent to the date of entail, did not fall to be deducted. Balfour-Melville v. Mylne, Feb. 1, 1901, p. 421.

See *Revenue*, 1.

ERROR. *Essential Error—Mutual Error—Master and Servant—Workmen's Compensation Act*, 1897.

An employer tendered £2, 7s. 4d. to D. a workman, who had been injured in his employment, as in full satisfaction of any claim he might have against him, stating, as was the fact, that he had obtained a report from a surgeon that D would be fit to return to his work in six weeks from the date of the accident. D accepted the money and granted a discharge in full. The medical opinion on which both parties relied proved to be mistaken, for D was not able for work for more than six months from the date of the accident. *Held* that the above facts were not sufficient to shew that the parties, in entering into the agreement for settling of the workman's claim, were under essential error to the effect of rendering the discharge null and void. Dornan v. Allan & Son, Nov. 22, 1900, p. 112.

ESTATE DUTY. See *Revenue*, 1, 2.

EXPENSES. *Awarding—Reparation—Slander—Apology.*

1. In an action of damages for slander, the defender lodged a minute in which he stated "that if any expressions used by the defender concerning the pursuer could be construed as reflecting in any way upon the pursuer, his character or conduct, he unreservedly withdraws the same, there being no ground therefor, and expresses his regret for the occurrence." The pursuer having lodged a minute of acceptance, moved for expenses. The defender maintained that there should be no expenses to either party. *Held* that the defender's minute accepted by the pursuer was

EXPENSES—*Continued.*

equivalent to the verdict of a jury in favour of the pursuer, and that the pursuer consequently was entitled to expenses. Hunter v. Russell, March 1, 1901, p. 596.

Awarding—Modification—Appeal to Court of Session—Penalty—Reduction on Appeal.

2. On a petition under the Burgh Police (Scotland) Act, 1892, the owner of certain new buildings was found to have contravened section 180 of the Act, by having permitted his building to be occupied before he had obtained a certificate from the burgh surveyor, and the maximum penalty of five pounds was imposed on him. In an appeal the Court, holding that there had been a contravention, but that it was merely technical, *reduced* the penalty to 2s. 6d., and found the appellant entitled to two-thirds of his expenses. Downie v. Fraser, July 10, 1901, p. 1044.

Awarding—Withdrawal of Reclaiming Note after printing by respondent.

3. A reclaiming note was sent to the Summar Roll on 16th May 1901. On 1st June 1901 the reclaimer moved that the note be refused, with £2, 2s. of modified expenses. The respondent moved for full expenses on the ground that he had printed various documents in preparation for the discussion of the case. It appeared that before printing he had communicated with the reclaimer, that on 27th May 1901 there had been a meeting of parties, when a proposal for a joint print was discussed, and that the reclaimer had declined the proposal, but without indicating that there was any chance of the reclaiming note being withdrawn. The Court *allowed* £6, 6s. of expenses instead of the usual £2, 2s. Henderson v. Menzies, June 1, 1901, p. 858.

Awarding—Abandonment of Appeal after printing by respondents.

4. An appeal from a Sheriff Court was abandoned before the case appeared on the roll for discussion. The respondents moved for full expenses, stating that they had printed certain correspondence passing between the parties, of importance in the case. This they had done without asking the appellant what he proposed to print. The Court *refused* to allow the respondents the expenses of printing. Gilchrist & Co. v. Smith, Jan. 9, 1901, p. 329.

Parties liable—Trust—Unsuccessful action by trustees against a residuary legatee—Liability of successful legatee's share of residue.

5. In an action by testamentary trustees for recovery of a sum of money alleged to form part of the trust-estate the Court held that the defender fell to be assoilzied, and that she was entitled to expenses. The defender, who was one of the residuary legatees under the trust-settlement, moved for a finding that no part of the expenses of the litigation should be paid out of her share of the residue. The Court *granted* the motion. Easson's Trustees v. Mailer, May 14, 1901, p. 778.

Parties liable—Husband and Wife—Action by Wife with consent of Husband—Liability of Husband.

6. In an action of damages for personal injuries raised by a married woman, with the consent and concurrence of her husband, in which she was unsuccessful, the Court decerned against the husband, conjunctly and severally with his wife, for the expenses of process, on the ground that he had by his conduct in the cause identified himself with his wife's claim, and truly been an active litigant. Maxwell v. Young, March 7, 1901, p. 638.

Parties liable—Several defenders—Successful and unsuccessful—Liability inter se.

7. Galbraith, who had been trustee on a coachbuilder's sequestrated estate, was sued in 1899 after his discharge, by Mackintosh for delivery of a carriage he had deposited with the coachbuilder, and for damages. Galbraith denied liability, and stated that in 1897 he sold the bank-

EXPENSES—*Continued.*

rupt's stock in trade to Arthur, and that Arthur by mistake had sold the bankrupt's carriage along with the stock, and pleaded all parties not called. The pursuer then raised an action against Galbraith and Arthur, jointly and severally, pleading—"The defender Galbraith having carelessly and negligently failed to protect the said car, and the defender Arthur having acted illegally and wrongfully in taking possession of and selling same, they are jointly and severally liable to the pursuer for the loss and damage thereby sustained." Arthur's defence was that he never had possession of the pursuer's carriage, and had not sold it. After a proof the Sheriff held Arthur liable in damages, and assoilzied Galbraith, and found Arthur liable in expenses to both parties. In an appeal the Court affirmed the judgment on the merits, but *found* that the pursuer was liable for Galbraith's expenses, and that Arthur was not liable for them. Mackintosh v. Galbraith and Arthur, Nov. 6, 1900, p. 66.

8. When separate actions against independent defenders are conjoined, the Court has power to find one defender liable in expenses to the other.

Question whether this would in any circumstances be competent if the actions were not conjoined. Thomson v. Edinburgh and District Tramways Co., Limited; Thomson v. Kerr, Jan. 15, 1901, p. 355.

Parties liable—Several defenders—Joint trial of two actions for reparation against different defenders—Verdict for pursuer in one action and for defender in the other—Defenders represented by same counsel and agent.

9. Crawford, founding upon statements in letters written by Dunlop, a law-agent, on the instructions of Adams, Dunlop's client, sued Adams and Dunlop in separate actions of damages for slander. The actions were sent to trial together. The verdict was for the pursuer in the action against Adams, and for Dunlop in the action in which he was the defender. Adams and Dunlop were represented at the trial by the same counsel and agent, and their expenses were, *quoad* the trial, in all respects joint. The successful party in each action was found entitled to expenses. *Held*, approving of the Auditor's reports, (1) that the pursuer, as the successful party in the action against Adams, was entitled to the whole expenses incurred by him, including his whole expenses at the trial, in respect these expenses were the expenses to which the pursuer would have been entitled had Adams been the only defender; and (2) that Dunlop was entitled to recover from the pursuer his whole expenses down to the trial, and to one-half only of the expenses incurred by the defenders at the trial, this being the amount of his outlay. Crawford v. Adams; Crawford v. Dunlop, Dec. 21, 1900, p. 296.

Parties liable—Dominus litis.

10. Stevenson and Bennett were the respective proprietors of two immediately adjoining feus, holding of the same superior, Stevenson's feu-disposition having been granted in 1887 and Bennett's in 1894. Under the feu-disposition Stevenson had a servitude of way over a portion of a private road on Bennett's feu. Shortly after Bennett had obtained his feu-disposition Stevenson brought an action in the Sheriff Court against Bennett for interdict against certain encroachments by Bennett, alleged to interfere with Stevenson's exercise of the servitude. Stevenson obtained interdict in the Sheriff Court, with expenses, and on appeal this judgment was affirmed, with additional expenses. Bennett having become bankrupt without payment of these expenses, Stevenson brought an action for the expenses against the common superior, alleging that the superior had been the true *dominus litis* in relation to the defence in the action for interdict. *Held*, after a proof, (1) that

:SES—*Continued.*
he appeal to the Court of Session was taken by the superior in his own nterest, and that he had the entire control of the proceedings in con-ection with the appeal, Bennett having neither interest therein nor ontrol thereof, and that the superior was the true *dominus litis* of the ppeal, and was liable to Stevenson for his expenses in opposing the ppeal; but that the superior was not liable to Stevenson for his xpenses incurred in the Sheriff Court. Stevenson v. Sneddon, Nov. 0, 1900, p. 182.
:ation—Excerpts from Session Papers.
ne expense of making and printing excerpts from session papers *dis-llowed* as between party and party. Duke of Atholl v. Wedderburn;)uke of Atholl v. Glover Incorporation of Perth, Nov. 13, 1900, . 89.
:ation—Jury Trial—Fees to medical men.
n action of damages for personal injuries brought against a railway ompany was settled the day before the trial, the defender being bound, *nter alia*, to pay the pursuer's expenses as taxed. On a consideration f objections to the Auditor's report, the Court, while *allowing* fees of :1, 1s. to each of two doctors for each of two reports made (1) prior) the raising of the action, and (2) immediately before the trial, and lso fees of £2, 2s. to each of two other doctors called into consulta-ion for the purposes of the trial, *disallowed in toto* sums charged as ees for three medical men as witnesses, and also the sums charged for rawing precognitions of medical witnesses. Watson v. Caledonian ailway Co., June 22, 1901, p. 999.
:ation—Fees to Counsel—Proof—Hearing in Inner-House.
ı a case in which the proof lasted twelve days, and the hearing in the nner-House nine days, the successful party objected to a reduction y the Auditor of the fees allowed for each day of the proof and earing respectively to senior counsel from thirty and twenty guineas) twenty and fifteen guineas, and to junior counsel from twenty and fteen guineas to fifteen and ten guineas. The Court *repelled* the bjection, and *approved* of the Auditor's report. Burrell & Son v. ussell & Co., Oct. 24, 1900, p. 12.
:ation—Fee to Witness.
ı a case in which a certified skilled witness was paid £214, 10s. for ork which, according to his account, occupied fifty-nine days, the ourt *approved* of the Auditor's report fixing his fee at £67, 7s. 6d. urrell & Son v. Russell & Co., Oct. 24, 1900, p. 12.
ation—Witness—Party as Witness.
ı action of reduction of a trust-deed was directed against the trustees, ıd against an individual who was a party to the deed. The last-men-oned defender appeared and gave evidence at the proof in support of ıe deed. *Held* that he was entitled to expenses against the unsuccess-ıl pursuer. Dairon v. Dairon, Dec. 4, 1900, p. 230.
Process, 12.

TY. See *Cautioner*, 1.

:Y ACTS. See *Master and Servant*, 11, 12, 13.

TIES AND POWERS. See *Succession*, 13, 14.

See *Reparation.*

ND LIFERENT. *Rights of Fiar and of Liferenter—Company—Conver-on of profits into capital—Issue of new shares in respect of capitalisa-on of profits.*
limited company which had power to capitalise profits duly passed ıe following resolutions:—"(1) That the board may apply £60,000 the moneys standing to the credit of the reserve fund by way of

dividend, distributable amongst the members in proportion to the amount paid up on each of their shares, and that such dividend be distributed as provided in the next resolution. (2) That the board may pay said dividend by the distribution of paid-up shares of the company in manner following—that is to say, the board shall allot such new shares *pro rata* amongst the existing members according to the number of shares of which they may, on the 14th day of June 1899, be registered as holders in the proportion of two new shares to thirteen existing shares, or as near thereunto as may be, and that the dividend to which each member is entitled under the preceding resolution be applied in payment of the shares falling to him." The directors, in the exercise of the powers thereby conferred upon them, allotted the unissued shares among the shareholders, and applied the £60,000 in paying for them. In a question between the liferenter of certain original shares and the fiar as to the right to the new shares, *held* that the operation was not a payment of dividend by the issue of paid-up shares, but was an addition to the capital of the company by the conversion of profits into capital, and that the new shares did not belong to the liferenter, but to the fiar. Cunliff's Trustees v. Cunliff, Nov. 30, 1900, p. 202.

Rights of Fiar and of Liferenter—Casualty—Duplications of Feu-duty.

2. A testator directed his trustees to hold his whole estate, heritable and moveable, for his widow in liferent, and for his children or their issue in fee. A third of the income of the trust-estate was derived from duplications of feu-duties payable at fixed intervals of nineteen years from upwards of 300 building feus given off from time to time by the testator. *Held* that the intention of the testator was to treat the duplications as income, and that they belonged to the liferentrix. Montgomerie-Fleming's Trustees v. Montgomerie-Fleming, Feb. 28, 1901, p. 591.

Rights of Fiar and of Liferenter—Mineral field let but unworked during testator's lifetime—New lease by trustees.

3. A testator, by his settlement, directed his trustees to hold the residue of his estate for his children in liferent and their issue in fee. The trustees had power to sell the estate, but the settlement was silent as to powers of leasing minerals. Part of the residue consisted of a mineral field, which the testator, who died in 1871, had let in 1868 for a term of thirty years, with breaks. The minerals were never worked by the lessees, who in 1878 took advantage of a break in the lease to end it. *Held* that the trustees had power to enter into a new lease of the subjects in 1900, and that the rents and lordships thereof fell to be paid to the liferenters. Dick's Trustees v. Robertson, June 28, 1901, p. 1021.

Rights of Fiar and of Liferenter—"Free annual income and produce" of residue—Profits from lease of colliery.

4. By trust-disposition and settlement a testator directed his trustees to pay "the free annual income and produce of the residue of my means and estate" to his widow in liferent. By a codicil he, *inter alia*, empowered his trustees to carry on and continue "for behoof of my whole estate" any business in which he was alone interested. At the date of his death the testator was the tenant of a colliery, which the trustees carried on after his death. In a competition between the testator's widow and his trustees, the widow maintained that the whole net profits of the colliery fell to be paid to her as liferentrix; the trustees maintained that the net profits of the colliery fell to be treated as capital; or alternatively that these profits fell to be paid to the widow only after deduction of such a sum as would, with the value of the colliery plant, &c., provide, on the termination of the lease, a sum equal to the value of the testator's interest as at the date of his death. *Held*

: AND LIFERENT—*Continued.*
that the net profits derived from the colliery were part of the free annual income and produce of the residue of the estate, and fell to be paid to the widow without deduction. Mein's Trustees v. Mein, June 21, 1901, p. 994.
ee *Succession*, 15, 16—*Trust*, 10, 11.

HINGS. *Trout-fishing—Loch—Riparian Proprietors—Joint right of fishing—Abuse of right—Regulation by Court—Allocation of boats for fishing according to extent of frontage to loch.*
The owners of several properties which together surrounded a loch had a joint right or common property in the loch, and a joint right of fishing trout over all the loch. One of the proprietors raised an action against the other proprietors for declarator that the trout-fishing was being injured and destroyed by excessive fishing by the defenders from boats on the loch, that the pursuer was entitled to have the fishing regulated according to such rules and regulations as the Court might think proper to frame, that the exercise of the right of trout-fishing should be regulated among the parties concerned to the effect that sixteen boats only should be allowed to fish on the loch, the boats being allocated among the proprietors in proportion to the extent of the frontage of each property along the loch, or in such other way as the Court might think fit. After a proof the Court *dismissed* the action. Menzies v. Wentworth, June 18, 1901, p. 941.
Herring Fishery Acts—Trawling—Seizure of nets before conviction—Attempt to set nets—Herring Fishery (Scotland) Act, 1889, *sec.* 6 (1) (3)—*Herring Fishery (Scotland) Act Amendment Act*, 1890, *sec.* 3.
Held (1) that the attempt to set a trawl net within the prohibited area is using a mode of fishing in contravention of the Herring Fishery (Scotland) Acts, 1889 and 1890, and (2) that seizure of the net is authorised before conviction. Pyper v. Ingram, Feb. 19, 1901, p. 514.
eizure of trawler's nets by Fishery Officers—Reparation—Public Officer—Privilege.
Held that a fishery officer, who on the instructions of the Fishery Board seized the nets of a trawler which they had reason to suspect of having been engaged in trawling within the three-mile limit, was not liable in damages, although the trawler had not been trawling within the prohibited area. Pyper v. Ingram, Feb. 19, 1901, p. 514.
Vhite-Fishing—Foreland—Act 1705, *cap.* 2.
Held that certain rocks above high-water mark, which were swept by the sea in times of storm, but which did not project beyond the line of the shore, were not "forelands" within the meaning of the Act of Anne 1705, cap. 2. Gilmour v. Peterson, Feb. 26, 1901, p. 569.
uilding on Croft for Fish-curing—Crofters Holdings (Scotland) Act, 1886, *secs.* 1, 8, 32, *and* 34.
Held that a crofter whose holding adjoined the seashore was not entitled under the Crofters Holdings (Scotland) Act, 1886, to erect or use buildings on his croft for the purpose of fish-curing. Gilmour v. Peterson, Feb. 26, 1901, p. 569.
ee *Justiciary Cases*, 5, 6, 26, 29.

THCOMING. See *Sheriff*.

E. See *Justiciary Cases*, 13.

ING. See *Justiciary Cases*, 1, 7.

LD, DEAN OF. See *Burgh*.

BOUR. See *Reparation*, 10.

ITABLE AND MOVEABLE. See *Succession*, 5.

HUSBAND AND WIFE. See *Expenses*, 6—*Justiciary Cases*, 20—*Marriage-Contract*—*Master and Servant*, 18—*Minor and Pupil*, 2, 3.

INCOME TAX. See *Revenue*, 4, 5.

INHABITED HOUSE DUTY. See *Revenue*, 6, 7.

INSURANCE. See *Marriage-Contract*, 3—*Revenue*, 4, 5, 7.

INTEREST. See *Trust*, 3.

ISSUE. See *Reparation*, 1, 9.

JOINT ADVENTURE. See *Trust*, 2.

JOINT AND SEVERAL. See *Process*, 1.

JUDICIAL FACTOR. *Appointment—Trust.*

1. An application was presented by two out of four trustees, with the concurrence of certain of the beneficiaries, craving the Court to supersede the administration by the trustees and appoint a judicial factor on the ground that the trust had become unworkable owing to differences between the petitioning trustees on the one hand and the two remaining trustees on the other. The remaining trustees and the chief beneficiary under the trust opposed this application. Circumstances in which the Court *refused* the application. Yuill v. Ross, Nov. 14, 1900, p. 96.

Powers—Curator Bonis to Lunatic—Power of election between legal and testamentary provisions.

2. The right of election between testamentary and legal provisions may be exercised by a curator bonis on behalf of his ward where the circumstances of the case warrant it. M'Call's Trustee v. M'Call's Curator Bonis, July 16, 1901, p. 1065.

Removal—Curator Bonis—Neglect of duty.

3. Circumstances in which, on a report by the Accountant of Court imputing to a curator bonis persistent neglect of duty and disregard of the Accountant's remonstrances, the Court *removed* the curator bonis from office. Marshall v. Chisholm, March 8, 1901, p. 642.

JURISDICTION. See *Burgh*, 1, 2, 3—*Justiciary Cases*, 29.

JURY TRIAL. See *Expenses*, 12—*Process*, 8, 9—*Reparation*, 1, 9.

JUS QUÆSITUM TERTIO. See *Contract*, 3—*Marriage-Contract*, 2, 4.

JUS RELICTI. See *Succession*, 1.

JUSTICIARY CASES. *Crimes and Offences—Betting—Bye-law—Local Government (Scotland) Act*, 1889, *sec.* 57 (1).

1. A bye-law made by a County Council was in the following terms:—"Betting on roads.—No person shall frequent and use any road or other public place, on behalf either of himself or of any other person, for the purpose of bookmaking or betting, or wagering, or agreeing to bet or wager with any person, or paying or receiving or settling bets." In a suspension of a conviction for a contravention of this bye-law on the ground that the bye-law was *ultra vires* of the County Council, *held* that the bye-law was not *ultra vires*, and suspension *refused*. Slowey v. Threshie, June 7, 1901, Just. Cases, p. 73.

Crimes and Offences—Bribery—Malversation of Office—Magistrate—Licensing Court.

2. An indictment set forth that in March 1900, the panel, being then a member of the Town-Council of Glasgow, did corruptly solicit and receive from G, then an applicant to the Magistrates of Glasgow for a certificate for a public-house licence, the sum of £600 as a bribe, "in consideration of which you undertook to procure the granting of the said certificate by the said Magistrates," and the said application for a

IARY CASES—*Continued.*
ɪrtificate having been refused at the Licensing Court in April 1900, and you having been thereafter, on 17th May 1900, appointed a Iagistrate" of Glasgow, and the said G having, in the month of ugust 1900, "stipulated with you that you must repay the said sum f £600, or undertake to procure the granting of the said certificate at ıe then ensuing Licensing Court in October 1900 upon his renewing is application for the same, you did then and there, in consideration f your retaining the said sum of £600, corruptly undertake to pro-ure the granting of the said certificate"; and the said G having pre-ɔnted a new application "you did, in consideration of the said bribe f £600, and in pursuance of your corrupt undertaking aforesaid, in reach of your duty as a Magistrate and to the malversation of your ffice, corruptly vote in favour of, and endeavour to procure, the grant-ıg of the said certificate." *Held* that the indictment was irrelevant, ıe receiving of the £600 by the panel when he was a Town-councillor ut not a Magistrate not being *per se* a crime, and there being no ɛlevant averment that he had taken a bribe after he had become a Iagistrate, or that before his appointment he had received money 'hich was given and taken in anticipation of his appointment, and ıtended to influence his conduct after it was made. H. M. Advocate . Dick, April 26, 1901, Just. Cases, p. 59.

nes and Offences—Bribery—Solicitation of bribe by Magistrate—ttempt to commit a crime—Criminal Procedure (Scotland) Act, 1887, ɛc. 61.

n indictment set forth that the accused being a Magistrate of Glas-ow did corruptly solicit from M, an applicant for a certificate for a ublic-house licence a bribe of £500 "as a consideration for your ɔrruptly voting for, and endeavouring to procure, the granting of" a ertificate for a public-house licence, "and you did thus attempt to btain the said bribe of £500 from the said M in breach of your duty s a Magistrate and to the malversation of your office." *Held* that the ıdictment was irrelevant, in respect that it alleged nothing more than xpression of willingness to commit a crime. H. M. Advocate v. Dick, pril 26, 1901, Just. Cases, p. 59.

mes and Offences—Deforcement—Warrant.

is not essential to the crime of deforcement that the officer should ave the principal warrant in his possession at the time of the alleged ffence, if the accused knows that the officer is an officer of the law ngaged in execution of his duty in serving the warrant. Cunningham . Wilson, April 26, 1901, Just. Cases, p. 65.

mes and Offences—Fishing—Salmon-fishing—Solway—Relevancy—Owner"—Time—Penalty—Salmon Fishery Act, 1861, *sec.* 11—*Salmon Fisheries (Scotland) Act*, 1862, *sec.* 33.

summary complaint set forth that the accused "did, between 2d uly and 8th August 1900," at a specified *locus* in the Scottish ortion of the Solway, "place and use for catching salmon" certain xed engines described, "and did by means thereof take and kill 64 sh of the salmon kind" contrary to the Salmon Fisheries Act, 1861, ec. 11, made applicable to the *locus* libelled by the Salmon Fisheries Scotland) Act, 1862, sec. 33; and prayed to have the accused djudged to suffer the penalties provided by the "said Act." Objec-ions—(1) that the complaint charged as an offence something, viz., he taking of salmon, which was not an offence under section 11 of the ct of 1861; (2) that the specification of the time of the alleged ffence was insufficient; and (3) that the prayer was ambiguous—*eld* to be ill founded.

Held further, that a complaint charging a contravention of section 11 f the Salmon Fisheries Act, 1861, as applied to Scotland by the

JUSTICIARY CASES—*Continued.*

Salmon Fisheries (Scotland) Act, 1862, sec. 33, need not set forth that the accused was the "owner" of the engines specified in the complaint. Marshall v. Phyn, Dec. 11, 1900, Just. Cases, p. 21.

Crimes and Offences—Fishing—Salmon-fishing—Solway—Annan Fisheries Act, 1841, secs. 33 and 46.

6. Certain persons, being neither owners nor occupiers of salmon-fishings, and having no permission from any owner or occupier of salmon-fishings to fish for salmon within the limits of the Annan Fisheries Act, were convicted of a contravention of section 33 of that Act. They appealed. The case stated:—The accused had fished for salmon at a spot a short distance westward of Torduff Point, between the Sark and the Lochar. They had fished up to an hour and a quarter before low water. The sea had then receded several miles to the south-west of the spot in question, leaving the estuary of the Solway nearly all dry except for a channel of brackish water, which flowed down to the sea, and contained the water of various English rivers. The spot at which the accused were fishing was within this channel and on the Scotch side both of the *medium filum* of the channel and of the *medium filum* of the estuary of the Solway. The Court *dismissed* the appeal, holding that the spot at which the appellants had been fishing was within the limits of the Annan Fisheries Act as defined by sec. 46 of the Act. Bryson v. Phyn, June 11, 1901, Just. Cases, p. 94.

Crimes and Offences—Lottery—Distribution of prizes by lot or chance—Mechanism operated by spring—Glasgow Police (Further Powers) Act, 1892, sec. 22.

7. The keeper of an ice-cream shop was charged with a contravention of the Glasgow (Further Powers) Act, 1892, sec. 22. The following facts were proved:—The accused exposed on the counter of his shop a machine called the Automatic Tivoli Cigar Machine, intended to be and actually used by his customers. The machine was put in operation by putting a penny in a slot, and by pressing a spring. The amount of the pressure applied to the spring determined the course taken by the penny inside the machine, and this in turn determined whether the person who had put in the penny got it back, lost it to the accused, or won from him a cigar valued at twopence. A certain amount of skill might be acquired in giving the requisite pressure to the spring, but it was not proved that the customers of the accused had any opportunity, or ever attempted, to acquire such skill. The accused was convicted. *Held* on appeal that the machine as worked and used was a lottery within the meaning of sec. 22 of the Act, and that the accused had rightly been convicted. Santongeli v. Neilson, Dec. 6, 1900, Just. Cases, p. 10.

Crimes and Offences—Sale of Food and Drugs Acts, 1875—Sale of Food and Drugs Act Amendment Act, 1879—Sale of watered milk—Bona fides.

8. A dairyman was charged with a contravention of the Sale of Food and Drugs Acts, 1875 and 1879, by selling to the prosecutor (an inspector under the Acts) to his prejudice twopence worth of sweet milk, which was not of the nature, substance, and quality demanded by the prosecutor, in respect that it contained 13 per cent of added water. The Sheriff-substitute acquitted the accused on the ground that the prosecutor had been supplied with the milk which he had insisted on getting after warning that it might not prove to be sweet milk. *Held* on appeal that the Sheriff-substitute had rightly acquitted the accused. Frew v. Gunning, March 18, 1901, Just. Cases, p. 51.

Crimes and Offences—Failure to provide education for children—Certificate—Education (Scotland) Act, 1872, sec. 70.

9. Conviction and sentence for failure to provide education for children

suspended, in respect that the certificate required by section 70 of the Education (Scotland) Act, 1872, (*a*) did not state what the relationship of the two children named in the certificate was to the accused, and (*b*) referred in certain clauses to "the said child" instead of to "the said children." Thomson v. Scott, June 11, 1901, Just. Cases, p. 79.

Crimes and Offences—Vaccination—Refusal to allow child to be vaccinated—Complaint—Relevancy—Vaccination (Scotland) Act, 1863, *sec.* 18.

10. In a complaint charging a refusal to allow a child to be vaccinated, in contravention of section 18 of the Vaccination (Scotland) Act, 1863, it is essential to set forth that the vaccinator tendered his services to the accused between ten and twenty days after the date on which written notice of the order to vaccinate, issued by the Parish Council, was given to the accused. Westwood v. Taylor, Dec. 6, 1900, Just. Cases, p. 1.

Crimes and Offences—Vaccination—Procedure where child removed from parish of birth before order for vaccination executed—Ultra vires—Vaccination (Scotland) Act, 1863, *secs.* 1, 5, 18, *and* 30—*Regulations by Board of Supervision, 15th December* 1864, *Art.* 7.

11. *Held* (1) that article 7 of Regulations issued by the Board of Supervision, 15th December 1864, entitled "Proceedings under sec. 18 of the Vaccination Act," 1863, was *intra vires* of the Board of Supervision, and (2) that in the case provided for in that article it was competent for the Parish Council of the parish to which the child had gone to take proceedings for the vaccination of the child, in terms of section 18 of the Act, and to prosecute the parent for failure to vaccinate in contravention of that section.

Held further, that looking to the terms of sections 1 and 30 of the Act, it was not competent for a parish to take proceedings for the vaccination of a child which had left the parish. Wallace v. Summers, Dec. 22, 1900, Just. Cases, p. 27.

Procedure—Instance—Procurator-Fiscal of Sheriff Court—Public-Houses Acts Amendment (Scotland) Act, 1862, *sec.* 25.

12. *Held* that section 25 of the Public-Houses Acts Amendment (Scotland) Act, 1862, does not exclude the instance of the Procurator-fiscal of a Sheriff Court to prosecute complaints in his Court for contraventions of the Act. Stirling v. Dickson, Dec. 10, 1900, Just. Cases, p. 17.

Procedure—Instance—Private Prosecutor—Ground Game Act, 1880, *sec.* 6.

13. The proprietor of an estate, with concurrence of the procurator-fiscal, brought a complaint against a person having a right to kill game under the Ground Game Act, 1880, on a farm on the estate, charging him with having set spring traps elsewhere than in rabbit holes, contrary to section 6 of the Act. *Held* that the instance was good. M'Douall v. Cochrane, June 6, 1901, Just. Cases, p. 71.

Procedure—Instance—Delegation of title to prosecute—Education (Scotland) Act, 1872, *sec.* 70.

14. Conviction and sentence for failure to provide education for children *suspended*, in respect that the officer appointed by the school board under section 70 of the Education (Scotland) Act, 1872, did not himself appear to prosecute, but sent his clerk. Thomson v. Scott, June 11, 1901, Just. Cases, p. 79.

Procedure—Complaint—Inducia—Statute—Repeal—Public-Houses Acts Amendment (Scotland) Act, 1862, *sec.* 18—*Home Drummond Act*, 1828, *sec.* 23—*Summary Procedure (Scotland) Act*, 1864, *secs.* 3 *and* 6—*Statute Law Revision Act*, 1893, *sec.* 1.

15. In a suspension of a conviction on a complaint, under the Summary Procedure (Scotland) Act, 1864, charging trafficking without a certifi-

JUSTICIARY CASES—*Continued.*

cate, contrary to the Public-Houses Acts Amendment (Scotland) Act, 1862, sec. 17, *held* that the repeal of sec. 18 of the Public-Houses Acts Amendment (Scotland) Act, 1862, did not make applicable the *inducice* of six free days provided by sec. 23 of the Home Drummond Act, and that the complaint had competently been tried on *inducice* of not less than forty-eight hours, in terms of the Summary Procedure (Scotland) Act, 1864. Stirling v. Dickson, Dec. 10, 1900, Just. Cases, p. 17.

Complaint—Relevancy—Specification of sections of statute constituting offence—Home Drummond Act, 1828, sec. 23.

16. A summary complaint set forth that the accused, "who holds a certificate for the sale of exciseable liquors at" a hotel specified "has been guilty of an offence against the laws for the regulation of public-houses in Scotland, in so far as he did between 1 and 2 o'clock in the morning" of a day specified "sell or give out from the said hotel" certain quantities of whisky to certain persons named. *Held*, on appeal, that the action was irrelevant, in respect that it neither alleged that the things said to have been done by the accused were done in contravention of his certificate, nor specified any section or sections of the Public-Houses (Scotland) Acts as having been contravened. Rule v. Thomson, March 4, 1901, Just. Cases, p. 33.

Complaint—Relevancy—Objections to relevancy—Must be disposed of before evidence on merits allowed.

17. *Held* that objections taken to the relevancy of a criminal charge must be disposed of before proceeding with the trial, and that reservation of such objections by the magistrate for consideration after proof on the merits had been led was an illegality constituting a good ground of suspension. Phillips v. Currie, June 7, 1901, Just. Cases, p. 75.

Procedure—Complaint—Complaint against a firm—Representation of firm at the trial—Representation of firm by its manager.

18. A summary complaint set forth that "Robert M'Alpine & Sons" had committed a contravention of the Factory and Workshops Acts. Robert M'Alpine & Sons was a firm consisting of four partners. The complaint was served on the firm by delivering a copy to the manager of the firm within the office of the firm. The manager appeared at the trial on behalf of the firm. The Sheriff-substitute refused to recognise the manager as representing the firm, found that the firm had failed to appear after having been duly summoned, and after evidence had been led in support of the complaint, convicted the firm of the contravention charged, and imposed a penalty. Conviction *quashed*, in respect that the Sheriff-substitute was wrong in refusing to recognise the manager as representing the firm. M'Alpine & Sons v. Ronaldson, June 11, 1901, Just. Cases, p. 82.

Procedure—Adjournment of diet by unsigned deliverance.

19. At the trial of a summary complaint on 7th January the Sheriff adjourned the diet, but the interlocutor appointing a day for the next diet was not signed. The accused appeared on the day named by the unsigned interlocutor, and, after evidence, was convicted. In a suspension, *held* that as the diet of 7th January had not been validly adjourned, subsequent proceedings were incompetent, and conviction *quashed*. Jamieson v. Wilson, June 11, 1901, Just. Cases, p. 90.

Procedure — Proof — Witness — Admissibility — Husband and Wife — Parent and Child — Prevention of Cruelty to Children Act, 1894, sec. 12.

20. *Held* by the Lord Justice-General that the wife of a man charged with the culpable homicide of his child aged twelve months, or alternatively with a contravention of sec. 1 of the Prevention of Cruelty to Children Act, 1894, was a competent witness under sec. 12 of the Act. H. M. Advocate v. Fraser, April 26, 1901, Just. Cases, p. 67.

JUSTICIARY CASES—*Continued.*

Procedure—Proof—Witness—Examination—Question as to person who has given facilities to police—Allowance of question subject to condition of non-disclosure of person's name.

21. At a trial in a Police Court on a summary complaint charging betting in a street contrary to the local Police Acts, a police-constable deponed in cross-examination for the accused that he had from the window of a house seen the accused commit the offence charged. The constable having been further asked to identify the house, the Procurator-fiscal objected to the question on the ground that the answer would lead to the public disclosure of the person who had given facilities to the police, but stated that he had no objection to the answer being communicated in writing to the Magistrate and to the agent for the accused—the latter to make no use of it in further cross-examination. The agent for the accused refused to accept the answer on this condition, whereupon the Magistrate disallowed the question. The accused having been convicted appealed. The Court *sustained* the appeal, holding that the question was a competent and proper question, and the condition one which the Magistrate was not entitled to impose. Thomson v. Neilson, Dec. 6, 1900, Just. Cases, p. 3.

Procedure—Proof—Note of Documentary Evidence—Book—Plan—Summary Procedure (Scotland) Act, 1864, *sec.* 16.

22. At the trial upon a summary complaint two witnesses when giving evidence used a business book to refresh their memory by referring to it, and a third witness gave his evidence with reference to a plan in his possession. The book and the plan were laid on the table and left there by the witnesses. No motion was made that the book or plan should be noted on the record, and they were not so noted. *Held* that the omission to note the book and plan did not invalidate the conviction. Marshall v. Phyn, Dec. 11, 1900, Just. Cases, p. 21.

Procedure—Sentence—Competency—Sentence on two or more persons.

23. A conviction and sentence on a summary complaint found the accused A and B guilty of the crimes charged: "Therefore fines and amerciates them in the sum of twenty shillings sterling each, . . . and unless said fines be instantly paid by them respectively, decerns and adjudges the said A and B to be imprisoned for the space of ten days each, unless said fines shall be sooner paid." The fines were paid. In a suspension of the conviction on the ground that under it both A and B were liable to imprisonment if either party failed to pay the fine, *opinion* that the objection was good. Allan v. Lamb, Dec. 7, 1900, Just. Cases, p. 15.

24. Where several persons were convicted on the same complaint of an offence and each adjudged to pay a fine, and in default of payment warrant granted to poind their goods, the sentence was so worded as to be capable of being read to the effect that if any one of the persons failed to pay his fine the goods of all might be poinded. Conviction *quashed*. Macleman v. Middleton, June 6, 1901, Just. Cases, p. 70.

Procedure—Sentence—Penalty—Imprisonment—Poinding and Sale—Arrestment—Pharmacy Act, 1852, *sec.* 12—*Pharmacy Act*, 1868, *sec.* 15—*Summary Procedure (Scotland) Act*, 1864, *sec.* 18, *subsec.* 6—*Summary Jurisdiction (Scotland) Act*, 1881, *sec.* 8, *subsec.* 1—*Debtors (Scotland) Act*, 1880.

25. In a proceeding upon a complaint under the Summary Jurisdiction (Scotland) Acts, 1864 and 1881, for a contravention of the Pharmacy Acts, which authorise the recovery of penalties by poinding—(1) it is competent, under the Summary Jurisdiction Act, 1881, to grant warrant for imprisonment, and (2) the warrant to imprison may be in default of payment of the penalty or recovery thereof by poinding and

JUSTICIARY CASES—*Continued.*

sale—it is not necessary that it should also be in default of recovery by arrestment. Gardner v. Bremridge, March 15, 1901, Just. Cases, p. 46.

Procedure—Sentence—Penalty—"Shall"—Salmon Fisheries (Scotland) Act, 1862, *sec.* 32.

26. The Salmon Fisheries (Scotland) Act, 1862, sec. 32, enacts,—"The penalties incurred under this Act shall in all prosecutions at the instance of the clerk of any District Board be payable to and recoverable by such clerk, and shall in all other cases be paid and applied in such manner as the Sheriff or Justices may direct. . . ." A person charged at the instance of the clerk of a District Fishery Board with a contravention of the Salmon Fisheries (Scotland) Act, 1862, was convicted and adjudged to pay a penalty to the Clerk of Court. In a suspension *held* that the direction to pay the penalty to the Clerk of Court was a direction for the convenience of the accused, the duty of the Clerk of Court being to hand over the money to the Clerk of the District Board, and that the sentence was unobjectionable. Marshall v. Phyn, Dec. 11, 1900, Just. Cases, p. 21.

Procedure—Sentence—Form of sentence.

27. Form of sentence *disapproved* in the conviction of a statutory offence, for which imprisonment was competent only in the case of failure to pay the penalty. Westwood v. Taylor, Dec. 6, 1900, Just. Cases, p. 1.

Review—Civil or Criminal—Dean of Guild—Penalty—Burgh Police Act, 1892, *sec.* 487—*Summary Procedure Act*, 1864, *sec.* 28.

28. In a petition to a Dean of Guild Court, that Court imposed a penalty of £5 on the respondent. An appeal by the respondent to the Court of Session was objected to as incompetent, on the ground that the proceedings were criminal and not civil, in respect that by sec. 487 of the Police Act, 1892, the Magistrates of burghs were authorised to pronounce a sentence of imprisonment in default of payment of a pecuniary penalty, and that by sec. 28 of the Summary Procedure Act all proceedings by way of complaint were to be deemed to be of a criminal nature where the Magistrate was authorised to pronounce a sentence of imprisonment. The Court *repelled* the objection, on the ground that sec. 487 of the Burgh Police Act, 1892, did not apply to a Dean of Guild Court. Fraser v. Downie, June 4, 1901, p. 881.

Review—Civil or Criminal—Sea Fisheries (Scotland) Amendment Act, 1885, *secs.* 7 *and* 8.

29. The Sea Fisheries (Scotland) Amendment Act, 1885, provides that in proceedings by way of summary complaint for contravention of the Act, the Sheriff may be called on at the trial to dispose of the question of damage to property by the contravention, and that where such damage as found by the Sheriff exceeds £12, appeal against such award "shall be competent as in ordinary cases before the Sheriff Court." In a suspension of a conviction and award of damages exceeding £12, under the Act, the Court *quashed* the conviction on the ground of irregularity in the proceedings, but *held* that it had no jurisdiction to consider the validity of the award of damages. Jamieson v. Wilson, June 11, 1901, Just. Cases, p. 90.

Review—Stated Case—Statutory conditions of obtaining case—Power to dispense with fulfilment of conditions—Summary Prosecutions Appeal (Scotland) Act, 1875, *sec.* 3.

30. Persons who had been convicted on a summary complaint in a Police Court presented a note for an order on the Magistrate to state and sign a case for appeal. The respondent (the prosecutor) objected that it was incompetent for the Magistrate to state and sign a case in respect that the applicants had not lodged a bond of caution or made consignation and had not paid the Clerk of Court's fees within three days of

JUSTICIARY CASES—*Continued.*

the date of the conviction, as required by sec. 3 of the Summary Prosecutions Appeals (Scotland) Act, 1875. It appeared that the applicants' law-agent had done everything in his power to find the Magistrate and the Clerk of Court within the three days, but without success. The Court, in the special circumstances, *pronounced* an order on the Magistrate to state and sign a case for appeal. Greig v. Finlay, March 4, 1901, Just. Cases, p. 36.

Review—Suspension—Oppression—Right of accused to adjournment of trial—Burgh Police (Scotland) Act, 1892, *sec.* 478—*Reformatory Schools Act*, 1866, *sec.* 14.

31. A boy, thirteen years and eleven months old, was charged in Fraserburgh Police Court with theft upon a complaint under the Burgh Police (Scotland) Act, 1892. His father was dead, but his mother was alive. She was resident in Aberdeen, but a maternal uncle of the boy's lived in Fraserburgh. A week before the trial the boy and his uncle were informed by the police that they were making investigations with a view to bringing the charge. The boy was apprehended on the morning of the trial. A copy of the complaint had not previously been delivered to him or to anyone on his behalf. The uncle, having been informed by the police of the boy's apprehension, and of the hour at which the trial would take place, was present in Court when the case was called. No intimation of the boy's apprehension was sent to his mother. The boy pleaded guilty, and was convicted and ordered to be detained in a reformatory school for three years. The Magistrate did not inform the boy of his right, under the Act, to an adjournment. The boy, with consent of his mother, brought a suspension on the grounds that the Magistrate ought to have adjourned the case, and that the order for detention in a reformatory school was illegal, having been pronounced without notice to the mother. In the bill the boy stated that his uncle had requested that the case should be adjourned, in order that he might obtain a law-agent, and that this request had been opposed by the prosecutor and refused by the Magistrate. The prosecutor denied these statements. He averred further that the boy's mother had died since the bringing of the suspension. At the hearing the boy's counsel stated that he did not desire an inquiry into the facts. Suspension *refused*, the Court holding that under section 478 of the Burgh Police (Scotland) Act, 1892, there was no absolute duty on the Magistrate to inform the accused of his right to an adjournment, and that, in the circumstances, there was no ground for suspending the conviction. Taylor v. Tarras, March 4, 1901, Just. Cases, p. 39.

Review—Suspension—Mora.

32. Suspension of a conviction on a summary complaint *refused* on the ground that ten months had elapsed since the conviction had been obtained and the fine paid without protest, and that there was no satisfactory explanation of the delay. Allan v. Lamb, Dec. 7, 1900, Just. Cases, p. 15.

See *Police*, 3, 13, 14, 15—*Public-House*, 2 *to* 6—*Sheriff*.

LAW-AGENT. See *Agent (Law)—Agent and Client*.

LEASE. *Retention of Rent—Obligation of landlord to put subjects into habitable repair.*

1. The proprietor of a farm let it for nineteen years from Whitsunday 1897, but did not, prior to the entry of the tenant, put the farm buildings into habitable condition and repair. During the first two years of the lease the proprietor made certain repairs on the buildings, and the tenant paid the rent until Whitsunday 1899, when he declined to pay the half year's rent then due, on the ground that he was entitled to

LEASE—*Continued.*

retain the rent until the landlord put the buildings into habitable condition and repair. The proprietor then brought an action for the half year's rent, alleging that by the repairs which he had executed the buildings had been put into habitable condition and repair, and pleading that in any view the tenant was not entitled to retain the rent. *Held*, after a proof (1) that the farm buildings were not in habitable condition and repair; and (2) that the tenant was entitled to retain the rent until the landlord had fulfilled his obligation to put the buildings into habitable condition and repair. M'Donald v. Kydd, June 14, 1901, p. 923.

Mineral Lease—Obligation on tenants fairly to work the minerals, with liberty to them to adopt the mode of working they might deem most advantageous.

2. A lease of coal and other minerals took the tenant and his heirs, assignees, and subtenants, bound "fairly and properly to work the said minerals, with liberty to him or them to adopt the long-wall, stoop-and-room, or any other mode of working the same, as he or they may deem most advantageous for the complete excavation of said minerals." On the termination of the lease the landlord brought an action of damages against the tenants, averring that they had not fairly and properly worked the minerals, in respect that, having adopted the long-wall system of working, they had improperly worked the upper portion of the splint coal seam first instead of the bottom portion, with the result that the bottom portion was left covered with debris and broken strata, rendering it for the future completely unworkable, and so causing a large quantity of coal to be lost to the pursuer. The defenders pleaded that the action was irrelevant, in respect that by the above clause of the lease they were made sole judges of the proper method of working. *Held* that the action was relevant. Jackson's Trustees v. William Dixon, Limited, May 16, 1901, p. 782.

Compensation for Improvements—Statute—Construction—Retrospective effect—Market Gardeners Compensation (Scotland) Act, 1897, *sec.* 4.

3. Held (aff. *judgment of Second Division*) *that sec.* 4 *of the Market Gardeners (Scotland) Act*, 1897, *is not retrospective, and does not entitle tenants under leases current at the date of the Act to compensation in respect of market garden improvements executed prior to the commencement of the Act.* Smith v. Callander, May 9, 1901, H. L., p. 28.

See *Master and Servant*, 1—*Poor*, 6—*Valuation Acts*, 5.

LEGACY DUTY. See *Revenue*, 3.

LEGITIM. See *Succession*, 2, 3, 4.

LIFERENT AND FEE. See *Fee and Liferent—Succession*, 15, 16—*Trust*, 10, 11.

LOCAL GOVERNMENT. See *Burgh—Police—Poor—Public Health.*

LOCH. See *Fishings*, 1.

LOTTERY. See *Justiciary Cases*, 7.

MALICE. See *Reparation*, 2 *to* 6.

MARRIAGE-CONTRACT. *Antenuptial Marriage-Contract — Provisions to children—Obligation by husband to convey specific funds in security of provisions payable at his death—Implement.*

1. A husband in his antenuptial marriage-contract bound himself to convey to the marriage-contract trustees his share of his father's succession in security of a provision of £3000, payable at his death to the children of the marriage who should then be alive. In an action by the trustees to recover part of this fund retained by the husband, *held* that the defender's obligation was not discharged (1) by an offer of

ayment of the balance required to bring the fund in the trustees' ands up to £3000, or (2) by the assignation of policies of insurance pon his life (with premiums paid up or secured) of a value as at his eath greater than the part of the fund retained. Henderson's Trustees . Henderson, Oct. 25, 1900, p. 17.

enuptial Marriage-Contract—Alimentary Annuity to Wife—Larger limentary Annuity in Husband's Settlement—Power of Wife to ischarge Marriage-Contract Annuity.

y antenuptial contract of marriage the husband, *inter alia*, bound imself to provide his wife, in the event of her surviving him, in an nnuity of £100 during her life, but restricted to an alimentary nnuity of £50 in the event of her second marriage. The husband lso made certain provisions for the children of the marriage, and ssigned certain moveable property to the marriage-contract trustees in ecurity of the provisions to the wife and the children. The marriage vas dissolved without issue by the death of the husband. He left a rust-disposition and settlement by which he conveyed his whole states, heritable and moveable, to trustees, and directed them, *inter lia*, to pay an annuity of £360 to his widow, restricted in the event f a second marriage to £120, the said annuity, both original and estricted, being declared to be purely alimentary, and to be in full atisfaction of the annuity provided in the marriage-contract. The ncome of the fund in the hands of the marriage-contract trustees, ogether with the income of the husband's remaining estate in the ands of his testamentary trustees, was insufficient to pay the widow n annuity of £360, but from the date of the husband's death she eceived payment of £360 a year, in name of the testamentary annuity, y receiving the income of both funds, the balance being made up by ncroachments on the capital of the testamentary fund. When, in onsequence of these encroachments, the capital of the testamentary und had been practically exhausted, the testamentary trustees, with onsent of the widow, called on the marriage-contract trustees to and over the marriage-contract fund to be applied by the testamentary trustees in payment of the testamentary annuity. The narriage-contract trustees maintained that they were bound to old the marriage-contract fund for payment of the marriage-contract nnuity. *Held* (1) that the widow was entitled to surrender the narriage-contract annuity, the testamentary annuity being declared to e alimentary, and the terms of the husband's settlement shewing that e consented to the surrender; and (2) that the marriage-contract rustees were bound to hand over the marriage-contract fund to the estamentary trustees, there being no marriage-contract purpose remaining to be fulfilled. Stillie's Trustees v. Stillie's Trustees, July 11, 901, p. 1054.

enuptial Marriage-Contract—Conveyance by wife of acquisita et acquirenda—Policy of insurance taken by a man in anticipation of marriage n his life payable to wife if living—Married Women's Policies of Assurance (Scotland) Act, 1880, *sec.* 2.

y antenuptial contract of marriage, C D, the intended wife, conveyed o trustees, for the purposes specified, "All and Sundry lands and eritages, goods and sums of money, and generally the whole property nd estate, heritable or moveable, now belonging, or which shall pertain and belong to her during the subsistence of the marriage." A B, n anticipation of his marriage, which took place two days afterwards, ook out a policy of insurance on his own life, payable at his death to C D, his intended wife, if then alive, if not to his executors. The olicy gave A B right to change the beneficiary, but this clause was leleted after the marriage at his request. A B was under no obliga-

tion to keep up the policy. The marriage having been dissolved by the death of the husband, and the insurance company having paid the sum due under the policy to the widow, the marriage-contract trustees claimed that sum on the ground that the wife took under the destination in the policy, and by virtue of section 2 of the Married Women's Policies of Assurance (Scotland) Act, 1880, a vested right in the proceeds of the policy *stante matrimonio*, and that this right was carried to them by the above quoted clause of the marriage-contract. *Held* that the sum due under the policy was not property which pertained or belonged to the wife during the subsistence of the marriage, and that the widow was entitled to it absolutely. Coulson's Trustees v. Coulson, July 5, 1901, p. 1041.

Deed by woman before marriage, but after agreement to marry—Revocation—Jus quæsitum—Fraud on Marital Rights—Trust.

4. A woman before her marriage, but after it had been agreed upon, executed a disposition and assignation in trust of all the means and estate she should acquire during her marriage to trustees therein named. The trustees were directed (1) to pay the annual income of the trust-estate to herself during her life, exclusive of her husband's *jus mariti* and right of administration; (2) in the event of her husband surviving her, and there being issue of the marriage, to pay the annual income to him during the survivance of such issue; and failing issue (3) to pay to him an annuity of £200 a year; (4) on the death of the longest liver of herself and her husband, to pay over the capital to the child or children of the marriage subject to a power of apportionment given to the spouses or the survivor; (5) and failing issue of the marriage, to pay over the capital to her in the event of her surviving her husband, or to such person or persons as she might direct, subject to her husband's annuity in the event of his surviving her. The deed was declared to be irrevocable. The husband also executed before marriage a bond of annuity for the sum of £200 in favour of his wife. He gave no formal assent to his wife's deed, but he was aware of its intended execution, and made no inquiry as to its provisions. A child was born of the marriage, and thereafter the trustees entered on the management of certain funds to which the wife had succeeded. In an action by the wife and husband against the trustees to have the wife's deed declared revocable, or otherwise to have it reduced as *in fraudem* of the husband's rights, *held* (1) that it was not revocable; and (2) that it was not reducible. Lyon v. Lyon's Trustees, March 12, 1901, p. 653.

Postnuptial provision to wife taking effect stante matrimonio—Donatio inter virum et uxorem—Bankruptcy.

5. A husband, by deed of assignation dated June 1898, on the narrative that there was no marriage-contract between himself and his wife, and "in order so far to supply that defect and make provision for the said" wife, assigned, in the first place, to her and her heirs and assignees whomsoever the lease of the house which he and she occupied; in the second place, he assigned to her, her executors, administrators, and assigns, a policy of insurance on his life, which he had taken out twenty-three years before; and, in the third place, he assigned to her the furniture in the house; declaring that he should have no right or title to the lease, and that neither the lease nor the subjects second and third assigned should be liable to his deeds or subject to the diligence of his creditors, it being further declared that the wife should be entitled to manage the said leasehold subjects in every respect as if she were still unmarried, his *jus mariti* and right of administration being excluded from these subjects as well as from the subjects second and third assigned. The deed of assignation was registered in the Register of

AGE-CONTRACT—*Continued.*
asines *quoad* the leasehold subjects, and the assignation of the policy
: insurance was intimated to the insurance company. The subjects
signed, which amounted in value to about £200, constituted the hus-
and's whole property (apart from his annual income, which amounted
) £120 a year), with the exception of a sum of £439 in bank, which
as held to be his property, and which he uplifted two months after
ie date of the assignation, and, to the extent of £400, handed over
) his wife. The husband's estates were sequestrated in April 1899 in
onsequence of the failure of a business which he was carrying on as
ne of a body of testamentary trustees. In an action by the trustee in
ie sequestration against the wife and the husband for his interest,
oncluding for reduction of the assignation, *held* that the assignation
ell to be reduced as a *donatio inter virum et uxorem*. Robertson's
'rustee v. Robertson, Jan. 22, 1901, p. 359.
Entail, 2—Succession, 1, 14.

ER AND SERVANT. *Lease or Service—Occupancy of house as part emuneration for services.*
he proprietors of an estate entered into an agreement with B, a gardener,
'hereby B agreed to keep in order the policy grounds, garden, and
venue of the mansion-house, for which services he was to receive £15
1 money, the occupancy of a cottage in the kitchen garden, and the
ccupancy and use for his own profit of that garden, and a cow's keep.
'he proprietors having thereafter dismissed B from their service brought
n action to have him summarily removed from the cottage. They did
ot ask for his removal from the garden. Evidence on a consideration
f which it was *held* that B occupied the cottage as tenant, and that
ie pursuers were not entitled to have him removed except after due
otice to him as tenant to remove. Dunbar's Trustees v. Bruce, Nov. 24,
900, p. 137.
by servant after leaving service of information obtained during ser-ice—Implied Contract—Confidentiality.
vidence on a consideration of which it was *held* that a person who
ad been the agent of a friendly society was not entitled, after he had
ift the society's service, to give written lists of the members of the
ociety to the officials of a rival society. Liverpool Victoria Legal
'riendly Society v. Houston, Nov. 2, 1900, p. 42.
rkmen's Compensation Act, 1897—*Accident arising out of and in the ourse of the employment—Act, sec.* 1 (1).
workman in the course of his employment in a "factory," within the
ieaning of the Workmen's Compensation Act, 1897, met with an acci-
ent caused by his fellow-workmen, who, at the time, were not engaged
t their work, but were indulging in horseplay. *Held* that the accident
vas not one arising "out of" the employment in the sense of the
Vorkmen's Compensation Act, 1897, sec. 1 (1), and that the injured
vorkman was not entitled to compensation under the Act. Falconer
. London and Glasgow Engineering and Iron Shipbuilding Co.,
imited, Feb. 23, 1901, p. 564.
workman employed in the renovation of the interior of a church found
he church door locked on his arrival in the morning, and was unable
o unlock the door. To gain access to his work he climbed the iron
ailing of a neighbouring schoolyard, which enabled him to scale the
hurchyard wall and enter the church by a window. The railing was
opped by spikes, one of which pierced his foot, from the effects of
vhich injury he died. *Held* that the accident did not arise "out of
nd in the course of the employment" of the workman in the sense of
ection 1 (1) of the Workmen's Compensation Act, 1897. Gibson v.
Wilson, March 12, 1901, p. 661.

MASTER AND SERVANT—*Continued.*

Workmen's Compensation Act, 1897 — "*Course of Employment*"—*Serious and wilful misconduct—Act, secs.* 1 (1) *and* (2) (*c*).

5. In a claim for compensation under the Workmen's Compensation Act, 1897, by a father for the death of his son, the following facts were set forth in a case stated by the arbitrator:—The deceased, who was engaged as a workman in the process of filling scrap-iron into barrows, was killed owing to the defective condition of a hoist in which he was ascending to a furnace platform, in order to procure handleathers, which were necessary to his work. The furnace platform could be reached either by a fixed iron ladder or by the hoist in question. Workmen were forbidden to ascend by the hoist, a notice to that effect being posted on a wall close by, and at the time of the accident the hoist had been rendered especially dangerous by recent alterations. There was no finding that the deceased knew of the notice, and it was stated that there was no proof that his attention was directed to the changed condition of the hoist. It was further stated that some of the workmen knew of the notice and that some did not, but that all of them used the hoist. *Held* (1) that the deceased had been killed in the course of his employment; and (2) that the arbitrator was right in holding that the deceased had not been guilty of serious and wilful misconduct in the sense of the Workmen's Compensation Act, 1897. Logue v. Fullarton, Hodgart, & Barclay, June 26, 1901, p. 1006.

Workmen's Compensation Act, 1897—*Serious and wilful misconduct—Act, sec.* 1, (2) (*c*).

6. A woman employed in a spinning mill was injured through attempting to clean a teaser card-machine, at which she was working, while it was in motion. It was the rule and practice of the factory, known to the woman, that no cleaning of machinery was to be done unless the machinery was stopped. *Held* that the injuries to the woman were attributable to her serious and wilful misconduct within the meaning of sec. 1, subsec. (2) (*c*), of the Workmen's Compensation Act, 1897, and consequently that her employers were not liable to her in compensation under the Act. Guthrie v. Boase Spinning Co., Limited, March 20, 1901, p. 769.

Workmen's Compensation Act, 1897—*Engineering Work—Act, sec.* 7.

7. A firm of engineers sold a hay-cutting machine to a customer, and undertook to fit it up in the customer's premises, and test its working before delivery. In the process of fitting up the hay-cutter one of the engineer's workmen, for the purpose of testing its working, connected it with a revolving shaft driven by electricity forming part of the customer's plant already in the premises, and while doing so was injured. *Held* (1) that the hay-cutter was an engineering work in the sense of the Act, (2) that the workman's employers were the undertakers for its construction, and (3) that the workman was entitled to compensation under the Act. Reid v. P. R. Fleming & Co., June 25, 1901, p. 1000.

Workmen's Compensation Act, 1897—*Mine—Siding adjacent to and belonging to mine—*"*On or in or about*"—*Work extraneous to proper business of employer—Act, secs.* 1 (1) *and* 7—*Coal Mines Regulation Act*, 1887, *sec.* 75.

8. A colliery company, owners of a coal-mine and siding connecting the mine with a main line of railway, entered into a contract with the owner of a sand-pit situated on the main line to carry sand from the sand-pit in railway waggons to the colliery siding, preparatory to removal by the railway company. The haulage was to be done by an engine belonging to the colliery company, and used in connection with their mine and siding. The siding was about 80 yards in length, and served only the one mine. The sand-pit was 300 or 400 yards from

the siding. In the course of executing this contract the brakesman of the engine, who was in the employment of the colliery company, was killed while uncoupling waggons on the main line at or near the extremity of the siding. *Held* (1) that the employment of the deceased was locally "about" a mine in the sense of sec. 7, subsec. (1), of the Workmen's Compensation Act, 1897; and (2) that a claim for compensation arose although the work upon which the deceased was employed at the time of the accident was not part of the proper business of the colliery. Monaghan v. United Collieries, Limited, Nov. 27, 1900, p. 149.

Workmen's Compensation Act, 1897—*Railway*—"*On or in or about*" *a railway*—*Act, sec.* 7.

A trading company's premises were connected, by a siding, which was its own property, with a line of railway belonging to a railway company. The siding, which was not constructed or carried on under any Act of Parliament, was used solely for the traffic of the trading company, and for that purpose was used by the railway company by means of its own rolling-stock and servants. A servant of the railway company, while so employed, was accidentally injured at a point on the siding three-quarters of a mile from its junction with the line of railway. *Held* that the accident had not occurred "on, in, or about" a railway within the meaning of the Workmen's Compensation Act, 1897. Brodie v. North British Railway Co., Nov. 6, 1900, p. 75.

Workmen's Compensation Act, 1897 — *Railway* — *Signal Cabin* — "*Ancillary or incidental*" *to business of undertaker*—*Act, sec.* 4.

A workman when engaged in the employment of a builder in the erection of a stone and lime wall in a railway cutting, was run down and killed by a passing train. The wall, which the builder had contracted to build for the railway company, was intended to prevent earth on the bank of the cutting from falling down and obstructing the access to a signal-cabin belonging to the railway company. The workman's widow claimed compensation under the Workmen's Compensation Act, 1897, from the railway company, as the undertakers within the meaning of the Act. *Held* that the work on which the deceased was engaged was not part of the business of the railway company, but was merely ancillary or incidental thereto, and that the railway company was not liable. Dundee and Arbroath Joint Railway Company v. Carlin, May 31, 1901, p. 843.

Workmen's Compensation Act, 1897—*Wharf*—*Factory*—*About a factory* —*Act, sec.* 7—*Factory and Workshop Act*, 1895, *sec.* 23.

In an arbitration under the Workmen's Compensation Act, 1897, the following facts were admitted:—The claimant, employed by the respondents as a quay labourer at a wharf occupied by them, was assisting in removing girders from the street immediately outside the wharf shed to the side of a steamship belonging to the respondents, which was being loaded. The girders were lifted by a hand crane on a hand truck, by which they were conveyed to the ship's side. While removing the hand crane from one pile of girders to another pile, both of which lay in the street immediately outside the wharf shed, the claimant got jammed between the platform of the crane and one of the girders and sustained injuries. *Held* (1) that, as one or more of the provisions in sec. 23 of the Factory and Workshops Act, 1895, applied to the wharf, it was a factory within the meaning of the Act of 1897; and (2) that the fact that the accident happened on a public street, immediately outside the wharf shed, did not, *per se*, exclude a claim for compensation. Strain v. Sloan & Co., March 13, 1901, p. 663.

A rivetter was injured in the employment of a firm of ship-repairers, while repairing a ship in a public dock at a distance from his em-

MASTER AND SERVANT—*Continued.*

ployers' factory of 550 yards in a direct line and about a mile by road. The employers' factory was not a shipbuilding yard. *Held* that the rivetter was not, when he received the injuries, employed "about" a factory in the sense of the Act. Barclay, Curle, & Co. v. M'Kinnon, Feb. 1, 1901, p. 436.

Workmen's Compensation Act, 1897—*Factory—Machinery on board lighter—Dock—Act, sec.* 7—*Factory and Workshop Act*, 1895, *sec.* 23.

13. A lighter and machinery thereon, the property of and worked by stevedores, was employed in raising goods from the hold to the deck of a vessel moored between the lighter and a quay, the goods being thereafter transferred to the quay, not by the stevedores, but by dock workmen. *Held* that sec. 23 of the Factory and Workshop Act, 1895, did not apply either to the lighter or to the machinery thereon, and that therefore they did not constitute a "factory" in the sense of the Workmen's Compensation Act, 1897; and further, that the process which was being performed by the lighter and its machinery was not one of unloading to a quay in the sense of the Act of 1895. Laing v. Young & Leslie, Nov. 2, 1900, p. 31.

Workmen's Compensation Act, 1897—*Building exceeding thirty feet in height—Part of building below ground—Foundations—Question of fact or law—Undertaker—Act, sec.* 7.

14. A wash-house, built to the order of the Police Commissioners of a burgh, was 30 feet 5½ inches in height above its foundation. Immediately above the foundation was a basement floor 6 feet below the level of the surrounding ground which contained pipes in connection with the wash-house. The floor of the wash-house was 6 feet 4 inches above the basement floor. *Held* that the question whether a building exceeded 30 feet in height, in proceedings under the Workmen's Compensation Act, 1897, was one of fact for the determination of the arbitrator.

Opinions that the building exceeded 30 feet in height in the sense of section 7 (1) of the Workmen's Compensation Act, 1897.

Question whether in estimating the height of a building for the purposes of the Act, the foundations are to be taken into account.

Opinion that the undertakers of the building in the sense of the Act were the Police Commissioners, and not the tradesmen employed by them. Halstead v. Alex. Thomson & Sons, March 13, 1901, p. 668.

Workmen's Compensation Act, 1897—*Building constructed by a scaffolding—Scaffolding not in use nor erected at time of accident—Question of fact or law—Act, sec.* 7.

15. In the construction of a building, scaffolding, consisting of trestles and planks, was used from time to time from the beginning to the end of the job. During the construction an accident happened to a workman, at a time when the scaffolding, although its component parts were there, was neither in use nor erected. *Held* that at the time of the accident the building was being constructed by means of a scaffolding in terms of sec. 7 (1) of the Workmen's Compensation Act, 1897.

Opinions that, in proceedings under the Act, the question whether or not at the time of the accident the building was being constructed by means of a scaffolding, was one of fact to be determined by the arbitrator. Halstead v. Alex. Thomson & Sons, March 13, 1901, p. 668.

Workmen's Compensation Act, 1897—*Separate proof as to preliminary defence—Reparation—Election.*

16. In an action raised by a workman against his employers at common law for damages for injuries alleged to have been received through their fault, the defenders, besides denying fault, averred that the pursuer had given written notice that he claimed compensation under the Workmen's Compensation Act, and that subsequently they had paid

SERVANT—*Continued.*

ıpensation, and pleaded that in respect thereof the pursuer was from suing the action. In answer, the pursuer averred that induced to sign the notice shortly after the accident by false ıtations on the part of the defenders, at a time when, through he could not, and did not, understand its import. *Held* that estion should be determined by proof *primo loco*. Hunter v. ıvil Coal Co., Oct. 23, 1900, p. 10.

n's Compensation Act, 1897—*Contract—Essential Error—d Error.*

ıployer tendered £2, 7s. 4d. to D, a workman, who had been d in his employment, as in full satisfaction of any claim he might against him, stating, as was the fact, that he had obtained a report a surgeon that D would be fit to return to his work in six weeks the date of the accident. D accepted the money and granted a arge in full. The medical opinion on which both parties relied ed to be mistaken, for D was not able for work for more than six ths from the date of the accident. *Held* that the above facts were sufficient to shew that the parties, in entering into the agreement settlement of the workman's claim, were under essential error to effect of rendering the discharge null and void. Dornan v. Allan ıon, Nov. 22, 1900, p. 112.

men's Compensation Act, 1897, *sec.* (1) (*a*) (i.), *sec.* 7, *subsec.* (2), *l First Sched.—Dependants—"Wholly" dependent—Husband and ife—Act.*

ı widow of a workman who had been found entitled to compensa- n under the Workmen's Compensation Act, 1897, on account of her sband's death, on the footing that she was only partly dependent on m, appealed on the question whether she was wholly dependent on m. The facts stated were:—The husband had for the three years amediately preceding his death lived separate from his wife. His ontribution to her support did not exceed £5 per annum. The ppellant had no regular means of livelihood. In addition to what she eceived from her husband she was supported by her earnings from ccasional employment, and by contributions from her relatives. *Held* that the appellant was, within the meaning of the Workmen's Compensation Act, 1897, First Schedule, sec. (1) (*a*) (i.), wholly dependent on her husband at the time of his death. Cunningham v. M'Gregor & Co., May 14, 1901, p. 775.

orkmen's Compensation Act, 1897—*Memorandum of Agreement—Act, Second Sched. sec.* 8—*A. S., 3d June* 1898, *sec.* 7 (*a*).

Where a Sheriff is applied to under Sched. II., sec. 8, of the Workmen's Compensation Act, 1897, and relative Act of Sederunt, 3d June 1898, sec. 7 (*a*), for a special warrant to register a memorandum of agreement, the genuineness of which is disputed, he is not acting as arbiter under the Act, and an appeal by stated case from any order pronounced by him in such an application is incompetent. Cochrane v. Traill & Sons, Nov. 1, 1900, p. 27.

Held that a Sheriff may entertain a petition under Schedule II., sec. 8, of the Workmen's Compensation Act, 1897, and relative Act of Sederunt, 3d June 1898, sec. 7 (*a*), for a special warrant to register a memorandum of an oral agreement, and where necessary may allow a proof. Traill & Sons v. Cochrane, July 19, 1901, p. 1091.

Workmen's Compensation Act, 1897—*Motion to find compensation due under Act in action of damages which had been dismissed—Act, sec.* 1 (4).

An action by a widow for damages in respect of the death of her husband by accident on 2d January 1900 was raised within two months of the accident. The action was dismissed as irrelevant by the Sheriff on 16th June 1900, and, on appeal, by the Court of Session on 29th

MASTER AND SERVANT—*Continued.*

November 1900. On 14th February 1901 the pursuer applied to the Court for a finding that compensation would have been due under the Workmen's Compensation Act, 1897, and to assess the same in terms of sec. 1 (4) of the Act. The Court *refused* the application. Baird v. Higginbotham & Co., Limited, March 14, 1901, p. 673.

Workmen's Compensation Act, 1897—*Claim for Compensation—Application to arbiter without previous claim—Act, sec.* 2.

22. *Held* that an application to the Sheriff as arbiter under the Act to fix the compensation is itself "a claim for compensation" within the meaning of the above section, and if brought within six months of the accident does not require to be preceded by any other form of claim.

Opinion reserved, whether a letter received by the employers within the six months intimating that a claim was to be made under the Act, but not stating the amount claimed, was a sufficient "claim for compensation" under the section. Fraser v. Great North of Scotland Railway Co., June 11, 1901, p. 908.

Workmen's Compensation Act, 1897—*Amount of Compensation—First Schedule* (1).

23. A miner entered the service of a coal company on Friday, 23d March; he did not work on Saturday, the 24th; he worked on Monday, the 26th, and on every day thereafter until Thursday, the 29th, when he received injuries, on account of which he claimed compensation under the Workmen's Compensation Act, 1897, from his employers. *Held* that these facts afforded a sufficient basis for calculating the claimant's "average weekly earnings" in terms of the First Schedule (1) (*b*) of the Act. Cadzow Coal Co., Limited, v. Gaffney, Nov. 6, 1900, p. 72.

24. *Held* that the minimum sum of £150 fixed by section (1) (*a*) (i.) of the First Schedule to the Workmen's Compensation Act, 1897, as the compensation for a deceased workman's dependants applied although the deceased workman had been less than three years in the employment. Forrester & Co. v. M'Callum, March 12, 1901, p. 650.

25. A miner was killed after he had descended to work in the pit in which he was employed, but before he had actually commenced to work, and before he had earned anything. *Held* that his widow was entitled to compensation under the Workmen's Compensation Act, 1897, and, the average weekly earnings of the deceased being *nil*, that she was entitled to the alternative sum of £150 under the First Schedule of the Act. Leonard v. Baird & Co., June 8, 1901, p. 890.

26. Where a workman in the course of his employment had earned 16s. 2d. in the first week, and in the second week had worked for two hours but earned nothing, and was then injured, *held* that 16s. 2d. represented his average weekly earnings in the sense of Schedule I. of the Workmen's Compensation Act, 1897. Nelson v. Kerr & Mitchell, June 8, 1901, p. 893.

27. A miner who was paid according to his output employed his son as an assistant in his work, but paid him nothing for his services. The usual wage for such assistance was 2s. 9d. per day. The miner having been injured in the course of his employment, and having claimed compensation under the Workmen's Compensation Act, 1897, *held* that in estimating his average weekly earnings nothing fell to be deducted in respect of the gratuitous assistance given by the son. Nelson v. Kerr & Mitchell, June 8, 1901, p. 893.

Workmen's Compensation Act, 1897—*Offer by employer to continue wages previously earned—Act, First Schedule* (2).

28. Employers in whose service a workman, earning wages at the rate of 16s. a week, had sustained injuries resulting in the loss of an arm, offered to retain him in the same employment at the same wages.

ER AND SERVANT—*Continued.*
This offer was declined by the workman. The Sheriff as arbitrator in an application to fix the compensation payable under the Workmen's Compensation Act, 1897, found that the loss of his arm diminished the applicant's capacity to earn wages in the employment in question and awarded compensation at the rate of 6s. a week. In an appeal, *held* that the refusal of the workman to accept the offer of employment did not exclude his right to compensation, if otherwise well founded, and award *sustained.* Fraser v. Great North of Scotland Railway Co., June 11, 1901, p. 908.
Workmen's Compensation Act, 1897—*Review of Weekly Payments—Certificate of Medical Practitioner appointed under the Act—Act, First Schedule* (11) *and* (12).
Held that where a certificate bore that a workman in receipt of weekly payments under the Act had recovered from the injuries in respect of which the payments were made, and that, although the workman was suffering from partial disability for work, such disability was not connected with the injuries, but was "the result of deficient natural vigour of constitution, together with advancing years," it was conclusive against any further claim by the workman for compensation under the Act. M'Avan v. Boase Spinning Co., Limited, July 11, 1901, p. 1048.
Held that in an arbitration under the Workmen's Compensation Act, 1897, the judgment of a Division of the Court of Session upon a case stated by the Sheriff cannot be appealed to the House of Lords. Osborne or M'Kinnon v. Barclay, Curle, & Co., March 20, 1901, p. 1.
Process, 14—*Public-House*, 3—*Reparation*, 2, 3, 8.

S AND MINERALS. See *Fee and Liferent*, 3, 4—*Lease*, 2—*Master and Servant*, 8, 25, 27—*Police*, 20, 21, 22—*Property.*

R AND PUPIL. *Tutor—Appointment of a domiciled Englishman—Guardianship of Infants Act*, 1886, *sec.* 2.
Circumstances in which the Court, on a petition by a widow, the mother of three pupil children, for the appointment of a tutor to act jointly with her, *appointed* a domiciled Englishman, on condition of his lodging a bond prorogating the jurisdiction of the Court. Sim v. Robertson, July 3, 1901, p. 1027.
Custody—Petition for custody pending action of adherence—Guardianship of Infants Act, 1886, *sec.* 5.
Circumstances in which the Court, on an application by a wife under the Guardianship of Infants Act, 1886, made an interim order giving her the custody of her three daughters, all under seven years of age, and an infant son, without ordering inquiry into the facts, and while an action at her instance against her husband of adherence, and, alternatively, for separation and aliment, with conclusions for the custody of the children, was pending in the Outer-House. Reid v. Reid, Jan. 9, 1901, p. 330.
Custody—Abduction of child by mother—Petition by father to recover custody of child—Denial of status of marriage.
In a petition at the instance of a father to recover the custody of his son, nine years of age, from the mother, the petitioner averred that the mother had suddenly left the United States of America, where the parties were resident, taking the child with her, that she had posted letters to the petitioner stating that by the time the letters were received she and her child would be dead, that the petitioner had succeeded in tracing the mother and child to a town in Scotland, that the mother had an ungovernable temper, and that the petitioner had reason to believe that there was danger of her destroying the child unless it was instantly removed from her custody. In her answers to the peti-

MINOR AND PUPIL—*Continued.*
tion the mother stated (1) that the petitioner was her uncle, and that her marriage was invalid by the law of Italy, where the parties were domiciled at the time of the marriage; (2) that she had no intention of injuring the child; and (3) that the petitioner had been cruel to the child, and that it was necessary for its welfare that it should remain in her custody; and contended (1) that the petitioner had no right to the custody of the child, and (2) that it was expedient that she should retain the custody. The Court *refused* to deal with the question of *status*, and having ascertained as the result of an examination of the child by one of the members of the Court that it was under no apprehension of ill-treatment by either of its parents, and regarded both with affection, *found* the father entitled to the custody. Marchetti v. Marchetti, June 7, 1901, p. 888.

MISREPRESENTATION. See *Cautioner*, 1.

MORA. See *Justiciary Cases*, 32—*Master and Servant*, 21.

NEGLIGENCE. See *Reparation*, 7 *to* 14.

NEWSPAPER. See *Police*, 2.

NOBILE OFFICIUM. See *Bankruptcy*, 5.

NOTICE. See *Police*, 2, 14.

NOVATION. See *Trust*, 5.

NUISANCE. *Rifle Range—Army—Foreshore—Artillery and Rifle Ranges Act*, 1885, *sec.* 3.

1. The firing on a rifle range near the sea leased by a certain corps of volunteers, and sanctioned by the Secretary of State for War, made the foreshore in the vicinity of the targets unsafe for persons passing along the foreshore. The public had from time immemorial used this part of the foreshore for recreation and as a means of passage. The consent of the Board of Trade under section 3 of the Artillery and Rifle Ranges Act, 1885, had not been obtained to any bye-laws made by a Secretary of State restricting the use of the foreshore by the public in order that the range might be used as such. *Held* that a member of the public was entitled to interdict against the use of the rifle range. Ferguson v. Pollok, July 19, 1901, p. 1140.

Rifle Range—Army—Public Road—Military Lands Act, 1892, *sec.* 16.

2. *Held* that a member of the public was entitled to interdict against the use of a rifle range by volunteers in respect that the noise of the firing was a source of danger to horse traffic on a public road in the vicinity, and that the consent of the road authorities had not been obtained under section 16 of the Military Lands Act, 1892. Ferguson v. Pollok, July 19, 1901, p. 1140.

Rifle Range—Adjoining Proprietor.

3. Evidence on a consideration of which it was *held* that the proprietor of an adjoining piece of ground was not entitled to interdict against the use of a rifle range by volunteers in respect that no appreciable risk of injury had been proved. Ferguson v. Pollok, July 19, 1901, p. 1140.

See *Police*, 12.

ONUS. See *Police*, 12.

OPPRESSION. See *Justiciary Cases*, 31.

ORDER. See *Police*, 2, 14—*Poor*, 2, 3, 4, 5.

PARENT AND CHILD. *Legitimate Children—Aliment—Advances from income of pupil's estate for his maintenance—Trust.*

1. A pupil, thirteen years of age, an heir to an earldom, was possessed of

PARENT AND CHILD—*Continued.*

funds held by trustees for his behoof, which yielded an income of £2500. In a petition presented by his father, with concurrence of the trustees, the Court *authorised* and *ordained* the trustees to make payment to the petitioner of any sums that should be disbursed by him, not exceeding £600 for each of the next two years, and not exceeding £700 for the third year, for the pupil's education and maintenance. Duke of Sutherland, March 20, 1901, p. 761.

Legitimate Children—Aliment—Son learning business or profession.

2. A son, twenty years of age, who was in the course of learning the business of a stockbroker, and who was earning a salary of £40 a year in a stockbroker's office, which he had entered with the consent of his mother (his surviving parent), *found* entitled to aliment from her at the rate of £12 a year, there being no offer to maintain him in her own house. Whyte v. Whyte, June 15, 1901, p. 937.

Illegitimate Children—Filiation—Proof of Paternity—Admission of intercourse subsequent to date of conception.

3. In an action of filiation and aliment brought by the mother of a child born on 13th February 1900, the pursuer deponed that she had connection with the defender on various occasions from December 1898 to 11th August 1899. The defender admitted having had connection with the pursuer on 11th August 1899, but deponed that he never had had connection with her on any other occasion. Apart from the pursuer's evidence there was no evidence of any familiarities between the parties prior to 11th August 1899, although they frequently met together. *Held* that the pursuer had failed to prove that the defender was the father of the child. Buchanan v. Finlayson, Dec. 8, 1900, p. 245.

Illegitimate Children—Filiation—Proof—Witness—Defender called as first witness for Pursuer.

4. *Observations* on the practice of calling the defender as the first witness for the pursuer in actions of filiation and aliment, and as to the extent to which if she does so she must be held to present him to the Court as a witness of credit. M'Arthur v. M'Queen, June 27, 1901, p. 1010.

See *Justiciary Cases*, 9, 10, 11, 20, 31—*Minor and Pupil*, 2, 3.

PARISH. See *Poor*, 2, 3, 4, 5.

PARTNERSHIP. See *Justiciary Cases*, 18—*Trust*, 5.

PAYMENT. *Proof—Bills of Exchange Act*, 1882, *sec.* 100.

1. *Held* that section 100 of the Bills of Exchange Act, 1882, did not make parole proof of payment of a bill competent. Robertson v. Thomson, Oct. 19, 1900, p. 5.

Proof—Parole.

2. Parole proof of payment in discharge of a written obligation is incompetent, although the sum is under £100 Scots. Robertson v. Thomson, Oct. 19, 1900, p. 5.

See *Cautioner*, 2.

PENALTY. See *Contract*, 1—*Justiciary Cases*, 25, 26, 27, 28.

PERSONAL OBJECTION. See *Bankruptcy*, 3.

PLAN. See *Justiciary Cases*, 22.

POINDING. See *Justiciary Cases*, 25.

POLICE. *Assessment—Statute—Construction—Glasgow Court Houses Act*, 1890, *sec.* 13.

1. For the purpose of providing and maintaining Sheriff Court Houses, the county of Lanark is divided into four separate districts, one of which, the Lower Ward District, comprises the Lower Ward of the county, the city of Glasgow, and the burgh of Rutherglen. The

POLICE—*Continued.*

Sheriff Court Houses of Glasgow are the Sheriff Court Houses of this district alone. By sec. 13 of the Glasgow Court Houses Act, 1890, the Court House Commissioners were empowered to apportion, assess, and charge sums of money borrowed by them under the Act upon three public bodies, the Corporation of Glasgow, the County Council of the county of Lanark, and the Magistrates of Rutherglen, "in proportion to the gross valuation for the year ending on the 15th May 1890 of the lands and heritages situated within the respective areas under the jurisdiction of such public bodies." By sec. 15 it was provided that the County Council of Lanark "as representing the Lower Ward thereof" should pay to the Glasgow Court Houses Commissioners the sum chargeable against the County Council. In an action by the Commissioners against the County Council of Lanark for £7669 as their proportion of the sum chargeable under the Act against the three bodies, the sum sued for being arrived at by taking the gross valuation of all lands and heritages within the county as the area within the jurisdiction of the County Council, the defenders maintained that the valuation should have been limited to the Lower Ward of the county, which was alone liable for the assessment. *Held* that the terms of sec. 13 were unambiguous, and not capable of construction; and that the "area under the jurisdiction of" the County Council referred to in the section was the whole county. *Held* further that, while the valuation for the year ending 15th May 1890 was to be taken as fixing the value of the subjects in the different areas, the Commissioners were to take the respective areas of jurisdiction of the three public bodies as these actually existed at the date of apportioning the assessment. Glasgow Court Houses Commissioners v. Lanarkshire County Council, Nov. 20, 1900, p. 103.

Assessment—Notice—Statute—Construction—Time—"Week"—Advertisement—Aberdeen Municipality Extension Act, 1871, *sec.* 145.

2. *Held* that a notice which had been inserted in an Aberdeen daily newspaper on Friday in one week, and on Wednesday in the following week, was a notice which had been inserted "for two successive weeks," within the meaning of the Aberdeen Municipality Extension Act, 1871, sec. 145. City of Aberdeen v. Watt, May 17, 1901, p. 787.

Assessment—Exemption—Premises exclusively appropriated to public religious worship—Church and Mission Halls—Rating Exemptions (Scotland) Act, 1874, *sec.* 1.

2*a*. *Held* that church and mission halls sometimes used for temperance meetings and for congregational social meetings could not be regarded as exclusively appropriated to public religious worship, and did not fall within the exemption provided by the Rating Exemptions (Scotland) Act, 1874. Trustees of College Street U. F. Church v. Parish Council of Edinburgh, Jan. 31, 1901, p. 414.

Buildings and Streets—Cleaning of Common Stair—Edinburgh Municipal and Police Extension Act, 1882, *sec.* 41, *subsec.* (5).

3. A club, in addition to its main premises, occupied a flat in an adjoining tenement. Entrance from the main club premises to this flat was obtained by a doorway through the gable wall between the tenements. Before the occupancy of the flat by the club, the entrance to the flat, as well as to the other flats of the tenement, was obtained from a common stair. The club made no use of this common stair, and the doorway therefrom, which formerly gave access to the flat, had been boarded up with wood battens. The secretary of the club was convicted of a contravention of sec. 41, subsec. 5, of the Edinburgh Municipal and Police Extension Act, 1882, in having failed to have the stair and landing immediately below the flat belonging to the club washed. *Held* on appeal that the mere fact that the club had ceased to use the

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common stair did not relieve it of its obligation under the statute to have the stair washed, and that the conviction was right. Macnaughton v. Smith, March 18, 1901, Just. Cases, p. 56.

Buildings and Streets—New Buildings—Permission to occupy—Burgh Police (Scotland) Act, 1892, sec. 180.

4. The owner of certain new houses, which had not been certified by the burgh surveyor under sec. 180 of the Burgh Police (Scotland) Act, 1892, gave the keys to his tenants, with permission to put their furniture in, but not to reside themselves until the surveyor's certificate had been obtained. *Held* that in the circumstances he had permitted the houses to be occupied in contravention of section 180. Downie v. Fraser, July 10, 1901, p. 1044.

Buildings and Streets—Taking down insecure part of building in order to restore to original condition—Turnpike Roads (Scotland) Act, 1831, sec. 91—Burgh Police (Scotland) Act, 1892, sec. 158.

5. *Held* that neither sec. 91 of the Turnpike Roads (Scotland) Act, 1831, nor sec. 158 of the Burgh Police (Scotland) Act, 1892, was applicable to the case of taking down part of an existing tenement, which had been injured by the operations of an adjoining proprietor, in order to restore it to its original condition. Smellie v. Gallon, June 8, 1901, p. 898.

Buildings and Streets—New building on old site—Turnpike Roads (Scotland) Act, 1831, sec. 91.

6. *Held* that sec. 91 of the Turnpike Roads (Scotland) Act, 1831, applied to the erection of new buildings on the site of existing buildings which had been erected prior to the passing of the Act, and which it was proposed to remove. Whyte v. Glass, Dec. 20, 1900, p. 291.

Buildings and Streets—"Court"—Width of Court—Entrance to Court—Burgh Police (Scotland) Act, 1892, secs. 4 and 152.

7. In a petition to the Dean of Guild in a burgh for warrant to erect dwelling-houses, the petitioners proposed to form a court, of the statutory width, opposite the houses, but with an access from the public street by a passage through the petitioners' property, 22 feet in width. *Held* that the passage must be taken to be part of the court, and must therefore, under sec. 152 of the Burgh Police (Scotland) Act, 1892, be of the width of at least 36 feet. M'Neill's Trustees v. Watson, May 30, 1901, p. 817.

Buildings and Streets—"New Street"—Width—Commissioners—Power to sanction width under 36 feet—Dean of Guild—Burgh Police (Scotland) Act, 1892, secs. 152, 153.

8. *Held* that by sec. 153 of the Burgh Police (Scotland) Act, 1892, the commissioners of a burgh have power, "on a consideration of the special circumstances of the case," to sanction the laying out of a "new street" less than 36 feet wide, and that where they have done so their decision is binding on the Burgh Dean of Guild Court, and it is thereafter *ultra vires* of the latter to refuse a warrant for the erection of buildings on the street so sanctioned, on the ground that it is less than 36 feet wide. Barr v. Lee, Feb. 14, 1901, p. 484.

Buildings and Streets—Making up private street—Lands and Heritages "fronting and abutting" on street—Railway Line—Edinburgh Corporation Act, 1897, sec. 73.

9. A railway line ran alongside a private street in Edinburgh, on an embankment at a height considerably above the level of the street. The line was fenced from the street by a wall at the bottom of the embankment, built by the railway company on their own ground. The Corporation having served a notice on the company, as the "owner of lands and heritages fronting or abutting" on the street, to make up and complete the street, the company appealed, on the ground that the street

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was a private street of which they had no beneficial use, and to which they had no right of access. The Court *dismissed* the appeal, holding that the railway company being owners of lands which in fact fronted and abutted on the street in question, they were liable to contribute to its construction and maintenance on the call of the Corporation. Caledonian Railway Co. v. Magistrates of Edinburgh, March 12, 1901, p. 645.

Drainage—"Ordinary public sewer"—Recovery of expense of construction from adjoining proprietors—Building erected on "a land or heritage" adjoining road—"Land or heritage"—Glasgow Police Act, 1866, *secs.* 4, 328, 329, *and* 330.

10. *Held* on a construction of secs. 328, 329, and 330 of the Glasgow Police Act, 1886, by a majority of seven Judges (1) that when a sewer had been constructed in a road and the whole expense ascertained and allocated among the proprietors of the adjoining ground in proportion to the respective frontages, the sums so allocated became due by the proprietors although payment was not exigible until a building had been erected on "a land or heritage adjoining the road"; and (2) that the existence of a farmhouse twenty-five yards from the road, which had been erected on a farm adjoining the road many years before the Act was passed, satisfied this condition, and made the proportion of the cost effeiring to the proprietor for the whole frontage of his lands at once exigible. Corporation of Glasgow v. Carter-Campbell, March 1, 1901, p. 598.

Drainage—Railway—Public Health (Scotland) Act, 1897, *secs.* 103, 107, 144, 145, 164.

11. *Held* that section 144 of the Public Health (Scotland) Act, 1897, did not imply any obligation upon the Local Authority to purchase lands occupied for the purposes indicated, and accordingly that they were entitled under section 103 to carry a sewer under a railway upon paying compensation under section 164.

Observed that the same rule would apply wherever a power is conferred by the Act and it is not made a condition of the exercise of that power that the lands occupied shall be purchased by the Local Authority. Caledonian Railway Co. v. Perth District Committee, July 4, 1901, p. 1029.

Drainage—Distillery—Proof—Onus—Rivers Pollution Prevention Act, 1876, *sec.* 7.

12. A distiller, who was liable in drainage assessment, presented a petition under section 7 of the Rivers Pollution Prevention Act, 1876, against the Local Authority of the district for a decree ordaining them to allow him to carry the liquid refuse from his distillery into the defenders' sewers. The defenders pleaded that the liquid would prejudicially affect the disposal of the sewage matter conveyed by their drains. After a proof the Court *held* that the liquid refuse was in fact of such a character that, if received into the defenders' sewers without treatment, it would prejudicially affect the disposal of the sewage, and that there was no obligation on the defenders themselves so to treat the liquid as to render it innocuous, or to shew that it was impossible to do so, and *refused* the petition. Cowie & Son v. Commissioners of Dufftown, Dec. 11, 1900, p. 257.

Regulation of traffic—Bye-law—Ultra vires—Edinburgh Municipal and Police Act, 1879, *sec.* 304.

13. The Magistrates of Edinburgh, in pursuance of the Edinburgh Municipal and Police Act, 1879, sec. 304, made a bye-law in the following terms:—"The driver of a hackney carriage shall not stand with the same longer than is necessary for taking up or setting down passengers on any part of the public streets not allotted as a hackney carriage

stance, except at the dismissal of the theatres, assemblies, public meetings, and the like." *Held* that the bye-law was not *ultra vires* of the magistrates.

A hackney cab-driver, in pursuance of a written order from the manager of a hotel to the driver's employers instructing them to send a cab to the hotel every day at a specified hour, was ordered by his employers to drive his cab to the hotel and take his orders from those in charge there. He was there told by the hotel boots to wait until he was discharged, and he waited accordingly for about an hour, when the boots told him that he was discharged. He had not been hired by anyone wishing to use his cab. *Held* that the hotel manager's order did not constitute a hire of the cab, and that the cab-driver had rightly been convicted of a contravention of the bye-law. Mackenzie v. Somerville, Dec. 6, 1900, Just. Cases, p. 4.

Regulation of traffic—Bye-law—Notice—Order—Ultra vires—Burgh Police (Scotland) Act, 1892, sec. 385.

14. The magistrates of a burgh, professing to act under section 385 of the Burgh Police (Scotland) Act, 1892, issued a notice and order permanently prohibiting all bicycle and tricycle traffic in the main thoroughfare of the burgh. *Held* that the notice and order was *ultra vires* and ineffectual, in respect that, on a sound construction of section 385, in the case of a regulation intended to be permanent, the procedure must be by bye-law. Baikie v. Charleson, March 18, 1901, Just. Cases, p. 54.

Regulation of traffic—Bye-law regulating carriage traffic—Loitering—Relevancy.

15. A bye-law, framed by the magistrates of a burgh, provided that "no driver of any carriage shall stand or loiter with the same . . . in any street or place not appropriated as a public stand except at places of public amusement or entertainment, and on the occasion thereof." A driver was charged with a contravention of the bye-law in so far as he did, on a certain date, with a horse and hackney carriage, loiter in a certain public street, not being a public stand nor at a place of public entertainment, and drive slowly up and down said street within a distance of 100 yards in a period of seventeen minutes, for the purpose of inviting or picking up passengers. *Held* that the charge was relevant. Murphy v. Neilson, June 7, 1901, Just. Cases, p. 77.

Water Supply—Assessment—Manufactories—Burgh Police (Scotland) Act, 1892, secs. 21 and 347—Public Health (Scotland) Act, 1897, secs. 134 and 136.

16. A Local Authority acting under the Public Health (Scotland) Act, 1867, introduced a water supply into a burgh in 1882. By virtue of section 21 of the Burgh Police Act, 1892, the whole powers and obligations of the Local Authority were transferred to the Police Commissioners of the burgh, who thereafter continued and administered the water supply. *Held* that the water was supplied by the Commissioners "in terms of this Act" in the sense of section 347 of the Act of 1892, and that consequently for the purposes of assessment, so far as applicable to such water supply, the annual value of manufactories within the burgh was to be held to be one-fourth of the annual value thereof entered in the Valuation-roll. Hawick Police Commissioners v. Watson & Sons, June 5, 1901, p. 885.

Water Supply—Assessment—Districts other than burghs—Burgh within Special Water Supply District—Canal—Public Health (Scotland) Act, 1897, secs. 134, 135, 136.

17. Under the provisions of sections 134, 135, and 136 of the Public Health (Scotland) Act, 1897, and statutes therein referred to, the expenses incurred by the Local Authority for a water supply are to be met by a special rate, levied in burghs in one manner under the provisions of

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section 136, and in districts other than burghs in another manner under the provisions of section 135. Under these provisions certain subjects, including, *inter alia*, canals, fall to be assessed on one-fourth of their valuation in burghs, and on their full valuation in districts other than burghs. *Held* that where part of an existing landward special water supply district was formed into a burgh, a canal which intersected the district and the new burgh was assessable on its full valuation, as being in a district other than a burgh. County Council of Dumbarton v. Caledonian Railway Co., July 19, 1901, p. 1093.

Water Supply—Public Road—Water-pipe—Compulsory Powers—Ultra vires—Statute—Construction—Water-Works Clauses Act, 1847, *sec.* 28.

18. Public water commissioners had statutory authority to lay a line of water-pipes in a street underneath which, for a distance of 575 feet, a line of railway passed. *Held* that it was *ultra vires* of the commissioners under sec. 28 of the Water-Works Clauses Act, 1847, to break open the brickwork forming the arch of the bridge or roof of the railway tunnel, and to lay therein an iron trough carrying their water-pipe.

Held further that the word "tunnels" in the section means tunnels similar in character to sewers and drains, and does not apply to a railway tunnel, and that in any event the right to interfere with sewers, drains, and tunnels did not warrant the permanent displacement or removal of any of these. Caledonian Railway Co. v. Corporation of Glasgow, Feb. 20, 1901, p. 526.

Water Supply—Public Road—Land dedicated to public use—Water-pipe—Railway under road—Roof of tunnel—Statute—Construction—Water-Works Clauses Act, 1847, *sec.* 29.

19. Public water commissioners had statutory authority to lay a line of water-pipes in a street under which, for a distance of 575 feet, a line of railway passed, the roof of the railway tunnel being only about 2½ feet below the surface of the street. At the date when the railway was constructed the street was a turnpike road. The commissioners were unable to lay their pipe without displacing a portion of the brickwork forming the roof of the railway tunnel. They maintained their right to do this under sec. 29 of the Water-Works Clauses Act, 1847, (1) on the ground that the brickwork was devoted to public use, having from the first been necessary for the support of the road; and (2) that it was in ground dedicated to public use, being within the area vested with the streets of the city in the magistrates for public purposes. *Held* that, whether the ground occupied by the roof of the railway tunnel might, in different circumstances, be held to be dedicated to public use or not, sec. 29 did not entitle the commissioners to interfere in any way with a structure placed where it was under statutory authority. Caledonian Railway Co. v. Corporation of Glasgow, Feb. 20, 1901, p. 526.

Water Supply—Right of Support for Pipes laid under Statutory Authority—Compensation—Minerals under and adjacent to Aqueduct—Presumption—Edinburgh Water Act, 1819—*Edinburgh Water Company Act*, 1843.

20. By an Act passed in 1819 the Edinburgh Water Company was empowered to lay a pipe for bringing water from the Crawley Spring into the city, and in 1821 a track was opened and a pipe laid, a portion of which passed through the lands of Pentland and Straiton, and water was thereafter brought in continuously by the pipe to Edinburgh. In 1898 the Edinburgh and District Water Trustees, who were vested in the rights and property of the original water company, raised an action against the Clippens Oil Company, who had come to be the owners of Straiton, and were tenants of the minerals in Pentland, and also against the owner of Pentland, for declarator that the pursuers

were entitled to have their pipe or aqueduct in Straiton and Pentland supported so as to serve uninterruptedly as a conduit for the water, and that the defenders were not entitled so to work the minerals as to injure or bring down the pipe, and for interdict. The defenders pleaded that the pursuers had no right of support for their pipe either under the Act of 1819 or at common law. A proof was led. It was not established that any compensation had been paid to the owners of Pentland and Straiton in respect of the pipe being laid through their lands, but it was proved that they were cognisant of the pipe being so laid. *Held* (1) that the Act of 1819 on a sound construction of it contained clauses under which the owners of lands in whose ground the pipe was laid were entitled to claim compensation for any injury thereby occasioned to them; (2) that after the lapse of seventy years from the date when the pipe was laid, it must be assumed either that compensation had been paid or that the right thereto had been waived; and (3) that the statutory right to lay the pipe carried with it a right of support for the pipe, and *interdict granted.*

Held further, that the Edinburgh Water Company's Act, 1843, did apply to "works" which had already been executed under the powers conferred by the Act of 1819. Edinburgh and District Water Trustees v. Clippens Oil Co., Limited, Nov. 27, 1900, p. 156.

Water Supply—Minerals under water-pipe track—Notice to abstain from working—Compensation—Arbiter—Statutory Reference—Water-Works Clauses Act, 1847, *sec.* 22.

21. *Held* that where the owners of minerals under or adjacent to water-works have given notices under sec. 22 of the Water-Works Clauses Act, 1847, that they propose to work these minerals, and the undertakers have served a counter notice on the owners that they are willing to pay compensation therefor, a contract is thereby concluded under which on the one hand the mineral owners are bound immediately to refrain from working the minerals, and on the other the undertakers are bound to pay compensation for the minerals as the same—failing agreement—shall be determined by an arbiter. Clippens Oil Co., Limited, v. Edinburgh and District Water Trustees, July 19, 1901, p. 1113.

Water Supply—Mines and Minerals—Minerals under water-works—Statutory notice by undertakers of willingness to pay compensation—Reservation in notice—Right of undertakers to have minerals unworked independently of statutory provisions—Liability to pay compensation—Water-Works Clauses Act, 1847, *sec.* 22.

22. The owners of a mineral field through which two water pipes belonging to the Edinburgh and District Water Trustees, called the Crawley pipe and the Moorfoot pipe respectively, were carried on the same pipe-track, gave notice, under sec. 22 of the Water-Works Clauses Act, 1847, which was applicable only to the Moorfoot pipe, to the Water Trustees of their intention to work the minerals under the pipe-track. The Water Trustees thereupon served a counter notice on the mineral owners intimating their willingness to pay compensation for the minerals "so far as you are entitled thereto," and requiring the owners to leave them unworked, "Declaring that the foregoing notice is given without prejudice to and under reservation of . . . all objections to your working out the said minerals competent to us and of our right of support of the Crawley pipes passing through said mineral field." In consequence of this notice the owners did not work the minerals, and the amount of compensation was fixed by arbitration under the statute. Thereafter it was decided in an action raised by the Water Trustees that they had a right independently of the provisions of the Water-Works Clauses Act to prevent the mineral owners from so work-

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ing the minerals under and adjacent to the pipe-track as to injure the Crawley pipe. The Water Trustees having refused to pay the compensation awarded by the arbiter, on the ground that the right of support which they had for the Crawley pipe necessarily involved an abstention from working the minerals covered by the notice, and that there was nothing therefore to compensate the mineral owners for, *held* that having elected to put in force the remedy provided by the statute and to require the mineral owners to abstain from working, they were not entitled to avoid fulfilment of the statutory condition of paying the compensation fixed by the arbiter. Clippens Oil Co., Limited, v. Edinburgh and District Water Trustees, July 19, 1901, p. 1113.

See *Justiciary Cases*, 2, 3—*Poor*, 2 *to* 7—*Property*—*Public Health*—*Reparation*, 11, 12.

POLICE FORCE. See *Reparation*, 1.

POLLUTION. See *Police*, 12.

POOR. *Settlement—Capacity of deserted wife to acquire a settlement—Poor-Law (Scotland) Act*, 1898, *sec.* 1.

1. *Held* by a Court of seven Judges that a wife, when deserted by her husband, has capacity to acquire a parochial settlement, the husband, so long as the desertion lasts, being regarded as dead.

A wife who had been deserted by her husband maintained herself for three years in the parish of R., and subsequently obtained relief from that parish. During the first of the three years four pupil children of the marriage were boarded out and maintained by G., the parish of the husband's settlement, under an arrangement between it and the husband, who agreed to make certain weekly payments. At the end of the first year the husband ceased to make any payments for the children, and disappeared, but G. continued to maintain them as before without making any claim against the wife. An action of relief was brought by the parish of R. against G. on the ground that before the wife had completed her three years' residence in R. she had become a pauper through the relief given to her children by G. G.'s defence was that as the wife was not on its roll of paupers, and as no claim had been made upon her for the support of her children, she had capacity to acquire an industrial settlement, and had done so in R. *Held* by a Court of seven Judges that, in the circumstances, the relief given to the children was not, within the meaning of the Poor-Law (Scotland) Act, 1898, sec. 1, relief "received" by the mother, and that the wife had acquired an industrial settlement in R. Parish Council of Rutherglen v. Parish Council of Glasgow, March 19, 1901, p. 705.

Residential Settlement—Effect of order altering parish boundaries—Extinction of Parish—Local Government (Scotland) Act, 1889, *sec.* 51—*Local Government (Scotland) Act*, 1894, *sec.* 46.

2. Where by Orders of the Secretary of Scotland under the Local Government Acts taking effect simultaneously, a parish was extinguished by a part of its territory being transferred to one parish and the remainder to another, *held* that the liabilities of the extinguished parish might be regarded as apportioned between the divided parts, and each part regarded as if it had previously been a complete parish, and therefore that the acquisition of a settlement in one of the parts was not interrupted by its being merged in another parish. City Parish of Edinburgh Parish Council v. Gladsmuir Parish Council, March 20, 1901, p. 753.

Residential Settlement—Alteration of boundaries of parishes—Adjustment Order—Local Government (Scotland) Act, 1889, *secs.* 49 *and* 51.

3. Keirfield, part of the parish of Lecropt, was transferred to the parish of Logie by an order under the Local Government Act, 1889, on 15th

May 1891. By an Adjustment Order in August 1898, the parish of Logie was required to relieve the parish of Lecropt of advances it "may have made since 15th May 1898, or may be called upon to make, on account of any pauper whose claim is derived (1) from birth in the transferred area prior to 15th May 1891, or (2) from residence for the statutory period in the said area prior to" said date. C, a person who had at 15th May 1891 acquired by residence in Keirfield a settlement in the parish of Lecropt, continued to reside in Keirfield for four years and twenty-six days after the transfer, *i.e.*, till 10th June 1895, when he became a pauper. In an action by Lecropt against Logie for relief of advances made since 15th August 1898 for C's widow on the ground that C had resided in the transferred area for the statutory period prior to 15th May 1891, *held* (1) that the Adjustment Order could not be construed as imposing liability on the parish of Logie for all persons who had acquired a settlement in Lecropt at the date of the transfer, but only for such of them as had retained their settlement at the date when their claim of relief emerged, and (2) that as C had been for four years and a day absent from Lecropt when he became a pauper he had no claim against that parish, and therefore that Lecropt had no claim of relief against Logie. Dunblane and Lecropt Parish Council v. Logie Parish Council, March 20, 1901, p. 764.

Parish—Division of Parish—Creation of new Parish—Combination Parish—Secretary for Scotland—Order—Ultra vires—Local Government (Scotland) Act, 1889, *secs.* 51 *and* 105—*Local Government (Scotland) Act*, 1894, *secs.* 46 *and* 54.

4. *Held* (1) that under the Local Government (Scotland) Acts, 1889 and 1894, the Secretary for Scotland has power to create new parishes by the division of existing parishes; and (2) that this power includes the creation of new parishes out of combination parishes constituted under section 16 of the Poor-Law (Scotland) Act, 1845. Dundee Combination Parish Council v. Secretary for Scotland, May 31, 1901, p. 848.

Parish—Division of Parish—Order—Procedure—Local Inquiry—Local Government (Scotland) Act, 1889, *sec.* 51—*Local Government (Scotland) Act*, 1894, *sec.* 46.

5. In 1898 the County Council of Forfar presented an application to the Secretary for Scotland for an order altering the boundaries of a parish in the county. The parish council of the parish opposed the application. A local inquiry was held under section 46 of the Local Government (Scotland) Act, 1894, at which the parties interested were heard. In February 1899 the Secretary for Scotland intimated that he was not "at present" prepared to grant the application. In December 1899 the County Council renewed their application, in support of which they brought under the notice of the Secretary for Scotland certain changes in the circumstances. The Secretary for Scotland then, without ordering any further local inquiry, but after considering a representation by the Parish Council, published a "proposed order" in the *Gazette*. In an action by the Parish Council against the Secretary for Scotland, for declarator that the proposed order was illegal, in respect that the statutory procedure had not been followed in regard to it, and for interdict against the Secretary proceeding with the order, *held* that the statutory procedure had been sufficiently complied with, and that the order was legal and regular. Dundee Combination Parish Council v. Secretary for Scotland, May 31, 1901, p. 848.

Assessment—Valuation of lands—Deductions—Average annual repairs—Landlord's and tenant's repairs—Poor-Law Amendment (Scotland)

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Act, 1845, *sec.* 37—*Valuation of Lands* (*Scotland*) *Act*, 1854, *secs.* 6 *and* 41.

6. *Held* that a Parish Council in assessing for poor-rate subjects occupied by the owner are bound by the Lands Valuation Act, 1854, to take the annual value of the subjects as entered in the Valuation-roll, and by section 37 of the Poor-Law Amendment Act, 1845, to deduct therefrom, *inter alia*, the probable annual average cost of repairs necessary to maintain the subjects in their actual state. Pumpherston Oil Co., Limited, v. Wilson, July 19, 1901, p. 1099.

Assessment — Exemption — Premises exclusively appropriated to public religious worship—Church and Mission Halls—Rating Exemptions (*Scotland*) *Act*, 1874, *sec.* 1.

7. *Held* that church and mission halls sometimes used for temperance meetings and for congregational social meetings could not be regarded as exclusively appropriated to public religious worship, and did not fall within the exemption provided by the Rating Exemptions (Scotland) Act, 1874. Trustees of College Street U. F. Church v. Parish Council of Edinburgh, Jan. 31, 1901, p. 414.

POWERS. See *Police*, 13, 14, 18—*Poor*, 4—*Succession*, 13, 14.

PRESCRIPTION. *Triennial Limitation—Continuity of Account—Change in method of rendering Accounts.*

In 1900, a miller raised an action against a horse-hirer for payment of £754 as the balance due on an account for corn and food-stuffs supplied by the pursuer to the defender. The account sued on was stated as a continuous account, beginning 2d May 1887 and ending 30th November 1899, and set forth various payments to account between these dates. The pursuer averred, *inter alia*, that in December 1895, when a large balance was due by the defender to the pursuer on the account, the defender requested the pursuer thereafter to send a note of the items supplied each month, promising to pay these when rendered, and to pay up the old balance by instalments from time to time; that in accordance with this arrangement a note of the supplies was given to the defender each month; that for some time the defender paid instalments approximating to the amount of these monthly notes, but that ultimately he became very irregular in paying the monthly instalments; that in December 1899 the defender's brother offered to pay the balance admittedly due on the monthly instalments, but refused to pay the older items; and that the offer was accepted, and payment made without prejudice to any rights or claims which the pursuer might have for supplies given prior to December 1895. The defender averred that no balance was due by him to the pursuer. He produced monthly accounts, receipted by the pursuer, for the period subsequent to December 1895, and as regarded the earlier portion of the account he pleaded the triennial limitation. *Held*, looking to the pursuer's averments, and to the monthly receipted accounts produced, that the account relating to the period prior to December 1895 had been closed under the arrangement then made, and that the triennial limitation applied to it. Christison v. Knowles, Feb. 14, 1901, p. 480.

PRESUMPTION. *Childbearing.*

Observed that the more recent cases establish the rule that a woman cannot be presumed to be past childbearing at any particular age. Gollan's Trustees v. Booth, July 5, 1901, p. 1035.

See *Police*, 12, 20.

PRIVILEGE. See *Reparation*, 2 *to* 6.

PROCESS. *Ordinary Procedure—Record—Amendment—Several Defenders—Conclusion for one sum of damages against several defenders for different wrongs.*

1. An action was raised by the widow and children of a deceased workman concluding for £500 in name of damages for injury to their feelings, caused (*a*) by an unauthorised *post-mortem* examination of the body of the deceased by two medical practitioners, and (*b*) by their removing and retaining portions thereof. The action was directed against (1) the two medical men, and also against (2) the employers of the deceased, and (3) the law-agent of the latter. It was averred that the examination was made by the first set of defenders upon the joint instructions of the others. *Held* that the action was incompetent, in respect that while the conclusion was for one sum of damages against the whole defenders, the grounds of action alleged consisted of two separate wrongs, with the latter of which (the removal and retention of portions of the body) it was not stated, and could not legitimately be inferred, that the employers or their law-agent were implicated.

   Opinion that amendment of the record would not be permissible, to the effect of making the action competent by striking out the averments dealing with the latter wrong. Conway v. Dalziel, June 13, 1901, p. 918.

Ordinary Procedure—Record—Amendment—Petition and Complaint for breach of interdict.

2. A obtained an interdict against B on 31st October 1900. On 13th February 1901 he presented a petition and complaint, averring that B had been guilty of a breach of interdict on 1st December 1899, which B in her answers denied. Thereafter, in March, the complainer craved leave to alter the date of the alleged breach by substituting 1900 for 1899, the latter figures having, he averred, been given *per incuriam*. The respondent objected to any amendment, on the ground that the proceedings were of a quasi-criminal nature. The Court *allowed* the amendment. Dunlop Pneumatic Tyre Co., Limited, v. Rose, March 7, 1901, p. 635.

Ordinary Procedure—Reclaiming Note—Competency—Failure to print Interlocutor closing Record—Judicature Act, 1825, *secs.* 10 *and* 18—*A. S.*, 11*th July* 1828, *sec.* 77—*Court of Session Act*, 1850, *sec.* 5.

3. *Held* that a reclaiming note was not rendered incompetent by the omission to print the interlocutor of the Lord Ordinary closing the record. Fisken v. Fisken, Oct. 20, 1900, p. 7.

Proof—Separate proof as to preliminary defence—Reparation—Election—Workmen's Compensation Act, 1897.

4. In an action raised by a workman against his employers at common law for damages for injuries alleged to have been received through their fault, the defenders, besides denying fault, averred that the pursuer had given written notice that he claimed compensation under the Workmen's Compensation Act, and that subsequently they had paid him compensation, and pleaded that in respect thereof the pursuer was barred from suing the action. In answer, the pursuer averred that he was induced to sign the notice shortly after the accident by false representations on the part of the defenders, at a time when, through illness, he could not, and did not, understand its import. *Held* that this question should be determined by proof *primo loco*. Hunter v. Darngavil Coal Co., Oct. 23, 1900, p. 10.

Proof—Diligence—Railway—Complaints as to rates and charges—Traders' profits—Railway and Canal Traffic Act, 1894, *sec.* 1.

5. A complaint having been brought before the Railway and Canal Commissioners by one of a number of coalmasters complaining of an increase in the rates applicable to the carriage of coal, the railway company,

PROCESS—*Continued.*

before any inquiry had taken place, moved for a commission and diligence to recover the books, &c., of the applicants for a period of years preceding the application, in order to ascertain the profit or loss upon their trading for that period. The railway company maintained that they were entitled to the diligence in order to meet the case that the trade could not profitably be carried on if burdened by the increase of rates. The Court *refused* the commission and diligence. John Watson, Limited, v. Caledonian Railway Co., May 18, 1901, p. 791.

Proof — Diligence — Slander — Newspaper — Circulation — Income-Tax Receipts—Defenders' Books.

6. In an action of damages for slander by a jeweller against the publishers of a newspaper, the pursuer averred, *inter alia*, that the alleged slander had seriously injured his business credit and reputation. *Held* (1) that the defenders were entitled to recover the income-tax receipts of the pursuer for three years, and (2) that the pursuer, while not entitled to recover the books generally of the defenders, or excerpts from any of them, tending to shew the localities in which the newspaper was circulated, was entitled to recover excerpts tending to shew the number of copies in circulation about the date of the alleged slander from the book or books in which the defenders recorded the numbers of the newspapers issued and sold by them. Macdonald v. Hedderwick & Sons, March 16, 1901, p. 674.

Proof—Witness—Filiation and Aliment—Defender called as first witness for Pursuer.

7. *Observations* on the practice of calling the defender as the first witness for the pursuer in actions of filiation and aliment, and as to the extent to which if she does so she must be held to present him to the Court as a witness of credit. M'Arthur v. M'Queen, June 27, 1901, p. 1010.

Proof—Jury Trial—Notice of Trial for Sittings—Postponement of trial.

8. Circumstances in which the Court granted postponement of a trial on the defender's motion. Robertson v. Hall, March 7, 1901, p. 637.

Proof—Jury Trial—Motion for new trial—Juryman in employment of successful party—Jury Trials (Scotland) Act, 1815, *sec.* 6—"*Essential to the justice of the case.*"

9. In an action of damages brought against the North British Railway Company by the widow of a merchant who had been run over and killed on the line at Slamannan Station, a jury in Edinburgh returned a verdict for the defenders. The pursuer moved for a new trial, on the ground that one of the jury was an employee of the defenders. The Court refused the motion, *holding* that the mere fact of one of the jury being an employee of the railway company did not make it "essential to the justice of the case" under section 6 of the Jury Trials (Scotland) Act, 1815, that there should be a new trial. Watson v. North British Railway Co., Jan. 12, 1901, p. 342.

Particular Actions — Stated Case — Master and Servant — Workmen's Compensation Act, 1897, *Sched. II., sec.* 8—*A. S., 3d June* 1898, *sec.* 7 (*a*).

10. Where a Sheriff is applied to under Sched. II., sec. 8, of the Workmen's Compensation Act, 1897, and relative Act of Sederunt, 3d June 1898, sec. 7 (*a*), for a special warrant to register a memorandum of agreement, the genuineness of which is disputed, he is not acting as arbiter under the Act, and an appeal by stated case from any order pronounced by him in such an application is incompetent. Cochrane v. Traill & Sons, Nov. 1, 1900, p. 27.

Appeal—Competency—Interlocutor allowing proof by writ—Judicature Act, 1825, *sec.* 40—*Court of Session Act*, 1868, *sec.* 73.

11. *Held* that an interlocutor allowing a proof by writ was not an interlocutor allowing a proof within the meaning of section 40 of the

PROCESS—*Continued.*

Judicature Act, 1825, and accordingly that an appeal under section 40 against such an interlocutor fell to be *dismissed* as incompetent. Glasgow Central Stores, Limited, v. Goodson, July 16, 1901, p. 1075.

Appeal—Competency—Appeal on question of expenses merely.

12. *Held* (1) that it is competent to appeal against a Sheriff's judgment disposing only of a question of expenses; but (2) that the Court will not sustain the appeal merely on the ground that the Sheriff's judgment is wrong. Bowman's Trustees v. Scott's Trustees, Feb. 13, 1901, p. 450.

Appeal—Competency—Sheriff—Failure to Lodge Prints—Power of Court to dispense with observance of Act of Sederunt—A. S. 10th March 1870, section 3.

13. In an appeal from the Sheriff Court the appellant omitted to lodge prints within fourteen days after the process had been received by the Clerk of Court as required by the A. S. 10th March 1870, section 3. The omission was due to inadvertence on the part of the appellant's agent. Objection to the competency of the appeal *sustained.*

Opinion that the Court had no power to dispense with the observance of the provisions of the section. Taylor v. Macilwain, Oct. 18, 1900, p. 1.

Appeal—Jury Trial—Proof or Jury Trial—Wrongous dismissal of farm servant—Claim for wages.

14. In an action of damages for wrongous dismissal brought in a Sheriff Court by an agricultural labourer against his employer, the Sheriff allowed a proof. The pursuer appealed for jury trial. The Court, in respect (1) that the claim though nominally for damages was really for the wages which the pursuer would have earned had he not been dismissed, and (2) that the bulk of the evidence would be that of local witnesses, *refused* the appeal and *remitted* the case to the Sheriff for proof. Pollock v. Mair, Jan. 10, 1901, p. 332.

Appeal—Penalty—Reduction on Appeal—Discretion of Inferior Court—Maximum penalty for technical offence—Expenses.

15. On a petition under the Burgh Police (Scotland) Act, 1892, the owner of certain new buildings was found to have contravened section 180 of the Act, by having permitted his building to be occupied before he had obtained a certificate from the burgh surveyor, and the maximum penalty of five pounds was imposed on him. In an appeal the Court, holding that there had been a contravention, but that it was merely technical, *reduced* the penalty to 2s. 6d., and found the appellant entitled to two-thirds of his expenses. Downie v. Fraser, July 10, 1901, p. 1044.

See *Arbitration—Justiciary Cases*, 18 *to* 27—*Sheriff.*

PROMISE. See *Contract*, 3.

PROOF. See *Bill of Exchange*, 1, 2, 3—*Justiciary Cases*, 20, 21, 22—*Parent and Child*, 3, 4—*Payment—Police*, 12—*Process*, 4 *to* 9—*Sale*, 1—*Trust*, 2.

PROPERTY. *Right to lateral support—Minerals—Right to work minerals to prejudice of adjacent ground—Interdict.*

A water company in 1821 under statutory authority constructed an aqueduct through certain lands. In 1825 the owner granted the company a feu-disposition of a strip of ground 25 yards wide (including the minerals) "in which the aqueduct pipe is laid." *Held* that the feu-disponees were entitled to lateral support sufficient not only for the ground acquired by them, but also for the pipe running through it, and to interdict against the disponers so working the minerals adjacent to the feu as to interfere with this right of support. Edinburgh and

PROPERTY—*Continued.*
District Water Trustees v. Clippens Oil Co., Limited, Nov. 27, 1900, p. 156.
See *Railway*, 2.

PROVISIONS TO WIDOWS AND CHILDREN. See *Entail*, 2—*Marriage-Contract*.

PUBLIC HEALTH. *Areas of Administration of County and Burgh—Public Health (Scotland) Act*, 1897, *secs.* 3, 12, *and* 181—*Local Government (Scotland) Act*, 1889, *secs.* 11, 17, 44, 105.
Held that the limitation of the boundaries of burghs in sec. 44 (*b*) of the Local Government (Scotland) Act, 1889, did not apply to public health administration under the Public Health (Scotland) Act, 1897, and accordingly that a District Committee had no jurisdiction for the purposes of the Act over the area included within the royalty but outside the police boundaries of a royal burgh. Lower Ward of Lanarkshire District Committee v. Magistrates of Rutherglen, March 20, 1901, p. 742.
See *Police*.

PUBLIC-HOUSE. *Certificate—Application refused by Magistrates, but granted on appeal by Quarter Sessions—Official to grant certificate—Home Drummond Act*, 1828—*Public-Houses Acts Amendment (Scotland) Act*, 1862.
1. *Held* that where the decision of the magistrates of a burgh refusing a public-house certificate is reversed on appeal by the Quarter Sessions, the clerk of the magistrates, and not the clerk of the Justices in Quarter Sessions, is the proper official to issue the certificate. Kerr v. Marwick and Gray, Feb. 14, 1901, p. 470.

Public-house Offences—Hawking exciseable liquors—Trafficking in streets—Public-Houses Acts Amendment (Scotland) Act, 1862, *secs.* 16 *and* 37.
2. In a complaint charging a contravention of sec. 16 of the Public-Houses Acts Amendment (Scotland) Act, 1862, it was proved that the accused, who was a member of a club which supplied exciseable liquors to its members on Sunday, received money in a street from a man on a Sunday, went to and entered the club, and returned with a small bottle of whisky, which he handed to the man from whom he had received the money; that he procured whisky in this way for three different persons on the same Sunday; that none of these persons were members of the club; that one of them at least was previously unknown to the accused; and that the accused made a profit of 3d. on each transaction. The magistrate having found the charge not proved, the prosecutor appealed. *Held* that the facts proved constituted a contravention of sec. 16 of the statute, and warranted a conviction against the accused for hawking exciseable liquor. Neilson v. Dunsmore, Dec. 6, 1900, Just. Cases, p. 6.

Public-house Offences—Hawking exciseable liquor—Responsibility of master for servant—Vanman—Public-Houses Acts Amendment (Scotland) Act, 1862, *sec.* 16.
3. A vanman, in the employment of and in charge of a van belonging to a licensed grocer, sold and delivered a pint of whisky from the van to A on a public road. A had not ordered the whisky previously. It was part of certain exciseable liquors which the vanman had taken from his master's licensed premises in the morning. The master was not present when the whisky was sold to A. The vanman was in the habit of keeping a book in which the liquor taken out by him in the morning was noted. Liquor taken out by him was frequently returned by him to his master as being unsold or undelivered. The master occasionally examined the vanman's book, and the vanman's actings were known to him. *Held* that the master, as well as the vanman, had, in respect of the sale to A, rightly been convicted of hawking exciseable liquors

PUBLIC-HOUSE—*Continued.*
in contravention of the Public-Houses Acts Amendment (Scotland) Act, 1862. Hogg v. Davidson, March 18, 1901, Just. Cases, p. 49.

Public-house Offences—Complaint—Relevancy—Specification of sections of statute—Home Drummond Act, 1828, *sec.* 23.

4. A summary complaint set forth that the accused, "who holds a certificate for the sale of exciseable liquors at" a hotel specified "has been guilty of an offence against the laws for the regulation of public-houses in Scotland, in so far as he did between 1 and 2 o'clock in the morning" of a day specified "sell or give out from the said hotel" certain quantities of whisky to certain persons named. *Held*, on appeal, that the complaint was irrelevant, in respect that it neither alleged that the things said to have been done by the accused were done in contravention of his certificate, nor specified any section or sections of the Public-Houses (Scotland) Acts as having been contravened. Rule v. Thomson, March 4, 1901, Just. Cases, p. 33.

Public-house Offences—Instance—Procurator-Fiscal of Sheriff Court—Public-Houses Acts Amendment (Scotland) Act, 1862, *sec.* 25.

5. *Held* that section 25 of the Public-Houses Acts Amendment (Scotland) Act, 1862, does not exclude the instance of the Procurator-fiscal of a Sheriff Court to prosecute complaints in his Court for contraventions of the Act. Stirling v. Dickson, Dec. 10, 1900, Just. Cases, p. 17.

Public-house Offences—Complaint—Inducice—Statute—Repeal—Public-Houses Acts Amendment (Scotland) Act, 1862, *sec.* 18—*Home Drummond Act*, 1828, *sec.* 23—*Summary Procedure (Scotland) Act*, 1864, *secs.* 3 *and* 6—*Statute Law Revision Act*, 1893, *sec.* 1.

6. In a suspension of a conviction on a complaint, under the Summary Procedure (Scotland) Act, 1864, charging trafficking without a certificate contrary to the Public-Houses Acts Amendment (Scotland) Act, 1862, sec. 17, *held* that the repeal of sec. 18 of the Public-Houses Acts Amendment (Scotland) Act, 1862, did not make applicable the *inducice* of six free days provided by sec. 23 of the Home Drummond Act, and that the complaint had competently been tried on *inducice* of not less than forty-eight hours, in terms of the Summary Procedure (Scotland) Act, 1864. Stirling v. Dickson, Dec. 10, 1900, Just. Cases, p. 17.

See *Justiciary Cases*, 2, 3.

PUBLIC OFFICIAL. See *Justiciary Cases*, 2, 3, 4—*Reparation*, 6.

RAILWAY. *Accommodation Works—Damages for failure to provide accommodation works timeously—"Forthwith"—Farm Road—Level Crossing—Servitude—Railways Clauses Consolidation (Scotland) Act*, 1845, *secs.* 46, 48, *and* 60.

1. A railway company, under the powers of their special Act passed in 1878, acquired in property the *solum* of a portion of a farm road which connected the north part of the farm with the south, and laid their rails on the portion so acquired. Compensation for lands taken and for severance was paid to the proprietor on the footing that a level crossing was to be provided at the point where the railway intersected the road, and a level crossing was provided accordingly. The railway, as originally constructed, was a single line with a local traffic only, but under the powers of an Act obtained by the railway company in 1893, the line was doubled and extended so as to form part of a main line, with a large traffic, including express trains. In June 1896 (before the double and extended line was opened for traffic) the proprietor and the tenant of the farm presented an application, under section 60 of the Railways Clauses Consolidation (Scotland) Act, 1845, for an accommodation bridge in lieu of the level crossing, on the ground that the increased traffic consequent on the doubling and extension of the line would make the level crossing useless for the purposes of the farm.

RAILWAY—*Continued.*

The railway company disputed liability, but in July 1897 they were ordained to provide an accommodation bridge. The bridge was not provided till March 1898, by which time the double and extended line had been opened for traffic, and the level crossing in consequence useless, for ten months. The tenant then brought an action against the railway company for damages on account of the loss sustained by him through the want of means of communication between the two portions of his farm during these ten months. *Held* that the pursuer was entitled to damages at common law, in respect that the defenders had not fulfilled their statutory duty under section 60 of the Act, of providing the accommodation bridge "forthwith" on the formation of their line. Pollock v. North British Railway Co., March 19, 1901, p. 727.

Accommodation Works—Conveyance in implement of decreet-arbitral—Railway Clauses (Scotland) Act, 1845, *sec.* 65.

2. *A decree-arbitral, dated 5th November* 1856, *determining the compensation payable by a railway company to a proprietor in respect of lands taken by the company, after findings in favour of the proprietor, proceeded,—"Fifth, we hereby repel all other claims made by" the proprietor "in the said reference, and find that the foresaid sums are in full satisfaction of all claims competent to him against the said railway company under the said reference, excepting always the obligation upon the said company to preserve the effective drainage of the lands in so far as the same may be interfered with by the construction of the works, and to keep up the works, fences, water-courses, and others, falling upon the said company under the Railway Clauses Consolidation (Scotland) Act,* 1845." *On 11th August* 1859, *a disposition was executed by the proprietor, which, after narrating the decreet-arbitral, conveyed the land to the railway company under the conditions contained in the decreet-arbitral, and with the following declaration:—"Declaring that the said railway company shall be bound and obliged to preserve the effective drainage of the lands in so far as the same may be interfered with by the railway works, and to keep up the works, fences, water-courses, and others falling upon them under the Railway Clauses Consolidation (Scotland) Act,* 1845." Held, reversing *the judgment of the First Division, that the disposition fell to be construed in conformity with the decreet-arbitral on which it proceeded, and the Railway Clauses Act, and that after the lapse of the statutory time fixed for the completion of the works the railway company could not be called on to execute additional accommodation works.* Duke of Fife v. Great North of Scotland Railway Company, March 20, 1901, H. L., p. 2.

Reasonable Facilities—Undue Preference—Private Siding—Railway Commissioners—Jurisdiction—Railway and Canal Traffic Act, 1854, *secs.* 1 *and* 2.

3. The North British Railway Company, which had for many years received and delivered goods for a firm of traders at a siding belonging to the traders, intimated to them that they would no longer deliver coal at the siding. The railway company continued to deliver at the siding all other goods consigned there. In an application by the traders, the Railway Commissioners pronounced an order finding that the railway company in refusing to deliver coal at the junction of their railway with the siding in question, had not afforded to the traders all due and reasonable facilities for the delivery of their coal traffic, and ordering the company to afford such facilities accordingly. In an appeal by the railway company, *held* (1) that the owner of a private siding on a railway had no other right than a right to use the railway as a highway for his own engines and carriages on payment of tolls; (2) that although a railway company had power to receive and deliver

RAILWAY—*Continued.*

goods at a private siding, it was under no obligation to do so; (3) that the fact that a railway company had been in the practice of receiving and delivering goods at a private siding for a series of years created no obligation on the railway company to continue to do so; (4) that a railway company was entitled to deliver certain classes of goods at a private siding without thereby coming under an obligation to deliver other classes of goods; and therefore (5) that as the North British Railway Company was under no obligation to deliver goods at the private siding, the provisions in section 2 of the Railway and Canal Traffic Act, 1854, as to affording all reasonable facilities for the receiving and delivery of traffic, had no application, and that the Railway Commissioners had no jurisdiction to issue the order requiring the railway company to deliver coal at the private siding.

The Railway Commissioners further pronounced an order finding that the railway company in delivering coal at the private sidings of other traders in the neighbourhood, competitors in trade with the applicant traders, and refusing to deliver coal at the applicant's siding, had given to such other traders an undue preference, and subjected the applicants to an undue prejudice, and ordering the railway to desist from so doing. *Held* that this order was within the jurisdiction of the Commissioners. Cowan & Sons, Limited, v. North British Railway Co., March 19, 1901, p. 677.

See *Burgh*, 3—*Master and Servant*, 9, 10—*Police*, 9, 18 *to* 22—*Process*, 5, 9—*Reparation*, 13, 14.

RATES. See *Police*, 1, 2, 9, 10, 16—*Poor*, 6, 7.

REDUCTION. See *Sheriff*.

REPARATION. *Wrongous Apprehension—Police-constable—Issue.*

1. In an action for damages for wrongous apprehension against two police-constables the pursuer averred:—That the defenders came to her house and apprehended her on a charge of making a disturbance in a shop; that she denied the charge, and signified her willingness to accompany the defenders to the police-office, "but before she could put on her hat and jacket, or any other thing properly, the said" defenders "suddenly seized hold of her, and in presence of her neighbours and a large number of people, dragged her out of her said house down the stairs into the street, and thence to" the police-office; that throughout she offered no resistance, and said to the defenders that she would go quietly with them if they would release their hold of her; but that they paid no heed to her requests. *Held* that the action was relevant.

Issue—Whether the defenders "wrongfully and with unnecessary force and violence" apprehended the pursuer in her house, and conveyed her to the police-office?—*approved*. M'Gilvray v. Main, Jan. 26, 1901, p. 397.

Slander—Privilege—Malice—Relevancy—Master and Servant.

2. In an action of damages for slander the pursuer averred that he had been for four years in the service of the defender as a barman, that on leaving his service in February 1899 he received from the defender a certificate that the defender had always found him honest, sober, and trustworthy; that in February 1900, in answer to an inquiry by a publican into whose service the pursuer had been taken, the defender wrote that the pursuer was "no good," meaning thereby that the pursuer was not honest and sober; that that statement was false, and was known to the defender to be false; and that it was made maliciously. The defender pleaded that the action was irrelevant, in respect that the occasion being privileged it was necessary for the pursuer to aver facts and circumstances inferring malice, and that he had not done so. The Court *repelled* the plea to relevancy, holding that the unexplained

contradiction between the character of 1899 and the character of 1900 was sufficient to infer malice. Macdonald v. M'Coll, July 18, 1901, p. 1082.

3. In an action of damages for slander, at the instance of a commercial traveller against his former employers, the pursuer averred that he commenced his engagement with the defenders at a fixed salary and commission, and that in implement of a condition of his engagement the defenders were insured with an insurance company under a policy taken out by him against possible defalcations by him; that, subsequently, his remuneration was changed by the defenders to commission alone; that this change in his remuneration avoided, to the defenders' knowledge, the policy of insurance; that thereafter the defenders, in the knowledge that they had no claim under the policy, falsely stated to the insurance company that the pursuer had embezzled sums of money belonging to them; and that they had done so with a view to hampering the pursuer in getting other employment in which he might use his knowledge in competition with them. The defenders, who denied that the policy was avoided by the change of remuneration, pleaded privilege, and contended that malice should be put in the issues. *Held* that there was a *prima facie* case of privilege, and that malice must be inserted in the issues. Dundas v. Livingstone & Co., Nov. 2, 1900, p. 37.

Slander—Privilege—Malice—Judicial Slander—Arbitration—Witness.

4. In an action of damages for slander the pursuer averred that during the course of arbitration proceedings to which the defender was a party, and in which the pursuer was called by the arbiter to give information, after a statement by the pursuer to the arbiter, the defender stated to the arbiter of and concerning the pursuer "that man cannot speak one word of truth, and all that he has stated just now is lies from beginning to end," and that on being asked to withdraw the statement he repeated it. *Held* that the pursuer was entitled to an issue, but that the occasion was privileged and malice must be put in issue. Neil v. Henderson, Jan. 25, 1901, p. 387.

Slander—Privilege—Malice—Trade Slander—Company for providing subscribers with confidential information as to financial status of traders.

5. In an action of damages for slander, the pursuers averred that shortly after they had placed an order with a manufacturer the defenders wrote to the manufacturer of and concerning them that "they do a fairly extensive trade, but the account, from various causes, is not regarded with much confidence in these markets, although in certain quarters, they appear to be in receipt of moderate credit. The capital at command, however, is limited, and the payments of late have been slow and unsatisfactory, but their settlements for years have always been dilatory. At the same time, several of their shops are not thought to be paying, and it is feared that credit transactions meanwhile represent more than an average risk"; and that the defenders had failed to make adequate inquiry, which would have shewn that these statements were false. It was admitted that the defenders were a company formed for the purpose, *inter alia*, of preventing their subscribers from making bad debts, by furnishing them with information as to the financial status of persons with whom they proposed to trade; that the manufacturer was a subscriber of the company; that the letter complained of was written in response to a request by the manufacturer for information as to the amount of credit which it would be safe for him to give the pursuers; and that the information was given on the condition that it was confidential, for the use of the subscriber only, and not to be divulged by him to any third party. *Held* (1) that the case was relevant, and (2) that the defenders were privileged in writing as they did, and that

REPARATION—*Continued.*

malice must be put in the issue. Bayne & Thomson v. Stubbs, Limited, Jan. 29, 1901, p. 408.

Public Officer—Privilege—Malice and want of probable cause—Seizure of trawler's nets by Fishery Officers.

6. *Held* that a fishery officer, who on the instructions of the Fishery Board seized the nets of a trawler which they had reason to suspect of having been engaged in trawling within the three-mile limit, was not liable in damages, although the trawler had not been trawling within the prohibited area. Pyper v. Ingram, Feb. 19, 1901, p. 514.

Negligence—Lease—Known Danger—Hole in floor—Relevancy.

7. In an action by a tenant of a house against her landlord for damages on account of personal injuries, the pursuer averred that she had occupied the house since May 1898; that, in common with others of the defender's tenants, she had the use of a wash-house attached to the house; that on 16th August 1900, while she was cleaning up the wash-house after using it, her right foot was caught in an opening in the floor, "which floor was in a very dilapidated condition, and much in want of repair"; that in consequence of her foot being so caught she fell, and sustained the injuries on account of which she sued; that the defender and his mother had been "repeatedly warned of the dangerous state of the said wash-house floor"; that the defender's mother had informed the pursuer that the defender's factors had been instructed to put the floor in a proper and safe state of repair, but that it had not been repaired prior to the date of the accident. The defender pleaded that the action was irrelevant. *Held* that the action was irrelevant. M'Manus v. Armour, July 16, 1901, p. 1078.

Negligence—Master and Servant—Person entrusted with Superintendence—Employers Liability Act, 1880, *sec.* 1, *subsec.* 2, *and sec.* 8.

8. A firm of stevedores employed two squads of dock labourers in loading a steamer, at the same hatch, one squad being under the superintendence of M'Neilly its foreman, who acted as hatch-mouth man for the lowering of goods from a shore crane, and the other under the superintendence of its foreman Murray, who acted as hatch-mouth man for the conveying of goods from the ship's winch. Falconer, one of M'Neilly's squad, who was injured by the fall of a piece of wood from the ship's winch, raised an action under the Employers Liability Act, 1880, against the stevedores as responsible for Murray, through whose fault he alleged the accident happened. It was proved that Murray was generally employed by the defenders as a labourer, but that he was occasionally selected to act as a hatch-mouth man—that at the time of the accident his duties were to superintend the lowering of goods into the hold and to take the chain of the winch ashore and to attach the hook to the goods—that he had complete control over his squad, and could dismiss any members of it, and that he was paid by the hour, but received higher wages than the men under him. *Held* that Murray was a person ordinarily engaged in manual labour, and could not be regarded as a person having superintendence entrusted to him in the sense of the Act. Falconer v. M'Cabe, Nov. 30, 1900, p. 210.

Negligence—Medical Man—Issue.

9. In an action of damages by a patient against his medical attendant, the pursuer averred that on 14th April 1900 he called upon the defender and consulted him as to a scratched finger, that the defender prescribed a course of treatment, that the defender visited him on 16th April, when he directed the treatment to be continued till he called again, which he promised to do on an early day, that he did not call again for nine days, and that in consequence of the defender's neglect the

REPARATION—*Continued.*

pursuer's finger had to be amputated. *Held* that the pursuer had set forth a relevant case for inquiry. Form of issue *adjusted*. Farquhar v. Murray, June 4, 1901, p. 859.

Negligence—Safety of Public—Pier—Injury caused by steamboat rope to person standing on pier—Contributory Negligence.

10. In an action of damages for personal injuries the pursuer averred that while he "was standing" on the steamboat quay at Greenock, a seaman on board an approaching steamboat belonging to the defenders threw a rope on to the quay in order that the steamboat might be made fast to the quay; that the rope was attached to a pillar for the purpose on the quay; and that the rope was negligently allowed to lie alongside another pillar nearer the edge of the quay; that the way which was on the steamboat was too great, and caused the rope to strain and then to spring over the last mentioned pillar and to swing violently across the quay, knocking the pursuer down and causing the injuries on account of which he sued; that the defenders were in fault in mooring the vessel in the manner adopted on the occasion in question; and that had the ordinary and safe method of mooring (which was specified) been followed, the accident would not have happened. The defenders pleaded that the action was irrelevant, in respect, *inter alia*, (1) that the pursuer did not aver that he had any business requiring him to be on the quay on the occasion in question; and (2) that according to his own shewing he had been guilty of contributory negligence. *Held* that the pursuer had averred a case for inquiry, and was entitled to an issue. Clark v. Glasgow, Dublin, and Londonderry Steam Packet Co., June 21, 1901, p. 991.

Negligence—Safety of Public—Responsibility of Magistrates for safety of foot-passengers—Obstruction of footpath—House projecting into street.

11. A child six years of age was run over and killed in crossing an old burgh road. In an action raised by the child's father against the Magistrates of the burgh, on the ground that the accident was caused by their fault in allowing the road to be in a dangerous condition, the pursuer averred that at the place where the accident happened the footpath on one side of the road was obstructed by a projecting house, which compelled passengers on that side of the road to cross the road, and at the same time prevented them from seeing approaching vehicles, and prevented drivers of such vehicles from seeing the foot-passengers; that the defenders were aware of the danger, but had done nothing to remove it. *Held* that the action was irrelevant. M'Kenzie v. Magistrates of Musselburgh, July 2, 1901, p. 1023.

Negligence—Safety of public—Children—Street—Deposit of building materials against wall separating street from pond.

12. In an action for damages on account of the death of a child seven years of age, the pursuer averred that the defender was engaged in building operations adjoining a public street; that the street on one side was separated from a mill pond ten feet deep by a stone wall eight feet high; that the defender deposited a large heap of building materials close to this wall and reaching to within thirty inches from its top; that the child, while playing with other children on the top of this heap, fell over the wall into the pond and was drowned; that the defender in heaping up the material close to the wall made the pond a practically unprotected source of danger to the public; that he knew that children were in the habit of playing on the top of the heap; and that in depositing the heap and failing to take precautions for the safety of children playing on it, the defender was guilty of gross negligence, in consequence of which the child lost its life. The Court *dismissed* the action as irrelevant. Horsburgh v. Sheach, Dec. 11, 1900, p. 268.

inued.
lway—Failure to fence Siding near Cottages.
er, in the course of backing some trucks down a siding, killed his own son, a child two years old, who was other children in the siding. He brought an action against his employers, in which he averred fault in hey had failed to provide a shunter to assist him in rucks, and had left the siding unfenced, although there elonging to them and let to their workmen immediately the only access to a bleaching-green used in connection uses was across the siding. *Held* that the action was ies v. Fife Coal Co., Limited, Jan. 10, 1901, p. 335.
lway—Injury to passenger owing to crowd on station

passenger from a station of the Glasgow District Subway, injured through being caught between the station platncoming train, brought an action for damages against the e averred that the trains of the company consisted of two with a single entrance door; that only persons holding admitted to the station platforms; that on the day in pursuer, having got a ticket, was admitted to the platation in which he was injured; that on that day, owing wn, trains were running at intervals of fifteen minutes, advertised interval of three minutes; that the interval a much larger number of intending passengers than o the station before the train arrived; that they were he ticket-clerk to the platform, with the result that it overcrowded, particularly at the point where the trains on the train entering the station, and while it was still crowd concentrated at the point where one of the entry ome to a stop, with the result that the pursuer was pressed oving train, and being caught between it and the platl the injuries on account of which he sued; that these due to the fault of the defenders or their servants in e proper steps to prevent the overcrowding of the platefenders pleaded that the action was irrelevant. *Held* ier's averments were sufficient to entitle him to inquiry, *owed.* Macgregor v. Glasgow District Subway Co., , p. 1131.
lient, 1—*Expenses*, 1, 6, 9—*Process*, 1, 4, 6.
Destination—Trust, 10, 11.
duty—Settlement Estate-duty—Entailed Estate—Money purchase lands to be entailed—Finance Act, 1894, *sec.*

ey vested in trustees for the purpose of purchasing land is not "entailed estate" in the sense of sec. 23, subsec. nance Act, 1894, and is not liable as such to settlement Lord Advocate v. Sprot's Trustees, Feb. 1, 1901, p. 440.
tlement Estate-duty—Estate contingently settled—Repaye Act, 1894, *sections* 5 *and* 8.
directed to hold the residue of a trust-estate for the arried daughter in liferent, and her children in fee, it d that if she had no children the fee should go as she by any writing under her hand, and, failing such direca third parties. On the death of the truster in 1895 the estate-duty and settlement estate-duty on the residue as a under the provisions of the Finance Act, 1894. The unmarried on 11th January 1898. On her death

REVENUE—*Continued.*

estate-duty was claimed and paid on the residue as an unsettled estate. In an action by the trustees for repayment of the amount paid as settlement estate-duty, on the ground that the estate was only settled contingently on the daughter leaving issue, and that this contingency had not arisen, *held* that as there was no enactment in the Finance Act, 1894, or otherwise, entitling the trustees to repayment, they were not entitled to repayment. Watherston's Trustees v. Lord Advocate, Feb. 1, 1901, p. 429.

Legacy-duty—Legacy free of duty—Agreement to take less than full amount of legacy—Legacy-Duty Act, 1796, *secs.* 21 *and* 23.

3. By certain testamentary writings, a testator provided for the payment of certain legacies, some free of legacy-duty, others not. On the testator's death the estate proved insufficient to pay the legacies in full. Questions as to the validity, construction, and effect of these testamentary writings were settled by all the parties interested executing a deed of agreement and compromise whereby they agreed severally to accept, as in full of their right, from the testamentary trustees, smaller sums than the legacies bequeathed, under declaration that all were to be free of legacy-duty, and that *quoad* the provisions thus arrived at the testator should be deemed to have died testate, and *quoad ultra* intestate. The Crown claimed legacy-duty from the trustees upon the sums paid to the legatees, and on the sums drawn by the trustees from other funds in order to pay duty on the legacies, as agreed on, contending (1) that the legatees took solely in virtue of the agreement, and therefore that sec. 21 of the Legacy-Duty Act, 1796, did not apply, and (2) that the sums paid to the legatees along with the amount of the duty was "the amount taken in satisfaction of the legacy" in the sense of sec. 23 of the Act. *Held* that the legatees took the sums as their legacies in virtue of the testamentary writings, the effect of the agreement being merely to restrict them in amount, and that therefore by sec. 21 of the Act no legacy-duty was payable on the sums paid as duty on those legacies which by the agreement were accepted in place of legacies declared in the testamentary writings to be free of duty. Lord Advocate v. Watherston's Trustees, March 5, 1901, p. 627.

Income-Tax—Revenue earned abroad—Constructive Remittance—Income-Tax Act, 1842, *sec.* 100, *Schedule D, Case iv.*

4. Where interest derived from the foreign and colonial investments of a proprietary insurance company was not remitted home, but was retained in the countries where it was earned, and was invested or otherwise applied there, *held* that by being entered in the company's accounts, and taken into account in estimating the amount of profit to be divided by way of bonus, dividend, or otherwise, it was not constructively received in this country so as to be chargeable with duty under case iv. of Schedule D of the Income-Tax Act, 1842. Standard Life Assurance Co. v. Allan, May 30, 1901, p. 805.

5. A Scottish mutual life assurance society was assessed for income-tax upon, *inter alia*, three sums of £25,000, £28,000, and £5000 remitted from Australia in 1898, on the ground that these sums were interest received in this country on investments in Australia. The Commissioners having sustained the assessments, the society obtained a case for appeal. The case stated the following facts:—Between 1885 and 1890 the society remitted to their agent in Australia sums to be invested in specific loans agreed to by the society. After 1890 no further remittances were made from this country, but the whole interest on these loans, until 1893, was invested in Australia. Subsequently various sums were remitted to this country. At 31st December 1898 the amount of loans in Australia exceeded the total capital sent out from

REVENUE—*Continued.*

this country for investment. Loans repaid and interest paid in Australia were credited to a general bank account in Australia, and remittances to Great Britain were made from the same account. The whole revenue of the society in Australia was derived from interest on loans. This interest, whether brought home or not, was regularly included in the society's annual revenue accounts as part of its income. On 1st February 1898 the society's Australian agent remitted the £25,000, with a letter that it was the amount of a loan repaid in 1891, and on 16th November 1898 he remitted the £28,000 as the amount of a loan repaid two days before. Both sums had been paid into the general bank account in Australia, and both remittances had been made from that account. The sum of £5000 was remitted directly by the borrower in Australia to the society's office in London as a repayment of capital. *Held* (1) that as the two loans of £25,000 and £28,000 had been immixed with the society's other funds, consisting of capital and interest, the remittances could not be identified as the return of capital sent from this country; (2) that as the total amount invested in Australia exceeded the amount sent out, it was to be presumed that in the ordinary course of business the sums remitted were from revenue, and not the return of capital sent from this country, and that as the revenue consisted entirely of interest, the assessment on these two sums was valid; but (3) that the £5000 could not be regarded as interest, and was not liable to duty. Scottish Provident Institution v. Inland Revenue, June 4, 1901, p. 874.

Inhabited House Duty—Different tenements occupied solely for business—Customs and Inland Revenue Act, 1878, *sec.* 13, *subsecs.* (1) *and* (2).

6. A house of four storeys owned by a bank was occupied as follows:—The first floor by a firm of writers to whom it was let, and the other three floors by the bank, the ground floor being used as the offices of the bank, and the second floor as the official residence of the bank accountant. Access to all the floors from the street was by a door which opened into a vestibule. In the vestibule there was a door to the bank office, a front stair leading to the first floor, and a door to a passage leading to the bank-agent's room and to a back stair, which was the access to the second floor. There was a door between the two stairs, which was kept locked. The first and second floors were each shut off from the staircase by outer doors on the landings. From the bank-agent's house on the second floor there was a bolt in connection with the lock of the safe in the bank office. The whole house, with the exception of the first floor, having been assessed for Inhabited House Duty, the Bank appealed, and maintained that the ground floor being occupied solely for the business of banking was entitled to exemption. *Held*, on the facts, that there were such means of internal communication and such structural connection between the bank offices and the house of the agent, and also such identity of occupation, that the bank premises could not be regarded as a separate tenement in the sense of sec. 13 of the Customs and Inland Revenue Act, 1878. Union Bank of Scotland, Limited, v. Inland Revenue, March 20, 1901, p. 771.

Inhabited House Duty—Exemption—Business Premises—"Profit"—Mutual Insurance Society—Customs and Inland Revenue Act, 1878, *sec.* 13, *subsec.* (2).

7. The Scottish Widows' Fund and Life Assurance Society had no share capital and no shareholders. Its membership consisted exclusively of the holders of policies of life insurance effected with the Society, and of the purchasers of annuities from it. The bulk of the members were the holders of "participating" policies, *i.e.*, members who were entitled to share in the surplus assets of the Society as brought out at each septennial investigation of its affairs; but a small proportion of

REVENUE—*Continued.*

the policy-holders and all the annuity-holders (who also were proportionally few in number) had no such right of participating in the surplus assets. The Society did not directly insure, or grant annuities to, persons who were not members of the Society, but it reinsured the risks of other life insurance companies. Its accumulated funds, which were of very large amount, and from which it derived a large income, were invested in stocks, shares, and other securities, and it also, to a small extent, purchased reversions. The Society having claimed exemption from inhabited house duty under the Customs and Inland Revenue Act, 1878, sec. 13, subsec. (2), in respect of premises which it occupied solely for the purposes of its business, the Surveyor of Taxes maintained that the exemption founded on did not apply, in respect that the Society, being a mutual insurance society, could make no trade or business profits, or at all events, if it did to some extent make trade or business profits, that it did not occupy the premises for the sole purpose of making such profits. *Held* that the premises in question fell within the exemption, in respect that they were solely occupied by the Society for the purposes of its business by which it sought to make a profit. Scottish Widows' Fund and Life Assurance Society v. Inland Revenue, Nov. 24, 1900, p. 129.

See *Succession*, 9.

REVOCATION. See *Marriage-Contract*, 2, 4, 5.

RIFLE RANGE. See *Nuisance.*

RIGHT IN SECURITY. See *Trust*, 2.

RIVER, LOCH, SEA. See *Fishing—Justiciary Cases*, 5, 6, 26—*Nuisance*, 1—*Police*, 12.

ROAD. See *Police*, 3 *to* 9, 13, 14, 15, 18, 19—*Railway*, 1—*Reparation*, 11, 12.

SALE. *Sale of Moveables—Written contract of Sale—Prior Oral Agreement—Innominate Contract.*

1. In an action raised by A against B for damages for failure to deliver certain parcels of indiarubber goods, A produced and founded on sale-notes under B's hand, bearing that he had sold the goods in question to A. In defence B averred that prior to the transactions condescended on the parties had entered into a verbal agreement to the effect that while the contracts for the supply of rubber by the defender to the pursuer were to be *pro forma* with the pursuer as buyer, the pursuer was only to receive a commission on the sale of the goods by him to a particular consumer who was named, and further, that the pursuer was to confine his dealings in the article in question to the defender alone. B further averred that A had not implemented this agreement, and moved to be allowed a proof *pro ut de jure* of his averments. The Lord Ordinary (Kincairney) held that the alleged agreement could only be proved by the writ or oath of the pursuer, on the ground that it was an agreement of an innominate and unusual character. The defender having reclaimed, the Court *adhered* to the Lord Ordinary's judgment on the ground that it was incompetent to supersede a contract of sale instructed by writing by parole proof of an antecedent oral contract of an entirely different character. Müller & Co. v. Weber & Schaer, Jan. 29, 1901, p. 401.

Sale of Moveables—Warranty—Collateral Representation—Sale of Goods Act, 1893, *secs.* 53 *and* 62.

2. A brickmaker who wished to replace the engine at his works with one of greater power, to be connected with the existing boiler, received a letter dated 1st October 1898 from a firm of engineers enclosing a

SALE—*Continued.*

specification and estimate of an engine. The letter contained a calculation bringing out that with the engine 30,000 bricks would be made at a cost for coal of 4s. 4d. This result proceeded on the assumptions, set forth in the letter, that 1½ lbs. of coal would develop 15 lbs. of steam, that 15 lbs. of steam would develop 1 i.h.p. per hour, and that the coal cost 4s. per ton. The brickmaker by letter gave the order "as per your specification . . . subject to your guarantee of fuel consumption being fulfilled." The engine when delivered was found to be capable of developing, as estimated, 1 horse-power from 15 lbs. of steam, but the amount of coal at 4s. per ton required to raise this quantity of steam by the brickmaker's boiler was more than double that stated. The discrepancy was due to the engineers' representative having taken from a text-book the formula 1½ lbs. of coal develop 15 lbs. of steam, without adverting to the fact that the coal referred to was best Welsh coal (costing over £1 per ton), while the coal used by the defenders was Scots dross, costing 4s. per ton. In an action for the price, the purchaser contended that the letter of 1st October contained a guarantee that with the engine he would be able to produce 30,000 bricks at a cost of 4s. 4d., and that the damage sustained by him through the pursuers' breach of contract exceeded the price. *Held* that in view of the subject-matter of the contract—the sale of an engine—the letter could not be construed as containing a warranty as to the cost of producing the steam to be supplied to the engine, or as to the total cost of producing bricks, in which the cost of steam production was an element. Robey & Co., Limited, v. Stein & Co., Dec. 14, 1900, p. 278.

Sale of Moveables—Warranty—Express Warranty—Advertisement—Implied Warranty—Sale of article under patent or trade-name—Sale of Goods Act, 1893, *sec.* 14.

3. Paul & Company were the sole licencees and makers of an apparatus known in the trade as "Patterson's Smoke-Prevention Suction Draught for Land and Marine Boilers." In March 1897 Paul & Company wrote to the engineer of the Corporation of Glasgow calling his attention to their apparatus as a means of both increasing boiler capacity and largely reducing or entirely preventing smoke: and also enclosing a circular, in which it was stated that "The smoke prevention is absolute, and is attained by a proper arrangement of," &c. In March 1898 the Corporation by letter accepted a written offer by Paul & Company to instal their apparatus at a price stated. Neither the offer nor the acceptance contained any reference to the circular. The apparatus having been erected, and the Corporation having thereafter rejected it as disconform to contract, Paul & Company brought an action against the Corporation for the price. The defenders denied that the pursuers had implemented their contract, and stated that they, the defenders, had ordered the installation, "relying on the statements and warranty contained in the said circular," and that the apparatus erected did not prevent smoke. They pleaded that the apparatus supplied being disconform to warranty and having been rejected they ought to be assoilzied. The pursuers pleaded that the contract did not contain any warranty as to the prevention of smoke. The pursuers renounced probation; the defenders asked for a proof. The Court *refused* to allow a proof, and *granted* decree, holding (1) that the defenders were not entitled to found on the circular as containing an express warranty, as the circular was not referred to in the contract; and (2) that in respect of the proviso contained in sec. 14, subsec. 1, of the Sale of Goods Act, 1893, there was no implied warranty, the apparatus in question being a specified article sold under its trade-name. Paul & Co. v. Corporation of Glasgow, Nov. 22, 1900, p. 119.

SALE—*Continued.*

Sale of Moveables—Sale of Horse—Breach of warranty—Death of horse shortly after delivery—Passing of property—Res perit domino.

4. A firm of contractors purchased and got delivery of a cart-horse, warranted by the seller to be "correct in wind and work." On being put into a cart on the day of delivery by one of the buyers' servants, the horse was very unruly, and plunged violently, although carefully managed; and on the following day, after behaving in a similar manner, it ran into a mill-dam and was drowned. The seller having brought an action for the price against the buyers, the defenders pleaded that they ought to be assoilzied, in respect that the horse was disconform to warranty. *Held* (1) that the horse was disconform to warranty; (2) that the defenders would therefore have been entitled to return it to the pursuer if it had not been drowned; and (3) that as the defenders' inability to return it was due to the pursuer's breach of warranty, the defenders were not liable for the price. Kinnear v. J. & D. Brodie, Feb. 22, 1901, p. 540.

Sale of Heritage—"Fixtures and Fittings"—Disposition in part implement of Missives.

5. The sale of a house "with the fixtures and fittings therein so far as belonging to the proprietor" was completed by missives. A disposition of the house which followed contained no mention of "fixtures and fittings," and no express reference to the missives. *Held* that the missives were not superseded by the disposition in so far as the subjects sold were moveable, and accordingly that the acceptance of the disposition by the purchaser did not discharge his right to delivery with the house of such moveables as fell within the terms "fixtures and fittings." Jamieson v. Welsh, Nov. 30, 1900, p. 176.

See *Company*, 1—*Contract*, 3, 5.

SALMON. See *Justiciary Cases*, 5, 6, 26.

SALVAGE. See *Ship*.

SCHOOL. See *Justiciary Cases*, 9, 14, 31—*Poor*, 7.

SECRETARY FOR SCOTLAND. See *Poor*, 2 *to* 5.

SERVICE OF HEIRS. *Disponee or heir of provision—Declaratory service to establish propinquity.*

A disponed to B for her liferent use allenarly, and to B's children *nascituri* in fee. B took infeftment in liferent. *Held* that on B's death her children were entitled to be served as heirs of provision in general to B for the purpose of establishing their propinquity and of obtaining a marketable title. Macdougall, Nov. 15, 1900, p. 99.

SERVITUDE. *Thirlage—Statutory Commutation—Dry Multures—Discontinuance of Mill—Thirlage Act*, 1799.

Held that (1) commuted payments in lieu of thirlage and services fixed by a verdict under the Thirlage Act, 1799, and (2) dry multures continue to be exigible notwithstanding the discontinuance of the mill. Porteous v. Haig, Jan. 15 1901, p. 347.

See *Railway*, 1.

SETTLEMENT ESTATE-DUTY. See *Revenue*, 1, 2.

SEWER. See *Police*, 10, 11, 12—*Railway*, 2.

SHERIFF. *Decree—Furthcoming—Parole proof of circumstances under which decree obtained—Sheriff—Reduction ope exceptionis—Debts Recovery (Scotland) Act*, 1867, *sec.* 17—*Sheriff Court Act*, 1877, *sec.* 11.

Held that it was not competent for a Sheriff sitting in the Small Debt Court to dismiss a furthcoming founded on a final decree in absence in

SHERIFF– *Continued.*

the Debts Recovery Court on parole evidence that the parties had agreed to the decree passing on the footing that it was to be used merely as a decree of constitution.

Opinions per Lord Moncreiff (1) that it was not competent for the common debtor in an action of furthcoming to plead objections which were competent and omitted in the action in which the decree on which the furthcoming was based was pronounced; and (2) that a decree of Court founded on by a party to a process is not a "deed or writing," in the sense of section 11 of the Sheriff Court (Scotland) Act, 1877, which can be set aside in the Sheriff Court by way of exception. Neil v. M'Nair, June 11, 1901, Just. Cases, p. 85.

See *Process*, 10 *to* 15.

SHIP. *Salvage—Amount.*

The "Acacia," a screw-steamship of the value, with her cargo and freight, of about £4000, whose pumps had been choked, and whose fires had been drowned out in a heavy gale, was rescued by a steam-trawler from a position of grave but not of imminent danger off the rocky coast near Aberdeen. Evidence on a consideration of which the Court *declined* to interfere with the judgment of the Lord Ordinary awarding £300 to the trawler for salvage services to the "Acacia." The "Ben Alder" v. The "Acacia," Feb. 15, 1901, p. 491.

SLANDER. See *Reparation*, 2 *to* 5.

SOLATIUM. See *Reparation.*

SOLWAY. See *Justiciary Cases*, 5, 6, 26.

STATUTE. *Construction—Glasgow Court Houses Act*, 1890, *sec.* 13.

1. Terms of a local assessing statute which were *held* to be unambiguous, and so incapable of construction by reference to the circumstances of the case. Glasgow Court Houses Commissioners v. Lanarkshire County Council, Nov. 20, 1900, p. 103.
2. *Observations* (*per* Lord M'Laren) on the construction of a series of statutes which are to be construed as one Act. Lord Advocate v. Sprot's Trustees, Feb. 1, 1901, p. 440.

See *Justiciary Cases*, 1, 6, 11, 15, 16, 26—*Lease*, 3—*Police*, 2, 13, 14, 15, 18 *to* 22—*Poor*, 4, 5.

STATUTES.

1705, *cap.* 2. See *Fishings*, 4.
36 *Geo. III. cap.* 52 (*Legacy Duty Act*, 1796). See *Revenue*, 3.
39 *Geo. III. cap.* 55 (*Thirlage Act*, 1799). See *Servitude.*
55 *Geo. III. cap.* 42 (*Jury Trials* (*Scotland*) *Act*, 1815). See *Process*, 9.
59 *Geo. III. cap. cxvi.* (*Edinburgh Water Act*, 1819). See *Police*, 20.
6 *Geo. IV. cap.* 120 (*Judicature Act*, 1825). See *Process*, 3.
9 *Geo. IV. cap.* 58 (*Home Drummond Act*, 1828). See *Public-House*, 1, 4, 6.
1 *and* 2 *Will. IV. cap.* 43 (*Turnpike Roads* (*Scotland*) *Act*, 1831). See *Police*, 5, 6.
4 *Vict. cap. xviii.* (*Annan Fisheries Act*, 1841). See *Justiciary Cases*, 6.
5 *and* 6 *Vict. cap.* 35 (*Income-Tax Act*, 1842). See *Revenue*, 4, 5.
6 *and* 7 *Vict. cap. lxxxix.* (*Edinburgh Water Company Act*, 1843). See *Police*, 20.
8 *and* 9 *Vict. cap.* 33 (*Railways Clauses Consolidation* (*Scotland*) *Act*, 1845). See *Railway*, 1, 2.
8 *and* 9 *Vict. cap.* 83 (*Poor-Law Amendment* (*Scotland*) *Act*, 1845). See *Poor*, 6.
10 *and* 11 *Vict. cap.* 17 (*Water-Works Clauses* (*Scotland*) *Act*, 1847). See *Police*, 18 *to* 22.

STATUTES—*Continued.*
13 *and* 14 *Vict. cap.* 36 (*Court of Session Act*, 1850). See *Process*, 3.
15 *and* 16 *Vict. cap.* 56 (*Pharmacy Act*, 1852). See *Justiciary Cases*, 25.
17 *and* 18 *Vict. cap.* 31 (*Railway and Canal Traffic Act*, 1854). See *Railway*, 3.
17 *and* 18 *Vict. cap.* 91 (*Valuation of Lands* (*Scotland*) *Act*, 1854). See *Poor*, 6—*Valuation Acts.*
19 *and* 20 *Vict. cap.* 79 (*Bankruptcy* (*Scotland*) *Act*, 1856). See *Bankruptcy.*
24 *and* 25 *Vict. cap.* 109 (*Salmon Fishery Act*, 1861). See *Justiciary Cases*, 5.
25 *and* 26 *Vict. cap.* 35 (*Public-Houses Acts Amendment* (*Scotland*) *Act*, 1862). See *Public-House.*
25 *and* 26 *Vict. cap.* 89 (*Companies Act*, 1862). See *Company.*
25 *and* 26 *Vict. cap.* 97 (*Salmon Fisheries* (*Scotland*) *Act*, 1862). See *Justiciary Cases*, 5, 26.
26 *and* 27 *Vict. cap.* 108 (*Vaccination* (*Scotland*) *Act*, 1863). See *Justiciary Cases*, 10, 11.
27 *and* 28 *Vict. cap.* 53 (*Summary Procedure Act*, 1864). See *Burgh*, 1—*Justiciary Cases*, 15, 22, 25, 28.
29 *and* 30 *Vict. cap.* 117 (*Reformatory Schools Act*, 1866). See *Justiciary Cases*, 31.
29 *and* 30 *Vict. cap. ccxxxv.* (*Glasgow Police Act*, 1866). See *Police*, 10.
30 *and* 31 *Vict. cap.* 96 (*Debts Recovery* (*Scotland*) *Act*, 1867). See *Sheriff.*
31 *and* 32 *Vict. cap.* 100 (*Court of Session Act*, 1868). See *Process.*
31 *and* 32 *Vict. cap.* 121 (*Pharmacy Act*, 1868). See *Justiciary Cases*, 25.
34 *and* 35 *Vict. cap. cxli.* (*Aberdeen Municipality Extension Act*, 1871). See *Police*, 2.
35 *and* 36 *Vict. cap.* 62 (*Education* (*Scotland*) *Act*, 1872). See *Justiciary Cases*, 9, 14.
36 *and* 37 *Vict. cap.* 63 (*Law-Agents* (*Scotland*) *Act*, 1873). See *Agent* (*Law*).
37 *and* 38 *Vict. cap.* 20 (*Rating Exemptions* (*Scotland*) *Act*, 1874). See *Poor*, 7.
37 *and* 38 *Vict. cap.* 94 (*Conveyancing* (*Scotland*) *Act*, 1874). See *Superior and Vassal*, 1, 2.
38 *and* 39 *Vict. cap.* 62 (*Summary Prosecutions Appeals* (*Scotland*) *Act*, 1875). See *Justiciary Cases*, 30.
38 *and* 39 *Vict. cap.* 63 (*Sale of Food and Drugs Act*, 1875). See *Justiciary Cases*, 8.
39 *and* 40 *Vict. cap.* 75 (*Rivers Pollution Prevention Act*, 1876). See *Police*, 12.
40 *and* 41 *Vict. cap.* 50 (*Sheriff Court* (*Scotland*) *Act*, 1877). See *Sheriff.*
41 *and* 42 *Vict. cap.* 15 (*Customs and Inland Revenue Act*, 1878). See *Revenue*, 6, 7.
42 *and* 43 *Vict. cap.* 30 (*Sale of Food and Drugs Act Amendment Act*, 1879). See *Justiciary Cases*, 8.
42 *and* 43 *Vict. cap. cxxxii.* (*Edinburgh Municipal and Police Act*, 1879). See *Burgh*, 6—*Police*, 13.
43 *and* 44 *Vict. cap.* 26 (*Married Women's Policies of Assurance* (*Scotland*) *Act*, 1880). See *Marriage-Contract*, 3.
43 *and* 44 *Vict. cap.* 34 (*Debtors* (*Scotland*) *Act*, 1880). See *Justiciary Cases*, 25.
43 *and* 44 *Vict. cap.* 42 (*Employers Liability Act*, 1880). See *Reparation*, 8.
43 *and* 44 *Vict. cap.* 47 (*Ground Game Act*, 1880). See *Justiciary Cases*, 13.

REPARATION—*Continued.*

malice must be put in the issue. Bayne & Thomson v. Stubbs, Limited, Jan. 29, 1901, p. 408.

Public Officer—Privilege—Malice and want of probable cause—Seizure of trawler's nets by Fishery Officers.

6. *Held* that a fishery officer, who on the instructions of the Fishery Board seized the nets of a trawler which they had reason to suspect of having been engaged in trawling within the three-mile limit, was not liable in damages, although the trawler had not been trawling within the prohibited area. Pyper v. Ingram, Feb. 19, 1901, p. 514.

Negligence—Lease—Known Danger—Hole in floor—Relevancy.

7. In an action by a tenant of a house against her landlord for damages on account of personal injuries, the pursuer averred that she had occupied the house since May 1898; that, in common with others of the defender's tenants, she had the use of a wash-house attached to the house; that on 16th August 1900, while she was cleaning up the wash-house after using it, her right foot was caught in an opening in the floor, "which floor was in a very dilapidated condition, and much in want of repair"; that in consequence of her foot being so caught she fell, and sustained the injuries on account of which she sued; that the defender and his mother had been "repeatedly warned of the dangerous state of the said wash-house floor"; that the defender's mother had informed the pursuer that the defender's factors had been instructed to put the floor in a proper and safe state of repair, but that it had not been repaired prior to the date of the accident. The defender pleaded that the action was irrelevant. *Held* that the action was irrelevant. M'Manus v. Armour, July 16, 1901, p. 1078.

Negligence—Master and Servant—Person entrusted with Superintendence—Employers Liability Act, 1880, *sec.* 1, *subsec.* 2, *and sec.* 8.

8. A firm of stevedores employed two squads of dock labourers in loading a steamer, at the same hatch, one squad being under the superintendence of M'Neilly its foreman, who acted as hatch-mouth man for the lowering of goods from a shore crane, and the other under the superintendence of its foreman Murray, who acted as hatch-mouth man for the conveying of goods from the ship's winch. Falconer, one of M'Neilly's squad, who was injured by the fall of a piece of wood from the ship's winch, raised an action under the Employers Liability Act, 1880, against the stevedores as responsible for Murray, through whose fault he alleged the accident happened. It was proved that Murray was generally employed by the defenders as a labourer, but that he was occasionally selected to act as a hatch-mouth man—that at the time of the accident his duties were to superintend the lowering of goods into the hold and to take the chain of the winch ashore and to attach the hook to the goods—that he had complete control over his squad, and could dismiss any members of it, and that he was paid by the hour, but received higher wages than the men under him. *Held* that Murray was a person ordinarily engaged in manual labour, and could not be regarded as a person having superintendence entrusted to him in the sense of the Act. Falconer v. M'Cabe, Nov. 30, 1900, p. 210.

Negligence—Medical Man—Issue.

9. In an action of damages by a patient against his medical attendant, the pursuer averred that on 14th April 1900 he called upon the defender and consulted him as to a scratched finger, that the defender prescribed a course of treatment, that the defender visited him on 16th April, when he directed the treatment to be continued till he called again, which he promised to do on an early day, that he did not call again for nine days, and that in consequence of the defender's neglect the

REPARATION—*Continued.*

pursuer's finger had to be amputated. *Held* that the pursuer had set forth a relevant case for inquiry. Form of issue *adjusted*. Farquhar v. Murray, June 4, 1901, p. 859.

Negligence—Safety of Public—Pier—Injury caused by steamboat rope to person standing on pier—Contributory Negligence.

10. In an action of damages for personal injuries the pursuer averred that while he "was standing" on the steamboat quay at Greenock, a seaman on board an approaching steamboat belonging to the defenders threw a rope on to the quay in order that the steamboat might be made fast to the quay; that the rope was attached to a pillar for the purpose on the quay; and that the rope was negligently allowed to lie alongside another pillar nearer the edge of the quay; that the way which was on the steamboat was too great, and caused the rope to strain and then to spring over the last mentioned pillar and to swing violently across the quay, knocking the pursuer down and causing the injuries on account of which he sued; that the defenders were in fault in mooring the vessel in the manner adopted on the occasion in question; and that had the ordinary and safe method of mooring (which was specified) been followed, the accident would not have happened. The defenders pleaded that the action was irrelevant, in respect, *inter alia*, (1) that the pursuer did not aver that he had any business requiring him to be on the quay on the occasion in question; and (2) that according to his own shewing he had been guilty of contributory negligence. *Held* that the pursuer had averred a case for inquiry, and was entitled to an issue. Clark v. Glasgow, Dublin, and Londonderry Steam Packet Co., June 21, 1901, p. 991.

Negligence—Safety of Public—Responsibility of Magistrates for safety of foot-passengers—Obstruction of footpath—House projecting into street.

11. A child six years of age was run over and killed in crossing an old burgh road. In an action raised by the child's father against the Magistrates of the burgh, on the ground that the accident was caused by their fault in allowing the road to be in a dangerous condition, the pursuer averred that at the place where the accident happened the footpath on one side of the road was obstructed by a projecting house, which compelled passengers on that side of the road to cross the road, and at the same time prevented them from seeing approaching vehicles, and prevented drivers of such vehicles from seeing the foot-passengers; that the defenders were aware of the danger, but had done nothing to remove it. *Held* that the action was irrelevant. M'Kenzie v. Magistrates of Musselburgh, July 2, 1901, p. 1023.

Negligence—Safety of public—Children—Street—Deposit of building materials against wall separating street from pond.

12. In an action for damages on account of the death of a child seven years of age, the pursuer averred that the defender was engaged in building operations adjoining a public street; that the street on one side was separated from a mill pond ten feet deep by a stone wall eight feet high; that the defender deposited a large heap of building materials close to this wall and reaching to within thirty inches from its top; that the child, while playing with other children on the top of this heap, fell over the wall into the pond and was drowned; that the defender in heaping up the material close to the wall made the pond a practically unprotected source of danger to the public; that he knew that children were in the habit of playing on the top of the heap; and that in depositing the heap and failing to take precautions for the safety of children playing on it, the defender was guilty of gross negligence, in consequence of which the child lost its life. The Court *dismissed* the action as irrelevant. Horsburgh v. Sheach, Dec. 11, 1900, p. 268.

REPARATION—*Continued.*

Negligence—Railway—Failure to fence Siding near Cottages.

13. An engine-driver, in the course of backing some trucks down a siding, ran over and killed his own son, a child two years old, who was playing with other children in the siding. He brought an action for *solatium* against his employers, in which he averred fault in respect that they had failed to provide a shunter to assist him in backing the trucks, and had left the siding unfenced, although there were houses belonging to them and let to their workmen immediately adjoining, and the only access to a bleaching-green used in connection with these houses was across the siding. *Held* that the action was relevant. Innes v. Fife Coal Co., Limited, Jan. 10, 1901, p. 335.

Negligence—Railway—Injury to passenger owing to crowd on station platform.

14. An intending passenger from a station of the Glasgow District Subway, who had been injured through being caught between the station platform and an incoming train, brought an action for damages against the company. He averred that the trains of the company consisted of two carriages, each with a single entrance door; that only persons holding tickets were admitted to the station platforms; that on the day in question the pursuer, having got a ticket, was admitted to the platform of the station in which he was injured; that on that day, owing to a breakdown, trains were running at intervals of fifteen minutes, instead of the advertised interval of three minutes; that the interval being longer a much larger number of intending passengers than usual came to the station before the train arrived; that they were admitted by the ticket-clerk to the platform, with the result that it became greatly overcrowded, particularly at the point where the trains stopped; that on the train entering the station, and while it was still in motion, the crowd concentrated at the point where one of the entry doors would come to a stop, with the result that the pursuer was pressed against the moving train, and being caught between it and the platform, received the injuries on account of which he sued; that these injuries were due to the fault of the defenders or their servants in failing to take proper steps to prevent the overcrowding of the platform. The defenders pleaded that the action was irrelevant. *Held* that the pursuer's averments were sufficient to entitle him to inquiry, and issue *allowed*. Macgregor v. Glasgow District Subway Co., July 19, 1901, p. 1131.

See *Agent and Client*, 1—*Expenses*, 1, 6, 9—*Process*, 1, 4, 6.

REPUGNANCY. See *Destination—Trust*, 10, 11.

REVENUE. *Estate-duty—Settlement Estate-duty—Entailed Estate—Money held in trust to purchase lands to be entailed—Finance Act*, 1894, *sec.* 23, *subsec.* 16.

1. *Held* that money vested in trustees for the purpose of purchasing land to be entailed is not "entailed estate" in the sense of sec. 23, subsec. 16, of the Finance Act, 1894, and is not liable as such to settlement estate-duty. Lord Advocate v. Sprot's Trustees, Feb. 1, 1901, p. 440.

Estate-duty—Settlement Estate-duty—Estate contingently settled—Repayment—Finance Act, 1894, *sections* 5 *and* 8.

2. Trustees were directed to hold the residue of a trust-estate for the truster's unmarried daughter in liferent, and her children in fee, it being provided that if she had no children the fee should go as she might direct by any writing under her hand, and, failing such direction, to certain third parties. On the death of the truster in 1895 the trustees paid estate-duty and settlement estate-duty on the residue as a settled estate under the provisions of the Finance Act, 1894. The daughter died unmarried on 11th January 1898. On her death

REVENUE—*Continued.*

estate-duty was claimed and paid on the residue as an unsettled estate. In an action by the trustees for repayment of the amount paid as settlement estate-duty, on the ground that the estate was only settled contingently on the daughter leaving issue, and that this contingency had not arisen, *held* that as there was no enactment in the Finance Act, 1894, or otherwise, entitling the trustees to repayment, they were not entitled to repayment. Watherston's Trustees v. Lord Advocate, Feb. 1, 1901, p. 429.

Legacy-duty—Legacy free of duty—Agreement to take less than full amount of legacy—Legacy-Duty Act, 1796, *secs.* 21 *and* 23.

3. By certain testamentary writings, a testator provided for the payment of certain legacies, some free of legacy-duty, others not. On the testator's death the estate proved insufficient to pay the legacies in full. Questions as to the validity, construction, and effect of these testamentary writings were settled by all the parties interested executing a deed of agreement and compromise whereby they agreed severally to accept, as in full of their right, from the testamentary trustees, smaller sums than the legacies bequeathed, under declaration that all were to be free of legacy-duty, and that *quoad* the provisions thus arrived at the testator should be deemed to have died testate, and *quoad ultra* intestate. The Crown claimed legacy-duty from the trustees upon the sums paid to the legatees, and on the sums drawn by the trustees from other funds in order to pay duty on the legacies, as agreed on, contending (1) that the legatees took solely in virtue of the agreement, and therefore that sec. 21 of the Legacy-Duty Act, 1796, did not apply, and (2) that the sums paid to the legatees along with the amount of the duty was "the amount taken in satisfaction of the legacy" in the sense of sec. 23 of the Act. *Held* that the legatees took the sums as their legacies in virtue of the testamentary writings, the effect of the agreement being merely to restrict them in amount, and that therefore by sec. 21 of the Act no legacy-duty was payable on the sums paid as duty on those legacies which by the agreement were accepted in place of legacies declared in the testamentary writings to be free of duty. Lord Advocate v. Watherston's Trustees, March 5, 1901, p. 627.

Income-Tax—Revenue earned abroad—Constructive Remittance—Income-Tax Act, 1842, *sec.* 100, *Schedule D, Case iv.*

4. Where interest derived from the foreign and colonial investments of a proprietary insurance company was not remitted home, but was retained in the countries where it was earned, and was invested or otherwise applied there, *held* that by being entered in the company's accounts, and taken into account in estimating the amount of profit to be divided by way of bonus, dividend, or otherwise, it was not constructively received in this country so as to be chargeable with duty under case iv. of Schedule D of the Income-Tax Act, 1842. Standard Life Assurance Co. v. Allan, May 30, 1901, p. 805.

5. A Scottish mutual life assurance society was assessed for income-tax upon, *inter alia*, three sums of £25,000, £28,000, and £5000 remitted from Australia in 1898, on the ground that these sums were interest received in this country on investments in Australia. The Commissioners having sustained the assessments, the society obtained a case for appeal. The case stated the following facts:—Between 1885 and 1890 the society remitted to their agent in Australia sums to be invested in specific loans agreed to by the society. After 1890 no further remittances were made from this country, but the whole interest on these loans, until 1893, was invested in Australia. Subsequently various sums were remitted to this country. At 31st December 1898 the amount of loans in Australia exceeded the total capital sent out from

this country for investment. Loans repaid and interest paid in Australia were credited to a general bank account in Australia, and remittances to Great Britain were made from the same account. The whole revenue of the society in Australia was derived from interest on loans. This interest, whether brought home or not, was regularly included in the society's annual revenue accounts as part of its income. On 1st February 1898 the society's Australian agent remitted the £25,000, with a letter that it was the amount of a loan repaid in 1891, and on 16th November 1898 he remitted the £28,000 as the amount of a loan repaid two days before. Both sums had been paid into the general bank account in Australia, and both remittances had been made from that account. The sum of £5000 was remitted directly by the borrower in Australia to the society's office in London as a repayment of capital. *Held* (1) that as the two loans of £25,000 and £28,000 had been immixed with the society's other funds, consisting of capital and interest, the remittances could not be identified as the return of capital sent from this country; (2) that as the total amount invested in Australia exceeded the amount sent out, it was to be presumed that in the ordinary course of business the sums remitted were from revenue, and not the return of capital sent from this country, and that as the revenue consisted entirely of interest, the assessment on these two sums was valid; but (3) that the £5000 could not be regarded as interest, and was not liable to duty. Scottish Provident Institution v. Inland Revenue, June 4, 1901, p. 874.

Inhabited House Duty—Different tenements occupied solely for business—Customs and Inland Revenue Act, 1878, *sec.* 13, *subsecs.* (1) *and* (2).

6. A house of four storeys owned by a bank was occupied as follows:—The first floor by a firm of writers to whom it was let, and the other three floors by the bank, the ground floor being used as the offices of the bank, and the second floor as the official residence of the bank accountant. Access to all the floors from the street was by a door which opened into a vestibule. In the vestibule there was a door to the bank office, a front stair leading to the first floor, and a door to a passage leading to the bank-agent's room and to a back stair, which was the access to the second floor. There was a door between the two stairs, which was kept locked. The first and second floors were each shut off from the staircase by outer doors on the landings. From the bank-agent's house on the second floor there was a bolt in connection with the lock of the safe in the bank office. The whole house, with the exception of the first floor, having been assessed for Inhabited House Duty, the Bank appealed, and maintained that the ground floor being occupied solely for the business of banking was entitled to exemption. *Held*, on the facts, that there were such means of internal communication and such structural connection between the bank offices and the house of the agent, and also such identity of occupation, that the bank premises could not be regarded as a separate tenement in the sense of sec. 13 of the Customs and Inland Revenue Act, 1878. Union Bank of Scotland, Limited, v. Inland Revenue, March 20, 1901, p. 771.

Inhabited House Duty—Exemption—Business Premises—"Profit"—Mutual Insurance Society—Customs and Inland Revenue Act, 1878, *sec.* 13, *subsec.* (2).

7. The Scottish Widows' Fund and Life Assurance Society had no share capital and no shareholders. Its membership consisted exclusively of the holders of policies of life insurance effected with the Society, and of the purchasers of annuities from it. The bulk of the members were the holders of "participating" policies, *i.e.*, members who were entitled to share in the surplus assets of the Society as brought out at each septennial investigation of its affairs; but a small proportion of

REVENUE—*Continued.*

the policy-holders and all the annuity-holders (who also were proportionally few in number) had no such right of participating in the surplus assets. The Society did not directly insure, or grant annuities to, persons who were not members of the Society, but it reinsured the risks of other life insurance companies. Its accumulated funds, which were of very large amount, and from which it derived a large income, were invested in stocks, shares, and other securities, and it also, to a small extent, purchased reversions. The Society having claimed exemption from inhabited house duty under the Customs and Inland Revenue Act, 1878, sec. 13, subsec. (2), in respect of premises which it occupied solely for the purposes of its business, the Surveyor of Taxes maintained that the exemption founded on did not apply, in respect that the Society, being a mutual insurance society, could make no trade or business profits, or at all events, if it did to some extent make trade or business profits, that it did not occupy the premises for the sole purpose of making such profits. *Held* that the premises in question fell within the exemption, in respect that they were solely occupied by the Society for the purposes of its business by which it sought to make a profit. Scottish Widows' Fund and Life Assurance Society v. Inland Revenue, Nov. 24, 1900, p. 129.

See *Succession*, 9.

REVOCATION. See *Marriage-Contract*, 2, 4, 5.

RIFLE RANGE. See *Nuisance.*

RIGHT IN SECURITY. See *Trust*, 2.

RIVER, LOCH, SEA. See *Fishing—Justiciary Cases*, 5, 6, 26—*Nuisance*, 1—*Police*, 12.

ROAD. See *Police*, 3 *to* 9, 13, 14, 15, 18, 19—*Railway*, 1—*Reparation*, 11, 12.

SALE. *Sale of Moveables—Written contract of Sale—Prior Oral Agreement—Innominate Contract.*

1. In an action raised by A against B for damages for failure to deliver certain parcels of indiarubber goods, A produced and founded on sale-notes under B's hand, bearing that he had sold the goods in question to A. In defence B averred that prior to the transactions condescended on the parties had entered into a verbal agreement to the effect that while the contracts for the supply of rubber by the defender to the pursuer were to be *pro forma* with the pursuer as buyer, the pursuer was only to receive a commission on the sale of the goods by him to a particular consumer who was named, and further, that the pursuer was to confine his dealings in the article in question to the defender alone. B further averred that A had not implemented this agreement, and moved to be allowed a proof *pro ut de jure* of his averments. The Lord Ordinary (Kincairney) held that the alleged agreement could only be proved by the writ or oath of the pursuer, on the ground that it was an agreement of an innominate and unusual character. The defender having reclaimed, the Court *adhered* to the Lord Ordinary's judgment on the ground that it was incompetent to supersede a contract of sale instructed by writing by parole proof of an antecedent oral contract of an entirely different character. Müller & Co. v. Weber & Schaer, Jan. 29, 1901, p. 401.

Sale of Moveables—Warranty—Collateral Representation—Sale of Goods Act, 1893, *secs.* 53 *and* 62.

2. A brickmaker who wished to replace the engine at his works with one of greater power, to be connected with the existing boiler, received a letter dated 1st October 1898 from a firm of engineers enclosing a

SUCCESSION—*Continued.*

Vesting—Fee or Liferent—Direction to Trustees to hold—Repugnancy—Power to advance capital.

16. By a testamentary settlement trustees were directed, on the death of two annuitants (who predeceased the testator), to hold a share of residue "for behoof of" J. H. and his family, as follows, viz., for payment of the interest of said share to said J. H. to the extent of one half thereof, and the interest of the other half thereof to his children, and if the said J. H. and his children "stand in need thereof" the trustees were directed "to expend the capital of said share for and in behalf of the said J. H. and his said children in such proportions as they may think proper." The settlement further declared that in the event of J. H. "dying before the division of the residue," the share which he would have been entitled to if alive was to go to his issue, but failing issue, then to the survivors of the beneficiaries equally. There was no further disposal of the share. *Held* that the power to advance capital was a power to advance to the extent of one-half only to J. H., and to the extent of the other half to the children, and that there was a gift of the fee of the share to the extent of one-half to J. H., and as regards the other half, to the children, which vested *a morte testatoris*. Gillies' Trustees v. Hodge, Dec. 7, 1900, p. 238.

Vesting.

17. Destination over—Whether proper conditional institution suspensive of vesting, or mere substitution. Cairns v. Cairns' Trustees, Feb. 22, 1901, p. 545.

Vesting—Clause of Survivorship—Trust—Discretion of Trustees.

18. Trustees under a settlement were directed to divide the residue of the truster's estate on the death of a liferentrix, "so soon thereafter as deemed proper," with the further provision that if any of the residuary legatees should predecease "the said term of payment and division among them," the share of such predeceaser should be held as lapsed. A residuary legatee survived the liferentrix, but died before the trustees had made payment and division. *Held* that the share of residue destined to the residuary legatee had vested on the death of the liferentrix. M'Call's Trustees v. Murray, Jan. 24, 1901, p. 380.

Vesting—Survivorship—Gift conditional on survivance of liferenter.

19. A testator directed his trustees to "hold and invest" the residue of his estate "for behoof of the whole of my children equally among them in liferent, for their respective liferent alimentary uses allenarly, . . . and for behoof of the issue of my said children respectively, *per stirpes*, equally among them in fee, subject to the contingent exception and declaration after mentioned with regard to the issue of my sons William Wilson and James Wilson; and failing any of my said children by decease without leaving issue who may attain to the age of majority or be married, then to the survivors or survivor of my said children and the issue of their bodies respectively, *per stirpes*, who may attain to majority or be married, in liferent and fee respectively as aforesaid subject to the said contingent exception and declaration after mentioned with regard to the issue of my said sons William Wilson and James Wilson . . . declaring always, and providing by way of exception, that in the event of the issue of my son William Wilson who may attain to the age of majority or be married exceeding in number the issue of my son James Wilson who may attain to the age of majority or be married, the shares of said residue falling to the issue of my said two sons . . . shall not be divided *per stirpes*, but shall be slumped together, and then divided *per capita* equally among the issue of my son William and the said issue of my son James." William Wilson was survived by three children who attained majority, and was predeceased by two children, who also attained majority. James was

SUCCESSION—*Continued.*

survived by an only son, who attained majority. *Held* that the gift to issue being contingent, not only on the parent's leaving issue, but on such issue attaining majority or being married, the right did not vest in the issue as a class, but that the contingency affected each individual, so as to make it a condition of his taking (1) that he should survive the parent, and (2) that he should attain majority or be married. Wilson's Trustees v. Wilson, June 18, 1901, p. 967.

Vesting—Vesting subject to defeasance—Direction to pay on death of liferenter—Accretion.

20. A testator directed his trustees to hold the residue of his estate, and to divide the annual proceeds thereof among three of his five children—Robert, Margaret, and Agnes; and on the death of the longest liver of the liferenters, to convey the residue in equal portions to and among the children respectively of the liferenters: "Declaring, however, that in the event of the death of any of my said children without leaving lawful issue, my said son John and my said daughter Susan, or in the event of their death leaving lawful issue, their said issue, shall be entitled to an equal share alongst with the issue of my other children, and that *per stirpes* and not *in capita* of the share of the residue of my said estates of which such child or children so deceasing without issue had or would have had the interest, and my said trustees are in that event directed so to divide, pay, or convey the same accordingly." *Held* that as it could not be known till the death of the last survivor of the three liferenters whether such survivor would leave issue, no vesting of the share of a deceased liferenter who left no issue could take place before that event.

Held further, that the provision that in the event stated John and Susan's issue should be entitled along with the issue of the testator's other children to the share of a deceased liferenter, implied a provision that if either John or Susan and their respective issue failed, the share so set free did not fall into intestacy, but vested in the three remaining children of the testator or their issue. Corbett's Trustees v. Pollock, June 18, 1901, p. 963.

See *Destination—Fee and Liferent—Marriage-Contract—Revenue*, 1, 2, 3 *—Service of Heirs—Trust—Writ.*

SUPERIOR AND VASSAL. *Casualty — Construction of clause of relief — Obligation by an a me vel de me disponer in* 1866 *to keep the fee full by the entry of heirs or to pay composition—Implied Entry — Supervenient Legislation — Conveyancing (Scotland) Act*, 1874, *sec.* 4.

1. By disposition, dated in 1866, B, who held certain subjects in feu from A, disponed them to C, to be held *a me vel de me*, binding and obliging himself, his heirs, and successors, "to enter with the superiors . . and if my heirs and successors shall not so enter, then I oblige myself, and my heirs and successors, to pay the whole composition exigible from the said" C "on receiving an entry direct from the over-superiors." C recorded the disposition, and by the passing of the Conveyancing (Scotland) Act, 1874, became the entered vassal of A. B died in 1877. A having demanded a casualty of composition from C, the latter brought an action of relief against the heirs of B, founding on the clause above quoted. *Held* that the obligation undertaken by B to pay the composition was only exigible if there was a failure on the part of B or his heirs to enter, and that the implied entry of C having made it impossible for B or his heirs so to enter, there was no such failure, and that the obligation was not therefore prestable. Caledonian Insurance Co. v. Mathieson's Trustees, June 4, 1901, p. 865.

SUPERIOR AND VASSAL—*Continued.*

Casualty—Construction of clause of relief—Effect of implied entry—Conveyancing (Scotland) Act, 1874, sec. 4.

2. By disposition, dated and recorded in 1868, B disponed *a me vel de me* certain subjects to C, binding himself "to free and relieve the said" C "of all casualties both prior to the said term of entry and in all time coming thereafter." On the passing of the Conveyancing Act, 1874, C was impliedly entered with the superior. B died in 1877, and the superior having demanded a composition from C, the latter raised an action against the representatives of B claiming relief under the obligation expressed in the clause above quoted. The defenders maintained that the obligation could no longer be enforced to the extent of exacting a composition by reason of the change of law effected by the 1874 Act, but for which B's heir could and would have entered on payment of relief. *Held* that the obligation being absolute in its terms, the defenders were bound to relieve C of the composition payable by him to the superior. Caledonian Insurance Co. v. Mathieson's Trustees, June 4, 1901, p. 865.

Feu-contract — Construction — Stipulation for additional feu-duty for ground "on which buildings shall be erected."

3. A feu-contract provided that the vassal should pay to the superior "besides the feu-duty above stipulated, the sum of two shillings sterling of additional feu-duty for every square pole of the said piece of ground on which buildings shall be erected." A singular successor of the original vassal acquired part of the subjects, upon one acre of which he erected a public laundry. The buildings occupied about one half of the acre, the remainder being occupied by a road forming the approach to the laundry, a road of an average breadth of 7 feet surrounding it, and a grass slope separating the buildings from a reservoir. *Held* that the additional feu-duty was payable for the whole acre, the ground not built on being properly accessory to the buildings, and incapable of separate occupation. Stirling-Maxwell v. M'Farlane, June 14, 1901, p. 933.

See *Fee and Liferent*, 2.

SUSPENSION. See *Justiciary Cases*, 29, 31.

THIRLAGE. See *Servitude.*

TIME. See *Master and Servant*, 23—*Police*, 2.

TITLE TO HERITAGE. See *Service of Heirs—Superior and Vassal.*

TRADE SLANDER. See *Reparation*, 5.

TRIENNIAL LIMITATION. See *Prescription.*

TRUST. *Constitution—Uncertainty—"Such charitable or public purposes as my trustee thinks proper."*

1. A lady by a holograph codicil to her trust-disposition and settlement directed that (in the events which happened) one half of the residue of her estate "shall be applied for such charitable or public purposes as my trustee thinks proper." *Held* that the direction was void from uncertainty. Young's Trustees v. Young's Trustee, Dec. 14, 1900, p. 274.

Proof of purposes of trust—Assignation—Real Security—Tantum et tale—Trust title for beneficiaries pro indiviso—Joint Adventure.

2. A feudal title to lands was taken to A and B as trustees for themselves, each to the extent of one-half *pro indiviso*. By *ex facie* absolute disposition, B conveyed to an onerous assignee his one-half *pro indiviso* of the lands. This disposition was recorded. In a competition between B's disponee and A, *held* (1) that the disponee's right was qualified by the trust disclosed in his disponer's title; (2) that the

TRUST—*Continued.*

purposes of the trust, not being set forth in the title might be proved by parole; and (3) that, accordingly, as it was established by such proof that the purpose was a joint adventure by A and B with reference to the lands in question, the disposition by B was only effectual to the extent of his interest in the joint adventure, viz., to the extent of one-half of the free balance on an accounting with A. Livingstone v. Allans, Dec. 5, 1900, p. 233.

Administration—Illegal payment of salary to trustee as manager of manufacturing business—Salary received repaid to trust—Interest.

3. Testamentary trustees had power by the trust-deed to appoint one of their number "to be factor or cashier, and to allow him a reasonable remuneration for his trouble." The trustees, in the belief, which was supported by an opinion of counsel, that they were authorised to do so, appointed one of their number as salaried manager of a business forming part of the trust-estate. After the trustee had acted as manager and drawn his salary for five years, an action was raised against him and the trustees by a beneficiary, in which the pursuer obtained a decree finding that it was *ultra vires* of the trustees to pay the salary, and ordaining the manager to repay to the trust the sums received by him. The pursuer having further contended that interest should be paid to the trust-estate upon the sums improperly paid, the Court *held* that, having regard to the *bona fides* of the trustees, and to the fact that the trust had got the benefit of the trustee's services as manager without payment, it was not equitable that the trustee should be called upon to pay interest. Mills v. Brown's Trustees, June 27, 1901, p. 1012.

Administration—Duty of Trustee—Purchase of beneficiary's interest by trustee.

4. In 1899, John Dougan, one of the trustees and also a beneficiary under his parents' antenuptial contract of marriage, purchased the interest in the trust-estate of his brother James, who was not a trustee. At the date of the purchase the interests of the beneficiaries had vested absolutely, and, both spouses being dead, were payable in the ordinary course of trust realisation, but none of the trust-estate, which consisted of house property and feu-duties, had been realised, and its value was somewhat uncertain. Before making the purchase, John Dougan had seen a valuation of the trust-estate. Upon the basis of this valuation, the value of James Dougan's interest was about £3500. This valuation was never communicated to James Dougan. The consideration for the purchase was the payment of £450 by John to James, and the taking over by John of the bulk of James' debts. If the valuation turned out to be correct, John would make a profit on the transaction of about £600. On receiving payment of the £450 from John, James left the country without paying the balance of his debts. The estates of James having thereafter been sequestrated, the trustee in the sequestration brought an action for reduction of the sale by James to John. *Held* on a consideration of the foregoing facts and the evidence generally, that decree of reduction fell to be granted, on repayment of the £450 paid by John. Dougan's Trustee v. Dougan, Feb. 22, 1901, p. 553.

Administration—Breach of Trust—Partnership—Transfer of assets and liabilities to new firm—Novation.

5. *In December* 1893 *a partner in a large engineering business died, leaving a settlement in which he authorised his trustees to allow his share of the capital in the business "to remain as a loan" to the firm, so long as his trustees considered it reasonably safe to do so. His trustees were A and B, two of the three surviving partners, and his widow. The testator's widow died in April* 1894. *The deceased's*

TRUST—*Continued.*

Termination—Direction to trustees to retain estate after it had vested in beneficiaries—Repugnancy.

11. A testator, after directing his trustees to divide his estate, on the expiry of certain liferents, among certain nephews and nieces *nominatim* equally, further directed that the trustees should retain the capital of the shares belonging to the nephews and nieces so long as their father should be alive, and pay to them the revenues thereof only. The liferents having expired, *held* that the capital of the shares having vested in the nephews and nieces *a morte testatoris*, they were entitled to call on the trustees to denude in their favour, notwithstanding that their father was still alive. Hargrave's Trustees v. Schofield, Oct. 25, 1900, p. 14.

See *Agent and Client*, 1—*Bankruptcy*, 1—*Charitable and Educational Bequests and Trusts—Expenses*, 5—*Judicial Factor*, 1—*Marriage-Contract—Parent and Child*, 1—*Succession.*

TUTOR. See *Minor and Pupil*, 1.

ULTRA VIRES. See *Police*, 13, 14, 18—*Poor*, 4—*Succession*, 13, 14.

VACCINATION. See *Justiciary Cases*, 10, 11.

VALUATION ACTS. *Subjects.*

1. Erections or structural improvements—Lands Valuation (Scotland) Act, 1895, sec. 4. Peggie v. Assessor for Kirkcaldy, Feb. 12, 1901, p. 462.
2. Waterfalls—Charge for permission to visit. Ross v. Assessor for Upper Ward of Lanarkshire, Feb. 13, 1901, p. 461.
3. Ground belonging to private person used as public square—Payments for temporary right of occupancy. Stevenson v. Assessor for Upper Ward of Lanarkshire, Feb. 13, 1901, p. 459.

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4. Flax-mill in occupation of owner—Recent sale of subjects. Andrew Lowson, Limited, v. Assessor for Arbroath, Feb. 13, 1901, p. 466.
5. Consideration other than the rent. Assessor for Greenock v. Bullen, Feb. 13, 1901, p. 452; Clark v. Assessor for Middle Ward of Lanarkshire, Feb. 13, 1901, p. 455.

See *Poor*, 6.

VESTING. See *Succession*, 16 *to* 20.

WARRANTY. See *Sale*, 2, 3, 4.

WATER. See *Fishing.*

WATER SUPPLY. See *Police*, 16 *to* 22—*Property.*

WITNESS. See *Justiciary Cases*, 20, 21—*Process*, 7—*Reparation*, 4.

WRIT. *Testament—Holograph Addition—Subscription.*

A man executed a will, written for him by another person, by subscribing it before two instrumentary witnesses. Some time afterwards the testator inserted in a space which had been left between the end of the will and his subscription and those of the witnesses a holograph addition which began "Codicil," and made provision for the disposal of an annuity which had lapsed through the death of the annuitant since the execution of the will. *Held* that the holograph addition was a valid part of the testamentary writings of the deceased. Gray's Trustees v. Dow, Nov. 7, 1900, p. 79.

WRIT OR OATH. See *Bill of Exchange*, 1, 3—*Payment*, 2—*Process*, 11—*Sale*, 1—*Trust*, 2.

WRONGOUS APPREHENSION. See *Reparation*, 1.

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